

<b>Mannino v Passalacqua</b>
2016 NY Slip Op 32809(U)
May 24, 2016
Supreme Court, Kings County
Docket Number: 13233/11
Judge: Larry D. Martin
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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of May, 2016.

P R E S E N T:

HON. LARRY D. MARTIN,  
Justice.  
-----X  
ANDREA MANNINO AND JOSEPHINE MANNINO,  
Plaintiffs,

- against -

SALVATORE R. PASSALACQUA AND  
JOSEPH PASSALACQUA,  
Defendants.  
-----X  
SALVATORE R. PASSALACQUA AND JOSEPH  
PASSALACQUA,

Third-Party Plaintiffs,

- against -

HARVEY W. SPIZZ, ESQ., MITCHELL J. COOPER,  
ESQ., AND SPIZZ & COOPER, LLP,  
Third-Party Defendants.  
-----X

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Third-Party  
Index No. 75823/11

The following papers numbered 1 to 5 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3-4 _____
Reply Affidavits (Affirmations) _____	5 _____

Upon the foregoing papers, defendants/third party plaintiffs, Salvatore R. Passalacqua and Joseph Passalacqua (Passalacquas or defendants), move for an order, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), dismissing the amended complaint against them based upon documentary evidence, the statute of limitations and failure to state a cause of action.

Plaintiffs, Andrea Mannino and Josephine Mannino (Manninos), have opposed the requested relief.

### *Background Facts and Procedural History*

This matter carries a long, tortured history which was detailed in this court's prior decision dated July 5, 2012. The Manninos, since that time, sold the subject property on June 21, 2013 and satisfied a mortgage held by former defendant, Wells Fargo Home Mortgage, Inc. (Wells) with a \$216,038.05 payment. This sale mooted the Manninos' appeal of this court's July 5, 2012 order. However, the Appellate Division, Second Department, instead of leaving the Manninos with an unreviewable order, "vacate[d] so much of the order of July 5, 2012, as awarded the defendants summary judgment dismissing the complaint" (*Mannino v Wells Fargo Home Mtge., Inc.*, 120 AD3d 638, 639 [2014]). Notably, the Appellate Division did not disturb any factual findings contained in that decision, which are now law of the case. Finally, the amended complaint was dismissed against former defendant Wells by this court's July 7, 2015 decision. That decision is presently under appeal.

### *Discussion*

#### *(1)*

The Manninos originally commenced this action seeking to have Wells' mortgage declared a nullity and removed as a lien against title. Now, and with the court's permission, the Manninos have amended their complaint seeking reimbursement from the Passalacquas for the monies paid to Wells. The Manninos amended verified complaint alleges four equitable causes of action against the Passalacquas, namely, 1) unjust enrichment, 2) conversion, 3) an accounting, and 4) the imposition of a constructive trust. The first two causes of action relate to the Manninos paying off the mortgage taken out by the Passalacquas with Wells Fargo while the latter two causes of action concern the rental income received by the Passalacquas from the tenants of the property for the period of 1999 through 2010.

(2)

“A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted only if the “documentary evidence” resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fontanetta v Doe*, 73 AD3d 78, 83 [2010] [internal citations omitted]). “[I]f the court does not find [their] submissions ‘documentary’, it will have to deny the motion” (*id.* at 84 [internal citations omitted]).

“On a motion to dismiss pursuant to CPLR 3211 (a) (5), the moving [party] must establish, prima facie, that the time in which to commence an action has expired. The burden then shifts to the [non-moving party] to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies” (*Romanelli v DiSilvio*, 76 AD3d 553, 554 [2010] [internal citations and quotation marks omitted]).

“On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 831, 851 [2012] [internal quotation marks and citations omitted]). “Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*id.* at 851-852; [internal citations omitted]).

(3)

“To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefore” (*Nakamura v Fujii*, 253 AD2d 387, 390 [1998] [internal citations omitted]; see also, *Smith v Chase Manhattan Bank USA, NA*, 293 AD2d 598, 600 [2002]). “Such quasi contract only applies in the absence of an express agreement, and is not really a contract at all, but rather an equitable obligation imposed in order to prevent a party's unjust enrichment” (*UETA Latinamerica, Inc. v Zafir*, 129 AD3d 704, 705-706 [2015] [internal quotation marks and citations omitted]); see e.g. *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-791 [2012], rearg denied 19 NY2d 937 [2012]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Simply put, the party must show no adequate remedy at law for this equitable action to proceed.

The Manninos claim that by paying off the Wells mortgage they bestowed a benefit upon the Passalacquas. More specifically, the Manninos maintain that their payment of the Wells mortgage relieved the Passalacquas of their personal obligation to pay Wells. Further, the Manninos contend that the Passalacquas refused to comply with their demands for payment. However, by paying off the personal debt of the Passalacquas, the Manninos have the right to be assigned the promissory note executed by the Passalacquas to Wells, as assignor. Even though the Manninos may not currently possess the promissory note, they have the right to obtain same and sue to enforce payment. In this regard, the Manninos are unable to assert an equitable claim for unjust enrichment because there is an express agreement which governs the parties' relationship and provides the Manninos a legal remedy to pursue (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; see also, *Goldman v Metropolitan Life Inc. Co.*, 5 NY3d 561, 572 [2005]). Due to the fact that

the existence of a valid and enforceable written contract (i.e., the promissory note<sup>1</sup>) governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter, the Manninos cause of action must be dismissed for failing to state a cause of action pursuant to CPLR 3211 (a) (7). As a result, the court need not address the other defenses claimed concerning this cause of action.

(4)

“Interference with another’s right to possession is the essence of conversion . . . In order to be guilty of conversion, it is not necessary that one take actual physical possession of the subject property [and any] wrongful exercise of dominion by one other than the owner is conversion . . . [A] wrongful intention to possess the property of another [is not] an essential element of a conversion. It is sufficient if the owner has been deprived of his property by the defendant’s unauthorized act in assuming dominion and control . . .” (*Glass v Weiner*, 104 AD2d 967, 968 [1984] [internal citations and quotation marks omitted]). Conversion is governed by a three-year state of limitations (see *Gold Sun Shipping Ltd. V Ionian Transport, Inc.*, 245 AD2d 420 [1997]; CPLR 214 [4]) and only applies to personal, not real property (see *Garelick v Carmel*, 141 AD2d 501, 502 [1988]). Lastly, a conversion cause of action accrues “when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court” (*Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Texas*, 87 NY2d 36, 43 [1995]).

Here, the Manninos claim that the Passalacquas, by receiving the Wells Fargo loan proceeds (i.e., an unauthorized act exercising dominion and control), were benefitted to the Manninos’ eventual detriment when the Manninos “were forced” to pay off the debt on June

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<sup>1</sup> The Passalacquas reliance on the real estate contract as the agreement between the parties is misplaced since absent language to the contrary in the real estate agreement, such a contract does not survive delivery of the deed.

21, 2013. Although the monies were paid to Wells, and not the Passalacquas directly, such a payment was a “conversion” of the Manninos property. However, both the act of taking out the mortgage and paying off the mortgage involve interests in real property exchanged for value and not taken without consideration. Specifically, the Manninos received the right to be assigned the aforementioned promissory note for payoff of the mortgage.

Finally, and assuming that this cause of action can even be maintained for “conversion” of an interest in real property, any act of “dominion and control” by the Passalacquas occurred when the last mortgage (CEMA Agreement) was given to Wells over a decade ago. The Manninos could have made this claim once the constructive trust was decreed in 2005, or even, within three years of the 2010 deed transfer from the Passalacquas to the Manninos. In light of the foregoing, the Manninos cause of action for conversion is dismissed pursuant to both CPLR 3211 (a) (5) and 3211 (a) (7).

(5)

“The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (*Lawrence v Kennedy*, 95 AD3d 955, 958 [2012] [internal citations and quotation marks omitted]).

This claim asserts that the Passalacquas account to the Manninos for the rents the Passalacquas received from the tenants of the property from 1999 to 2010, when the Passalacquas, in their capacity as co-administrators from 1999 to 2002, and from 2002 to 2010 in their individual capacities, asserted dominion and control over the premises. By decision and decree of the Hon. Albert Tomei, as Acting Surrogate, the Passalacquas were made fiduciaries to the Manninos by creation of a constructive trust consisting of the deed to the premises. As a result of the constructive trust, the Manninos were granted an interest sufficient to demand an accounting.

A right to an accounting against a former trustee is governed by a six year statute of limitations (see *Tydings v. Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 201 [2008]; see also, CPLR 213 [1]). The action for an accounting accrues once the trustee yields his position to another or is removed (see *Spallholz v Sheldon*, 216 NY 205, 209 [1915]).

It cannot be disputed that the Passalacquas yielded control over the constructive trust upon transfer of the deed to the Manninos. Since the deed transfer occurred in 2010, and the Manninos amended their complaint in 2015, the action is timely. Therefore, defendants' motion as to the cause of action for an accounting is denied.

(6)

“The equitable remedy of 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 . . . The elements of a cause of action to impose a constructive are (1) the existence of a confidential relationship or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment . . . However, as these elements serve only as guideline, a constructive trust may still be imposed even if all of the elements are not established” (*Lee v Rakower*, 112 AD3d 204, 208 [2013] [internal citations and quotation marks omitted]).

This claim asserted by the Manninos requests imposition of a constructive trust against the Passalacquas for rents they received from the tenants of the property from 1999 to 2010. “It is well settled that the Statute of Limitations applicable in actions to impress constructive trusts can be found in CPLR 213 (subd 1), which prescribes a six-year period that commences to run upon occurrence of the wrongful act giving rise to a duty of restitution” (*Kitchner v Kitchner*, 100 AD2d 954, 954 [1984]). Since the imposition of a constructive trust as to the deed to the property was previously decreed by Acting Surrogate Tomei, a constructive trust as to the proceeds of the property appears reasonable. Further, the action

appears to have been timely commenced. Therefore, the Passalacguas motion is denied as to this cause of action. However, some or part of either surviving cause of action might be subject to a statute of limitations defense after completion of discovery or at trial herein.

*Conclusion*

Accordingly, it is

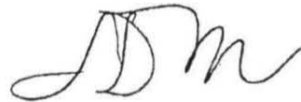
ORDERED that the portion of the Passalacguas' motion seeking dismissal of the Manninos' first and second causes of action for unjust enrichment and conversion, respectively, is granted, and those claims are hereby dismissed and severed; and it is further

ORDERED that the portion of the Passalacguas motion seeking dismissal of the Manninos' third cause of action for an accounting and fourth cause of action for imposition of a constructive trust are denied.

This constitutes the decision and order of the court.

E N T E R,

MAY 24 2016



J. S. C.

HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT

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