

<b>Sikorsky v City of Newburgh</b>
2019 NY Slip Op 34092(U)
January 2, 2019
Supreme Court, Orange County
Docket Number: EF007194-2017
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,  
held in and for the County of Orange, at 285 Main Street,  
Goshen, New York 10924 on the 2<sup>nd</sup> day of January, 2019.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

LIEUTENANT COLONEL KENNETH M. SIKORSKY

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

PLAINTIFF,

-AGAINST-

CITY OF NEWBURGH, NEW YORK and  
JOHN AND JANE DOES 1-10

**DECISION & ORDER**  
INDEX # EF007194-2017  
Motion Date: 10/5/18  
Motion Seq. #4

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 8 were read on Defendant's motion to dismiss the twelfth cause of action in Plaintiff's Amended Complaint, pursuant to CPLR §3211 and §3212:

Notice of Motion/Affirmation Paul Svensson, Esq./Exhibits A - C.....	1 - 5
Affidavit in Opposition of Dennis Lynch, Esq./Exhibit A .....	6 - 7
Reply Affirmation of Paul Svensson, Esq.....	8

This action is one for both declaratory and equitable relief, which was commenced by Plaintiff on September 11, 2017, and then amended by the filing of a First Amended Complaint on November 3, 2017. Plaintiff alleges that Defendants acted unlawfully in the collection of real estate property taxes and as a result, Plaintiff lost his property located at 22 Bay View Terrace, Newburgh, NY, to a tax sale. Defendant argues that Plaintiff was given an opportunity to re-purchase his home, by Agreement dated June 30, 2014, but failed to comply with the terms of that agreement.

On or about February 6, 2018, Defendant, City of Newburgh, brought a pre-answer motion for dismissal of the entire Amended complaint for failing to state a cause of action. By Decision and Order dated July 2, 2018, this Court granted Defendant's motion on the 1<sup>st</sup> through

the 11<sup>th</sup> causes of action. The 12<sup>th</sup> cause of action for liquidated damages was not addressed by the Defendant in the first motion, and was therefore left open by the Court. The instant motion, Sequence # 4, is one to dismiss the 12<sup>th</sup> and final cause of action.<sup>1</sup> In this twelfth claim for relief, Plaintiff asks the Court to declare the liquidated damages clause in the contract inequitable and unenforceable, and estop Defendant from enforcing such clause.

**Analysis:**

Defendant argues that the twelfth cause of action must be dismissed, pre-discovery, because Plaintiff has failed to give any supporting factual allegations and has failed to meet the burden of establishing that the damages were proportionate to the probable loss. Plaintiff counters this argument by saying that discovery is needed before he is able to give specific facts.

In considering a motion to dismiss for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*Sokol v Leader* 74 AD3d 1180 [2d Dept 2010]). The standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v Ginzburg* 43 NY2d 268 [1977]).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” (*Bell Atlantic Corporation v Twombly*, 127 S.Ct. 1955 [2007]). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged (*Id.*, at 556). The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

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<sup>1</sup>As noted in the prior Decision of the Court, Plaintiff’s amended complaint has two “twelfth claims for relief”. This decision addresses paragraph 143-146, the first 12<sup>th</sup> claim.

(*Id.*, at 557 [brackets omitted]). Commonplace recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice. The Court is not bound to accept as true a legal conclusion couched as a factual allegation. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations (*Ashcroft v Iqbal*, 129 S.Ct 1937 [2009]). Although a plaintiff may not be required to plead a claim with detailed factual allegations, it must be more than a bare-naked accusation that “the defendant unlawfully harmed me”.

In applying the above standards to the Amended Complaint, the twelfth claim for relief must also be dismissed. Plaintiff has failed to give any specific facts to support his claim that the liquidated damages clause is unconscionable. On the other hand, Defendant proffers that the amount of the damages is directly related to the amount of prior taxes which were owed on the property before the tax sale. According to Defendants, the amount of taxes owed were in excess of \$92,000, and the amount of liquidated damages, \$14,882.96 was but a fraction of that \$92,000 which was used as a down payment to buy back the home. Thus “[t]he provision for liquidated damages related reasonably to potential harm that was difficult to estimate and did not constitute a disguised penalty.” *Truck Rent-A-Ctr., Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 427 [1977]. While Plaintiff broadly argues that discovery is needed before specific facts can be alleged, he gives no inkling what facts he hopes to uncover. Thus the Plaintiff has not established “...either that actual damages were readily ascertainable at the time the contract was entered into or that the liquidated damages were conspicuously disproportionate to foreseeable or probable losses (citing *Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120 [2006]; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]; *Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 424 [1977]).” *United Tit. Agency, LLC v Surfside-3 Mar., Inc.*, 65 AD3d 1134, 1135 [2d Dept 2009]. Thus this Court can not determine, as a matter of law, that “...the liquidated damages provision contained in the parties' contract was an unenforceable penalty... (citing generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).” *id* at 1135.

Accordingly, it is hereby

**ORDERED** that defendant's motions to dismiss the twelfth cause of action in the Amended Complaint is granted; and it is further

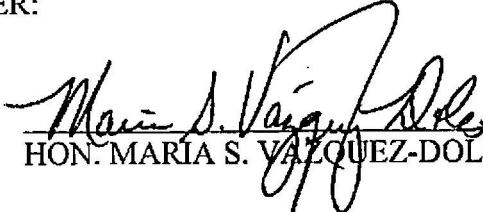
**ORDERED** that Plaintiff's amended complaint is dismissed in its entirety and this matter is marked off calendar.

Defendant is directed to submit judgment on notice.

The foregoing constitutes the Decision and Order of this Court.

Dated: January 2, 2019  
Goshen, New York

ENTER:

  
HON. MARIA S. VALQUEZ-DOLES, J.S.C.

To: Counsel of record via NYCEF