

**Joglo Realities, Inc. v Tortorella**

2019 NY Slip Op 32995(U)

October 3, 2019

Supreme Court, Kings County

Docket Number: 205503/13

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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JOGLO REALITIES, INC.,  
AND ROBERT I. TOUSSIE,

Plaintiff,

Decision and order

- against -

Index No. 20503/13

MERILYN TORTORELLA & OTTAVIO TORTORELLA  
d/b/a TORTORELLA LANDSCAPING,

Defendants,

ms # 56, 11, 12 & 14

October 3, 2019

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MERILYN TORTORELLA & OTTAVIO TORTORELLA  
d/b/a TORTORELLA LANDSCAPING,

Counterclaim-Plaintiffs

- against -

JOGLO REALITIES, INC., & ROBERT I. TOUSSIE,  
Counterclaim-Defendants

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION,

Counterclaim-Defendant

-----x  
PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §2221 seeking to renew and reargue a decision and order dated September 5, 2018. The plaintiff's have moved seeking to dismiss counterclaims filed by the defendants. The counterclaim defendant the New York State Department of Environmental Conservation has moved seeking to dismiss all counterclaims asserted against it. The motions have been opposed respectively and papers submitted by all parties. After reviewing the arguments of all parties this court now makes the following determination.

As recorded in a prior order, the defendants Marilyn and Ottavio Tortorella own property located at 4316 Ocean Avenue in

Kings County. Following damage to the property caused by Hurricane Sandy, the defendants entered into a contract with plaintiffs wherein the defendants agreed to pay the plaintiffs \$8,950 to clean debris upon defendants property. The plaintiffs claimed they owned the southerly adjoining property which measured approximately forty feet by over a thousand feet in length, a strip running from the east side of Ocean Avenue to the east side of Beaumont Avenue along the Atlantic Ocean. The contract further provided the defendants would perform lawn maintenance for the plaintiffs at five locations at no charge. The defendants were unhappy with the work performed by the plaintiffs and filed a petition with the New York State Environmental Control Board. The plaintiffs filed complaints with the New York City Department of Buildings and the Environmental Control Board alleging building code and other violations. The complaints filed by the plaintiffs were dismissed without the imposition of any fines against the defendants. Approximately a month later this lawsuit was filed wherein the plaintiffs alleged a cause of action for breach of contract asserting the defendants failed to perform the lawn maintenance as promised and failed to pay \$200,000 based upon an oral modification to the contract. On May 24, 2017 the New York State Department of Environmental Conservation entered into an Order of Consent with the plaintiffs requiring them to take certain action with respect to the area that was the subject of the contract between the plaintiffs and defendants and was likewise the subject of the petition filed by

the defendants. The court held that pursuant to GBL §771 although necessary information was missing from the contract that did not render the contract illegal and hence invalid.

The defendants now seek to reargue that determination. They assert that the contract was based upon the Consent Decree of the Department of Environmental Conservation and that Decree contained numerous conclusions of illegal activity on the part of the plaintiff's which render the contract between the parties illegal and unenforceable.

#### Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

It is well settled that contracts that are legal in their inducement and capable of being performed legally but are nevertheless performed in an illegal manner are not enforceable (McConnell v. Commonwealth Pictures Corp., 7 NY2d 465, 199 NYS2d 483 [1960]). However, that rule only applies if there is a direct connection between the illegality and the obligation sued upon (Alpha Interiors Inc., v. Tulgar Construction Corp., 101 AD3d 660, 956 NYS2d 67 [2d Dept., 2012]).

In this case, the obligation sued upon is for work for cleanup following Hurricane Sandy. As noted in the contract itself "JOGLO

agrees to clean the portion of Merilyn Tortorella's property that is south of her residence up to the northerly border of Joglo's property line, from the debris deposited by storm sandy for the cost of \$8,950.00 which sum shall be paid upon the signing of the agreement" (see, Short Agreement Between Neighbors). There is no connection between the illegality and the work sued upon, indeed, the contract is not illegal on its face for these reasons. The mere fact the plaintiff was fined for environmental violations does not mean the contract was illegal. Therefore, the contract entered between the parties was not an illegal contract that concerned the health or safety of the public and was a contract that did not satisfy the terms of GBL §771. However, any omissions in that regard do not render the contract illegal. Consequently, the motion seeking to reargue that determination is denied. Likewise, the motion seeking to dismiss the ninth and tenth counterclaims are granted.

The New York State Department of Environmental Conservation [hereinafter 'DEC'] has moved seeking to dismiss three third party claims filed by the Tortorellas. The Tortorellas served counterclaims, three of which the DEC seeks to dismiss including a claim for a declaratory judgement, a permanent injunction and nuisance. The declaratory judgement claim seeks a judgement that the Consent Order and the acts of Toussie and Joglo Realities Inc., constituted a trespass of the Tortorellas property. The permanent injunction claim seeks to modify the Consent Order to provide that

Toussie and Joglo Realities Inc., must restore the esplanade to its pre-Sandy level and condition. The eight claim seeks a modification of the Consent Order to provide that Toussie and Joglo Realities Inc., must remove a concrete wall and restore the property in any other way to its pre-Sandy condition. The DEC has moved seeking to dismiss those counterclaims are various grounds including the fact those claims fail to state any cause of action against DEC. The Tortorellas oppose the motion.

First, there is no merit to the argument the DEC consented to the counterclaims filed. Furthermore, the court's grant of permission to file the counterclaims does not mean the DEC is foreclosed from challenging them. There can be no dispute the Tortorellas seek to compel the DEC to act in certain specific ways and thus they seek a writ of mandamus. It is well settled that a Writ of Mandamus is an "extraordinary remedy" and is only available for the performance of a purely ministerial act where there is a clear right to the relief sought (Klostermann v. Cuomo, 61 NY2d 525, 475 NYS2d 247 [1984]). However, it is equally clear that mandamus may not compel an agency to perform an act where the agency may exercise judgement or discretion (see, Thomas v. Trustees of Freeholders & Commonality of Town of Southampton, 59 Misc3d 1202(A), 98 NYS2d 503 [Supreme Court Suffolk County 2018]). The Tortorellas argue they were aggrieved by the actions of Toussie and that "inexplicably, the DEC elected not to include the Tortorellas and their neighbors in the negotiations, hold hearings

or inform the Tortorellas of the Consent Order, notwithstanding that the DEC knew that lives and the safety of the properties of the Tortorellas (and their neighbor)'s who had filed the initial petition with the DEC complaining about plaintiffs' illegal construction would be impacted by the Consent Order" (see, Affirmation in Opposition to Counterclaim Defendant New York State Department of Environmental Conservation's Motion to Dismiss, pages 12, 13). However, even if true, that the DEC was aware the Tortorellas were aggrieved by Toussie's actions it does not state a cause of action against the DEC since it does not raise any issue regarding the discretion exercised by the DEC. The DEC commenced action against Toussie for environmental violations not for trespass or nuisance or improperly acquiring Tortorellas property. Those claims are being pursued in their proper venue, namely the Supreme Court and they do not involve any actions or inactions taken by the DEC at all. Thus, regardless of any characterization of the esplanade by the DEC or any information contained in the DEC Complaint the Tortorellas simply cannot maintain any cause of action requiring the DEC to amend its Consent Order. Likewise, there is no basis upon which a nuisance action can be maintained against the DEC.

Therefore, the DEC's motion seeking to dismiss any claims against it is granted.

Likewise, the third and fourth counterclaims do not really seek any relief from the plaintiffs since they involve actions to

be taken by the DEC. Therefore, the motion seeking to dismiss these two counterclaims is granted.

Next, the defendants argue the contract should be declared void due to a fraudulent deed. However, that issue was not raised in the prior motion. It is true that in the prior motion the defendants noted that Justice Partnow questioned the authenticity of the 1977 deed, nevertheless, there was no motion seeking to vacate the contract on those grounds. Thus, this request is properly a motion to renew. It is well settled that evidence sought to be introduced in a motion to renew must be evidence which was not in possession of the party at the time of the initial motion and could not have been obtained in time (Sherman v. Piccione, 304 AD2d 552, 757 NYS2d 112 [2d Dept., 2003]). However, that rule has been defined as 'flexible' and a party may file a motion to renew even if the evidence was known at the time of the original motion provided the party offers a reasonable explanation why the additional facts were not included within the original motion (Progressive Northeastern Insurance Company v. Frenkel, 8 AD3d 390, 777 NYS2d 652 [2d Dept., 2004]). In this case there has been no explanation at all why such evidence was not submitted earlier. Nor is there an explanation that such evidence could not have been obtained until this point. Thus, utilizing due diligence such information should have been presented (Allstate Insurance Company v. Davis, 23 AD3d 418, 803 NYS2d 929 [2d Dept., 2005]). A motion to renew is not a second chance given to a party who failed

to exercise due diligence (Elder v. Elder, 21 AD3d 1055, 802 NYS2d 457 [2d Dept., 2005]). Therefore, the motion seeking to vacate the contract is denied.


Turning to the motion to reargue the failure to determine the dismissed claims were SLAPP claims, it must be noted the dismissed causes of action were for tortious interference with economic advantage and nuisance. Those claims do not involve any public petitioning and participation pursuant to Civil Rights Law §76-a. Indeed, the original complaint filed does not mention or allege any of the elements necessary to plead an improper SLAPP lawsuit. Thus, unlike the decision of Justice Partnow in a similar case filed by the same plaintiffs herein against a different neighbor, this case does not involve the petitioning by a public applicant or permittee that is materially related to efforts to report or comment or rule on or challenge or oppose any application or permission (see, Waterways at Bay Pointe Homeowners Association Inc., v. Waterways Development Corp., 132 AD3d 975, 19 NYS3d 536 [2d Dept., 2015]). As noted, the complaint filed in this case does not concern any public permits nor does it involve any disputed land. The complaint concerns a breach of contract and the two dismissed claims which involved construction materials and debris which allegedly impeded the plaintiff's ability to sell the property. These claims are not "identical" in any manner with the claims which Justice Partnow concluded were SLAPP claims. First, since the complaint in this case does not involve any permits the

plaintiff could not have been a "public applicant" (see, Civil Rights Law §76-a[1][b]). Further, the complaint does not allege any "communications" a necessary element of a SLAPP claim (see, Civil Rights Law §76-a[1][c]). Therefore, the complaint was not a SLAPP lawsuit and the motion seeking a summary determination in this regard is denied.

So ordered.

ENTER:

DATED: October 3, 2019  
Brooklyn NY

  
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Hon. Leon Ruchelsman  
JSC

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KINGS COUNTY CLERK  
FILED