Falk v Nassau County
2017 NY Slip Op 33238(U)
September 27, 2017
Supreme Court, Nassau County
Docket Number: 600868/17
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

JEFFREY P. FALK, on behalf of himself and all other similarly situated, Plaintiffs, -against- **NASSAU COUNTY and NASSAU COUNTY DEPARTMENT OF ASSESSMENTS,** Defendants.	**TRIAL/IAS PART 13** **INDEX # 600868/17** **Mot. Seq. 1** **Mot. Date 5.26.17** **Submit Date 8.14.17**

The following papers were read on this motion:	E File Docs Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	3
Answering Affidavits (Affirmations)	11
Reply Affidavit	12

Defendant, County of Nassau, sued herein as Nassau County (County), moves by notice of motion pursuant CPLR 3211(a)(7) to dismiss the plaintiff's complaint in its entirety on the basis that it fails to state a viable cause of action upon which relief can be granted.

In this putative class action, plaintiff alleges that the County has charged excessive fees and/or an unlawful tax pursuant to Nassau County Administrative Code (NCAC) § 6-33.0, which code assesses a fee for the verification of the section, block and lot information contained in tax map certification letters (TMCLs). TMCLs are issued by the Nassau County Department of Assessments and must be filed with real property documents presented to the Nassau County Clerk for recording. Such documents include deeds, mortgages or satisfactions, or any modifications or consolidations thereof. Plaintiff alleges that the fees are excessive and not reasonably necessary to maintain the County's real property registry. In addition, the plaintiff alleges that the fees constitute a tax because they are exacted for general revenue purposes.

Specifically, the plaintiff alleges that the fee was first assessed in 2012 at a cost of $50 for each TMCL. Effective January 12, 2015, the County raised the fee for TMCLs to $75. According to the plaintiff, on January 1, 2016, the fee was increased to $225 for the same service that was provided in the previous year. On January 1, 2017, the fee was raised to $355. Each increase was authorized by a series of local laws that amended NCAC § 6-33.0. Plaintiff alleges that despite these successive increases, the Department of Assessments has not changed its structure, the manner in which it carries out its responsibilities, the manner in which TMCLs are generated, or the time or cost associated with generating a TMCL. Plaintiff alleges that the fees are not intended to defray the costs of providing the TMCL and are far in excess thereof. Nor, according to the plaintiff, are the fees reasonably necessary to maintain the County's registry of property. Rather, plaintiff alleges that the fees are a revenue-generating measure. Plaintiff contends that based on budgets and available public documents, over $27 million was projected to be collected from the increase to $225 in 2016. Plaintiff notes that prior to the 2016 increase, the Nassau County Clerk, Maureen O'Connell sent a letter to the members of the County Legislature "vehemently" objecting to the proposed increases in TMCL fees and other fees impacting her office.

With respect to the named plaintiff, the complaint alleges that he closed on a home purchase in Nassau County on November 18, 2016. Pursuant to the closing, he was required to pay the title company $1,255 to record the deed and mortgage with the Nassau County Clerk, of which $450 was assessed to obtain two TMCLs–one for the deed and one for the mortgage. Plaintiff brings this action on behalf of himself and all others similarly situated.

The complaint contains four counts. First, the plaintiff seeks declaratory and injunctive relief under CPLR 3001, with a declaration that the County's imposition of fees for providing a TMCL is excessive and not reasonably necessary to maintain the County's registry and are not assessed on the basis of reliable factual studies or statistics. Further, plaintiff seeks a declaration that the fees associated with TMCLs are not valid or constitute an unconstitutional tax, and upon such declaration, an order that the County disgorge all fees associated with the TMCL program during the relevant time period. Second, plaintiff alleges that the County has been unjustly enriched and seeks restitution. Third, plaintiff asserts that the County is liable for conversion of the monies represented by the allegedly excessive fees and/or unconstitutional tax. Fourth, plaintiff asserts that the County is liable for "money had and received."

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the court must determine whether, from the four corners of the pleading "factual allegations are discerned, which taken together, manifest any cause of action cognizable at law." (*Salvatore v. Kumar*, 45 AD3d 560 [2nd Dept. 2007], lv to app den. 10 NY3d 703 [2008], *quoting Morad v. Morad*, 27 AD3d 626, 627 [2006]). Further, the pleading is to be afforded a liberal construction, the fact alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference. (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). However, "[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss . . . , 'allegations consisting of bare legal conclusions as well as factual claims

flatly contradicted by documentary evidence are not entitled to any such consideration'" (*Garber v. Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2d Dept. 2007], *quoting Maas v. Cornell Univ.*, 94 NY2d 87, 91 [1999]).

As correctly noted by the County, legislative acts "enjoy a strong presumption of constitutionality [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt." (*New York State United Teacher v. State of New York*, 140 AD3d 90 [3d Dept 2016] [internal quotations omitted]). "A local law is cloaked with the same strong presumption of constitutionality as a statute." (*Nicholson v. Incorp. Vil. Of Garden City*, 112 AD3d 893 [2d Dept 2013]).

Count I: Declaratory and Injunctive Relief Under CPLR 3001

With regard to the first count in the complaint, the County asserts that given the presumptions of validity and constitutionality accorded to all legislative enactments, the complaint's "conclusory and vague" allegations are insufficient to overcome these presumptions. Rather, according to the County, unconstitutionality must be demonstrated beyond a reasonable doubt. Moreover, the County alleges that because the plaintiff has failed to allege any facts to support that he paid the fees under legal protest, plaintiff's claim for disgorgement, or refund of the fees, must be dismissed.

By way of background, "[a] tax is a charge that a government exacts from a citizen to defray the general costs of government unrelated to any particular benefit received by that citizen." (*Walton v. New York State Dept. Of Correctional Services*, 13 NY3d 475, 485 [2009]). Whereas only a legislature may impose taxes, "[m]unicipalities and administrative agencies engaged in regulatory activity can assess fees that need not be legislatively authorized as long as 'the fees charged [are] reasonably necessary to the accomplishment of the regulatory program.'" (*Id.* [citing *Suffolk County Bldrs. Assn. v. County of Suffolk*, 46 NY2d 613, 619 [1979] ["Typically, fees are paid to obtain access to a government service or benefit . . . ."]).

Generally, "the label assigned to an assessment (i.e., tax or fee) is not determinative of its true nature." (*New York Ins. Ass'n, Inc. v. State of New York*, 145 AD3d 80 [3d Dept 2016]). "Funds collected are found to be taxes where they are not reasonably necessary to the accomplishment of the regulatory purposes of the agency charged with their collection or the entities to be regulated are not primarily or proportionally benefitted through their expenditure." (*Id.*). In other words, "where a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement." (*Matter of Torsoe Bros. Constr. Corp. v. Board of Trustees of Inc. Vil. of Monroe*, 49 AD2d 461 [2d Dept 1975]).

Of relevance here, in *Fairhaven Apartments No. 4, Inc. v. Town of North Hempstead*, 8 AD3d 425 [2d Dept 2004], the Appellate Division, Second Department granted summary judgment in favor of the Town of North Hempstead upon a showing that the nonrefundable

application fee for a rental occupancy permit was "not greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement." Conversely, in *ATM One, LLC v. Incorporated Village of Freeport*, 276 AD2d 573 [2d Dept 2000], the plaintiffs, owners of rental properties in the Village of Freeport, challenged the validity of an amendment to the Village Code that raised the fees for residential rental permits. The plaintiffs argued that the fees "were revenue-producing measures bearing no reasonable relation to the administration of the permit process." (*Id.*). The Second Department, denied the Village's motion for summary judgment where it did not justify its inclusion of enforcement activities in its calculation of the cost of administration of the rental permit program or the significant increase in fees for properties with multiple rental units. (*Id.* at 574). Likewise, in *New York Telephone Co. v. City of Amsterdam*, 200 AD2d 315, 317 [3d Dept 1994], the Third Department granted summary judgment in favor of the challenger to a fee of $13 per square foot of roadway excavation, which was exacted for general revenue purposes and was "clearly" disproportionate to the costs associated with issuing the permit and subsequent inspection and enforcement.

Viewing the factual allegations as true and drawing reasonable inferences in a light most favorable to the plaintiff, the complaint states a cause of action upon which relief could be granted pursuant to the principles laid out in the above-cited cases, even in light of the presumption of legislative validity. In particular, the complaint sets out specific allegations concerning changes to the fee assessment over time in comparison to the services rendered. The complaint further alleges that the fees were not assessed on the basis of reliable factual studies. In addition, the complaint sufficiently alleges that the fees assessed are not reasonably necessary to cover the costs of issuance of the TMCLs but, instead, are exacted for general revenue purposes to offset the costs of the County's governmental functions. (*See ATM One,* 276 AD2d at 574). The complaint cites numerous figures from the County budget in support of this claim. As the above-cited cases demonstrate, the fact that the fees have been assessed pursuant to legislative enactment is not fatal to plaintiff's claim on a dispositive motion. (*See Fairhaven Apartments*, 8 AD3d 425 [challenging fee imposed pursuant to Code of Town of North Hempstead]; *ATM One*, 278 AD2d 573 [challenging fee imposed pursuant to Village of Freeport Code]; *see also Matter of Torsoe Bros.*, 49 AD2d 461).

Next, plaintiff's demand for "retrospective injunctive relief" in the form of disgorgement, or restitution, of the fees charged between January 2016 and the present, must fail. A party seeking restitution of an illegally imposed tax must show that their payment was made under legal protest. (*Walton*, 13 NY3d at 488). "Whether a payment is considered involuntary in the context of an action for reimbursement of taxes or fees paid to a governmental entity is a question of intention to be resolved upon consideration of the totality of the circumstances." (*Video Aid Corp. v. Town of Wallkill*, 85 NY2d 663, 667 [1995]).

> Where protest has been interposed, the municipality is notified that it may be obliged to refund the taxes and must be prepared to meet that contingency (*see, id.*, [*Mercury Mach. Corp. v City of New York*, 3 NY2d 418] at 426). Otherwise, moneys remitted as taxes or

> fees are applied to authorized public expenditures, and financial provision is not made for refunds. In situations where payment of the tax or fee is made under actual duress or coercion, which is present when payment is necessary to avoid threatened interference with present liberty of person or immediate possession of property, the failure to formally protest will be excused (*see, Mercury Mach. Importing Corp. v. City of New York*, 3 NY2d at 425, *supra; Five Boro Elec. Contrs. Assn. v. City of New York*, 12 N.Y.2d 146, 149–150; *Adrico Realty Corp. v. City of New York*, 250 N.Y. at 32, *supra*).

(*Video Aid*, 85 NY2d at 667 [finding likely disruption of a tight renovation schedule without prompt payment of water and sewer tap-in fees insufficient to constitute duress or coercion]; *see also City of Rochester v. Chiarella*, 58 NY2d 316 [1983] [absent authentic resistence to payment, possibility of a tax lien plus attendant interest on delinquent property taxes did not render tax payments involuntary]; *Corp. Prop. Invs. v. Board of Assessor of County of Nassau*, 153 AD2d 656 [2d Dept 1989] [commencement of declaratory judgment actions before payment constituted sufficient notice to place County on notice of tax refund claims]). Here, despite the plaintiff's contention that the issue of whether payment was voluntarily or involuntary is an evidentiary question to be answered following discovery, the complaint makes no factual allegation to support a finding that the fees were paid under express protest. In fact, the complaint makes no reference to an express protest and plaintiff acknowledges that he was "unaware at the time of his payment of the title company service fee, [of] the breakdown of the individual fee and service charges assessed."

Nor does the complaint allege that the payments were made under circumstances amounting to coercion or duress, as a threat to immediate possession of property, such that a formal protest would be excused. Contrary to plaintiff's contention that by operation of New York's Real Property Law the "failure to properly record deeds and mortgages renders them void," the relevant section actually provides that a conveyance of real property not recorded is void *as against* a good faith subsequent purchaser who is first in time to duly record. (*See* N.Y.R.P.L. § 291). The immediacy of interference with possession of property is not present. Accordingly, plaintiff's demand for disgorgement of the fees must be dismissed. Nonetheless, because the first cause of action also seeks a declaration that the fees are unlawful, the demand for declaratory relief must stand.

Count IV: Money Had and Received

> A cause of action for money had and received is one of quasi-contract or of contract implied-in-law (*see, State of New York v. Barclays Bank*, 76 NY2d 533, 540; *Parsa v. State of New York*, 64 NY2d 143, 148). As this Court has explained, the law recognizes such a cause of action "in the absence of an agreement when one party possesses money that in equity and good

> conscience [it] ought not to retain and that belongs to another (*Miller v. Schloss*, 218 N.Y. 400, 406–407). It allows [a] plaintiff to recover money which has come into the hands of the defendant 'impressed with a species of trust' (*see Chapman v. Forbes*, 123 N.Y. 532, 537) because under the circumstances it is ' "against good conscience for the defendant to keep the money" ' (*Federal Ins. Co. v. Groveland State Bank*, 37 NY2d 252, 258, [372 NYS2d 18], quoting from *Schank v. Schuchman*, 212 NY 352, 358]).
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> The action depends upon equitable principles in the sense that broad considerations of right, justice and morality apply to it, but it has long been considered an action at law (*see Roberts v. Ely*, 113 NY 128 [20 N.E. 606]; *Diefenthaler v. Mayor of City of N.Y.*, 111 NY 331, 337 [19 N.E. 48])." (*Parsa v. State of New York*, 64 NY2d, at 148, *supra*.)

(*Bd. of Educ. of Cold Spring Harbor Cent. Sch. Dist. v. Rettaliata*, 78 N.Y.2d 128, 138 [1991]).

As is the case with the claim for a restitution of illegally collected taxes, plaintiff's fourth cause of action for "money had and received" requires a showing that the payments were made involuntarily or under protest. (*See Bushwick Hotel Inc. v. Dep't. Of Finance of the City of New York*, 273 AD2d 129, 130 [1st Dept 2000]; *see also City of Rochester v. Chiarella*, 64 NY2d 92 [1985]; *Niagara Mohawk Power Corp. v. City School Dist. Of City of Troy*, 59 NY2d 262, 267-268 [1983]); *First Nat. City Bank v. City of New York Finance Admin.*, 36 NY2d 87, 93 [1975]). As explained above, the complaint fails to do so. Accordingly, the plaintiff's fourth cause of action must be dismissed.

Count II: Unjust Enrichment

With respect to the second cause of action for unjust enrichment:

> The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Grombach Prods. v. Waring*, 293 N.Y. 609; *American Sur. Co. v. Conner*, 251 N.Y. 1, 8-11; *Miller v. Schloss*, 218 N.Y. 400, 407; *Schank v. Schuchman*, 212 N.Y. 352; Restatement, Restitution, s 1; 50 N.Y.Jur., Restitution, ss 1, 3). Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice (50 N.Y.Jur., Restitutions, s 7). Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent (Restatement, Restitution, ss 1, 142, esp. Comment B; id., s 155, including Comment B).

(*Paramount Film Distrib. Corp. v. State*, 30 NY2d 415, 421 [1972]). For the same reasons underlying the standards preventing the plaintiff from seeking disgorgement of the allegedly improper fees absent express protest, or excuse thereof, the plaintiff cannot seek restitution by packaging his claim as one for unjust enrichment.

Count III: Conversion

Finally, with respect to plaintiff's third cause of action, a claim for conversion of money will stand only where there is a specific identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question. "'The rule is clear that, to establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights . . . . Tangible personal property or *specific money* must be involved' (*Independence Discount Corp. v. Bressner*, 47 AD2d 756, 757 [citations omitted; emphasis in original])." (*Fiorenti v. Cent. Emergency Physicians, PLLC.*, 305 AD2d 453, 454–55 [2d Dept 2003]).

"Money, if specifically identifiable, may be the subject of a conversion action." (*Petrone v. Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017] [quotations omitted). "Conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose." (*Id.*). However, "[a] cause of action alleging conversion should be dismissed when the plaintiff does not allege 'legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights' (*Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590, 592; *see Daub v. Future Tech Enter., Inc.*, 65 AD3d 1004, 1006)." (*Barker v. Amorini*, 121 AD3d 823, 825 [2d Dept 2014]).

Here, the funds allegedly converted by the County are not sufficiently identifiable to sustain a cause of action for conversion. (*9310 Third Ave. Associates, Inc. v. Schaffer Food Service Co.*, 210 AD2d 207 [2d Dept 1994]). Nor has plaintiff alleged unauthorized use or dominion over funds designated for a particular purpose.

For the foregoing reasons, it is hereby

ORDERED, that the defendant's motion to dismiss the first cause of action is **granted** to the extent that the plaintiff's claim for injunctive relief in the form of disgorgement is dismissed and the motion is otherwise **denied**; and it is further

ORDERED, that the defendant's motion to dismiss the second, third and fourth causes of action is **granted**; and it is further

ORDERED, that all parties shall appear at a **preliminary conference** at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on **October 16, 2017**, at 9:30

a.m. No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 27, 2017

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED

OCT 03 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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