

2952 Victory Blvd. Pump Corp. v Bhatt
2018 NY Slip Op 32975(U)
October 22, 2018
Supreme Court, Richmond County
Docket Number: 151082/2018
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

2952 VICTORY BOULEVARD PUMP CORP.,

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 151082/2018
Motion No. 1

Plaintiff(s),

-against-

**ABRAR ALI BHATTY, FARIHA BHATTY,
LARRY BLOOM, THOMAS BALZANO, LOUISE
BALZANO, CARMINE MAZZA, MAUREEN
MAZA, ROBERT PACIFICI, KATHLEEN
PACIFICI and ANGELIKI GIORDANO.**

Defendant(s)

The following numbered 1 to 3 were fully submitted on 2nd day of October 2018

Papers
Numbered

Defendants motion to dismiss the complaint, with Supporting Papers and Exhibits, dated, June 27, 2018.....	1
Plaintiff's Affirmation in Opposition, with Supporting Papers and Exhibits, dated, August 24, 2018.....	2
Reply, dated, September 25, 2018	3

Defendant moves for an order to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(3) and/or (a)(5). As is set forth below, defendant's motion is granted, and the complaint is dismissed.

Plaintiff commenced this action for payment of sewage pumping fees they claim are owed by the defendants for the period covering October 16, 2013 to December 31, 2017. In support of its claim, plaintiff alleges that it owns a “sewage pumping station” located at 2952 Victory Boulevard Staten Island, NY that services homes owned by each of the defendants. Plaintiff claims it is entitled to recover “sewage pumping fees” from defendants based upon unjust enrichment and or implied agreement.

The sewage pumping station alleged to be owned by plaintiffs has, in fact, been owned since November 1, 2003 by A&F Realty Holding, LLC as evidenced by the Referee’s Deed. Said conveyance was made pursuant to a foreclosure sale conducted on September 13, 2003 in accordance with a Judgment of Foreclosure and Sale entered on October 29, 2003.

It is well settled that a motion to dismiss an action pursuant to CPLR 3211 (a) (7) will not be granted unless the moving papers conclusively establish that the plaintiff does not have a cause of action.

"[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; see *Pacific Carlton Dev. Corp. v. 752 Pac., LLC*, 62 AD3d 677, 679 [App Div, 2nd Dept, 2009].)

Additionally, "the complaint must be liberally construed [see, CPLR § 3026] in the light most favorable to the plaintiff and all allegations must be accepted as true;" and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration. However the facts alleged must fit within a cognizable legal theory (*Thomas v Thomas*, 70 AD3d 588, 590 [App Div, 1st Dept, 2010]; *Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *Pacific Carlton Dev. Corp. v. 752 Pac., LLC*, 62 AD3d at 679,; see *Cohn v Lionel Corp.*, 21 NY2d 559 [1968]; *Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Morone v Morone* 50 NY2d 481 [1980]; *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Gertler v Goodgold*, 107 AD2d 481, 485 [App Div, 1st Dept, 1985], *affd.* 66 NY2d 946, 948 [1985]; *Goldfarb v Schwartz*, 26 AD3d 462, 463 [App Div, 2nd Dept, 2006].)

"Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; also see, *International Oil Field Supply Serv. Corp., v Fadeyi*, 35 AD3d 372, 375 [App Div, 2nd Dept, 2006].)

Affidavits may be freely received, and the court may freely consider them for the limited purpose of remedying any defects in the complaint (*see Leon v. Martinez*,

84 NY2d at 88; *Wilner v Allstate Ins., Co.*, 71 AD3d 155, [App Div, 2nd Dept, 2010]; *Fitzgerald v Federal Signal Corp.*, 63 AD3d 994, 995 [App Div, 2nd Dept, 2009].)

If a plaintiff is entitled to recovery upon any reasonable review of the stated facts, the complaint, as a pleading, is legally sufficient (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506 [1979].) Essentially, “a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only where documentary evidence utterly refutes the complaint's factual allegations, thereby conclusively establishing a defense as a matter of law” (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83 at 88; *Kalmon Dolgin Affiliates of Long Island v Robert Plan Corp.*, 248 Ad2d 594 [App Div, 2nd Dept, 1988]; *McMorrow v Dime Savings Bank of Williamsburgh*, 48 AD3d 646, 647 [App Div, 2nd Dept, 2008]; *Aeld Associates, Inc. V Marcarrio*, 57 AD3d 660 [App Div, 2nd Dept, 2008]; *Newcomb v Sims*, 63 AD3d 1022, 1023 [App Div, 2nd Dept, 2009]; *Reznikov v Walowitz*, 63 AD3d 1134, 1135 [App Div, 2nd Dept, 2009].)

Here, the claims set forth in the complaint rely upon a decision and order rendered by the Honorable Joseph J. Maltese on December 1, 2004 captioned under in the *Matter of Conigliaro et al v 2952 VBPC* Index No: 12268/2004. In that prior action certain homeowners sought determination of plaintiff's right to collect the same “sewage pumping fees” which Plaintiff now seeks to recover in this action. Justice Maltese ruled that the plaintiff was unable to collect pumping service fees

until the 2952 VBPC complied with the requirements of the court's order. (A copy of the Order is attached to defendant's motion as Exhibit "B"). Because of the *Conigliaro* decision, plaintiff stopped invoicing the homeowners in the development and bore all the expenses of the pumping station with no income collected for almost 12 years covering the period from October 2003 through February 2015.

The *Conigliaro* decision concluded that the previous pump station owners, Trailway Associates, abandoned the pumping station and voided its covenants with the property owners pursuant to the covenant language. Further, the court held that the covenants between the homeowners and 2952 VBPC are unenforceable because 2952 VBOC is not a direct successor to Trailway Associates, the original party to the covenants. The court ruled that the covenants with the property were terminated and stated that 2952 VPBC must obtain a Certificate of Occupancy before it could collect fees and further required that 2952 VBPC must obtain approval of its rates from the New York City Water Board. In a letter dated June 5, 2014 from the New York City Water Board (attached as Exhibit "D" to defendant's motion) the New York City Water Board opined that it does not have the authority to review or approve the rates of 2952 VBPC.

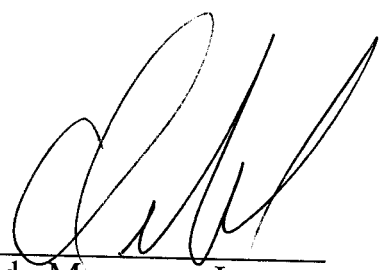
First and foremost, the certificate of occupancy plaintiff relies upon does not satisfy Justice Maltese's directives. According to the Referee's Deed, A&F Realty Holding, LLC is the only owner of the premises for which the certificate was issued.

Additionally, said certificate of occupancy is unrelated to plaintiff's alleged property because it was issued for 2940 Victory Boulevard and not 2952 Victory Boulevard, which is the address of the premises conveyed under the Referee's Deed and where the "sewage pumping station" is located.

Therefore, as a matter of law this court is granting defendant's motion to dismiss without prejudice. Plaintiff may seek its cause of action upon full compliance of all requirements as set forth in Justice Maltese's prior ruling in the *Conigliaro* decision, which is the controlling case law.

This constitutes the decision and order of the court.

Dated: October 22, 2018
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court