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| <b>Abakporo v Abakporo</b>                                                                                                                                                                                                     |
| 2018 NY Slip Op 33233(U)                                                                                                                                                                                                       |
| December 14, 2018                                                                                                                                                                                                              |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: 9161/17                                                                                                                                                                                                         |
| Judge: Allan B. Weiss                                                                                                                                                                                                          |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2  
Justice

ROSEMARY ABAKPORO,

Index No.: 9161/17

Plaintiff,

Motion Date: 8/22/18

-against-

Motion Seq. No.: 5

THEOPHINE ABAKPORO, ERIC ABAKPORO,  
TUTHILL FINANCE,

Defendants.

The following papers numbered 1 to 4 read on this motion by defendant Theophine Abakporo for, inter alia, summary judgment dismissing all of the complaints against him and on this cross motion by plaintiff Rosemary Abakporo for, inter alia, an order dismissing this action against defendant Theophine Abakporo on the ground of mootness

Papers  
Numbered

|                                                    |     |
|----------------------------------------------------|-----|
| Notice of Motion - Affidavits - Exhibits .....     | 1   |
| Notice of Cross Motion - Affidavits- Exhibits..... | 2   |
| Answering Affidavits - Exhibits .....              |     |
| Reply Affidavits .....                             |     |
| Memoranda of Law .....                             | 3-4 |

Upon the foregoing papers it is ordered that the branch of the defendant's motion which is for summary judgment dismissing all of the complaints against him is granted. The remaining branches of his motion are denied. The plaintiff's cross motion is denied.

## I. Background

The allegations made by plaintiff Rosemary Abakporo and the relevant procedural history are given more fully in the decision and order (one paper) rendered by this court on the motion made by defendant Tuthill Finance for an order, inter alia, dismissing the complaints against it. Briefly, plaintiff Rosemary Abakporo (Rosemary) alleges the following: She is, the wife of defendant Eric Abakporo (Eric) and the sister-in-law of defendant Theophine Abakporo (Theophine) She is the equitable owner of premises known as 179-15 Grand Central Parkway, Jamaica, New York ( the subject property). In the winter of 1997, Eric and Rosemary decided to purchase the subject property, and, because they needed someone with better credit than theirs, they asked Theophine, a medical doctor, to apply for the mortgage and to take a deed in his name. Without Rosemary's knowledge, Eric and Theophine mortgaged the subject property to defendant Tuthill Finance ( Tuthill) in December, 2007. After a default occurred on the mortgage payments due Tuthill, the mortgagee began an action to foreclose on the subject property without providing notice to Rosemary.

On March 9, 2010, Tuthill began an action to foreclose on the mortgage against Theophine in the Supreme Court of the State of New York, County of Queens ( Index No. 5920/10). On November 26, 2012, Tuthill entered a judgment of foreclosure and sale. On June 16, 2017 an order amending the judgment of foreclosure and sale was entered in the County Clerk's Office. A foreclosure sale was scheduled for September 22, 2017, but the parties entered into a stipulation whereby Tuthill agreed to forebear on the foreclosure provided Theophine made a payment of \$450,000.

On March 5, 2018, defendant Tuthill submitted a motion (seq. no. 1) in the instant action for an order, inter alia, dismissing the complaints against it, and Rosemary, submitted a cross motion for, inter alia, an order nunc pro tunc deeming her second amended complaint properly served. By decision and order dated March 29, 2018, this court granted Tuthill's motion and denied Rosemary's cross motion. On February 1, 2018, defendant Theophine submitted a motion (seq. no 2) for an order directing the Clerk of Queens County to cancel notices of pendency filed by plaintiff Rosemary, and Rosemary submitted a cross motion for , inter alia, a nunc pro tunc order deeming her second amended complaint properly served. By decision and order dated April 3, 2018, this court granted that branch of the motion which was for an order cancelling the notices of pendency and otherwise denied the motion. The court also denied Rosemary's cross motion.

## II. Discussion

### A. Defendant Theophine's Motion

## 1. Summary Judgment Dismissing The Complaint

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact \*\*\*.” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986].) Defendant Theophine successfully carried this burden, and he showed that he is entitled to summary judgment dismissing all of the complaints that the plaintiff served upon him. In regard to the second amended complaint served by the plaintiff, this court has already ruled in its decision and order dated March 29, 2018 that it is a nullity since the plaintiff served it without leave of court or a stipulation of the parties in accordance with CPLR 3025(b). (*See, Nikolic v. Fed'n Employment & Guidance Serv., Inc.*, 18 AD3d 522 [2<sup>nd</sup> Dept 2005].) This court has already ruled in the same decision and order: (1) “The plaintiff’s proposed cause of action based on adverse possession plainly lacks merit.” (2). “The cause of action to impose a constructive trust is time-barred.” Plaintiff Rosemary failed to raise a genuine issue of fact in opposition papers to the instant motion and failed to show that the court committed error in its previous rulings. The court notes here that the statute of limitations governing a cause of action for the imposition of a constructive trust “commences to run upon occurrence of the wrongful act giving rise to a duty of restitution, and not from the time when the facts constituting the fraud are discovered \*\*\*.” (*Kaufman v. Cohen*, 307 AD2d 113, 127 [1<sup>st</sup> Dept 2003]; *Knobel v. Shaw*, 90 AD3d 493[1st Dept 2011].) Theophine executed and delivered the mortgage to Tuthill on or about December 28, 2007, and the mortgage was recorded on January 14, 2008. Insofar as the first amended complaint is concerned, which is the pleading that is operative, it asserts a cause of action for the imposition of a constructive trust, and this court has already ruled in its decision and order dated March 29, 2018 that such a cause of action is time-barred. The original complaint was superceded by the first amended complaint. Defendant Theophine is entitled to summary judgment dismissing all of the complaints against him.

## 2. Summary Judgment on Defendant Theophine’s Purported Counterclaim

Defendant Theophine’s purported counterclaim against plaintiff Rosemary asserts in relevant part: “[I]n an attempt to thwart T. Abakporo’s ability to finance the \$400,000 payment due to Tuthill by the terms of the Stipulation and terminate the foreclosure proceeding, Plaintiff commenced the above-captioned action and filed and recorded against the Property a Notice of Pendency on September 11, 2017, rendering the property unfinanceable and subjecting T. Abakporo to a substantial loss equal to the market value of the Property.” The defendant’s memorandum of law identifies that the counterclaim as one grounded upon Section 130-1.1, “Costs; sanctions,” of the Rules of the Chief Administrator of the Courts ( 22 NYCRR 130-1.1) which empowers the court, in its discretion, to award “costs in the form of reimbursement for actual expenses reasonably incurred and reasonable

attorney's fees, resulting from frivolous conduct” and to impose financial sanctions for frivolous conduct. However, “New York does not recognize a separate cause of action or counterclaim seeking the imposition of sanctions \*\*\*,” (*Adirondack Bank v. Midstate Foam & Equip., Inc.*, 159 AD3d 1354, 1357[ 4<sup>th</sup> Dept. 2018]; *Licalzi v. Wells Fargo Bank, N.A.*, 125 AD3d 942 [2<sup>nd</sup> Dept. 2015].) The plaintiff’s memorandum of law also identifies the counterclaim as one grounded on CPLR 8303-a, “ Costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death.” However, New York does not recognize an independent cause of action for the imposition of sanctions under CPLR 8303-a . ( *Cerciello v. Admiral Ins. Brokerage Corp.*, 90 AD3d 967[2nd Dept 2011].) A party may seek the imposition of sanctions via a motion for an order. ( *See*, Alexander, Supplementary Practice Commentaries 2012, McKinney’s Cons. L. of NY, Book 7B, CPLR 8303-a..)

Although Point III of Theophine’s memorandum of law asserts that he “is entitled to summary judgment on its [sic: his] counterclaim,” he is not helped by deeming his motion as seeking an order imposing sanctions. Section 130-1.1 provides in relevant part: “(c) For purposes of this Part, conduct is frivolous if:(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.” In regard to the first branch of the definition of frivolous conduct, the court does not find that Rosemary’s complaint is “completely without merit” since the pro se plaintiff’s cause of action for a constructive trust was dismissed on statute of limitation grounds and it was not necessary to reach the merits of the cause of action which alleges that her funds were used to purchase the property. In regard to the second branch of the definition, conflicting inferences can be drawn as to Rosemary’s motives in commencing the instant action, and the court will not speculate about whether she just wanted to delay the resolution of the Tuthill foreclosure action. Sanctions under Section 130-1.1 are in the court’s discretion, and, in its discretion, under all of the facts and circumstances, the court will not spend limited judicial resources in conducting a hearing as to Rosemary’s motives which would be difficult to prove. ( *See*, *Altadonna v. Accord Contracting & Mgmt. Corp.*, 148 AD3d 764[2nd Dept. 2017] [ hearing required under CPLR 8303-a where there were issues of fact pertaining to whether the action was “commenced or continued in bad faith without any reasonable basis in \*\*\*. fact” ],) In regard to the third branch of the definition, whether Rosemary’s version of the facts is true or false has been left an open issue. As far as CPLR 8303-a is concerned, the statute applies to an “action to recover damages for personal injury, injury to property or wrongful death,” and the first amended complaint does not seek damages, nor is this case of the type within the scope of the statute. The untested allegations of the plaintiff concerning her investment in the subject property preclude a finding that this

case was commenced in bad faith. (*See*, CPLR 8303–a[c]; *Broich v. Nabisco, Inc.*, 2 AD3d 474, [2<sup>nd</sup> Dept (2003)].)

B. Plaintiff Rosemary's Cross Motion

Plaintiff Rosemary's cross motion for an order dismissing her own action is largely duplicative of her motion ( seq. no 6) for an order of this court vacating its decisions and orders dated March 29, 2018 and April 3, 2018. The court has denied Rosemary's other motion.

Dated: December 14, 2018

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J.S.C.