Lehmann v EDM Lenox, LLC
2020 NY Slip Op 33359(U)
October 13, 2020
Supreme Court, New York County
Docket Number: 653609/2018
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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DAVID LEHMANN, CARYN LEHMANN,

Plaintiffs,

- v -

EDM LENOX, LLC,EDM REALTY PARTNERS LP, HELENE HARTIG, and LAW OFFICES OF HELENE HARTIG,

Defendants.

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INDEX NO. 653609/2018

MOTION DATE 02/10/2020

MOTION SEQ. NO. 004

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104, 105, 113, 114

were read on this motion to/for REARGUMENT/RECONSIDERATION.

ORDER

Upon the foregoing documents, it is hereby

ORDERED pursuant to CPLR § 5019(a), that the order dated September 28, 2020 is resettled, amended and modified, nunc pro tunc; and it is further

ORDERED that the motion of plaintiffs for leave to reargue their motion to dismiss defendants' counterclaims (Motion Seq. No. 001) and to reargue the defendants' motion for summary judgment on their counterclaims (Motion Seq. No. 002) is granted; and it is further

ORDERED that, upon reargument, the Court modifies its prior order, dated January 6, 2020, only to the extent that it vacates that portion of the order that granted defendants' motion for

summary judgment on their first counterclaim for a declaration that the contract was breached and granted defendants' motion to dismiss plaintiff's complaint in its entirety, and having rescinded such portion of its prior order, now denies defendants' motion for summary judgment on their first counterclaim to the extent that it seeks a declaratory judgment and grants plaintiffs' motion to dismiss such first counterclaim to extent that such first counterclaim seeks a declaratory judgment, but denies plaintiffs' motion to dismiss defendants' first counterclaim to the extent that such counterclaim asserts breach of contract; and it is further

ORDERED, that except as to plaintiffs' claim for enforcement of lien/declaratory judgment (count five) that is determined in favor of defendants, plaintiffs' claims for conversion (count six) and unjust enrichment (count seven) remain dismissed, defendants' motion for summary judgment dismissing the remaining claims (counts two, three and four) of the complaint is denied, as premature, and such causes of actions are severed and are reinstated and shall be restored to the calendar and continue; and it is further

ORDERED that "count five" of the complaint is summarily determined and the notice of pendency filed in the office of the County Clerk of New York County on August 10, 2018 affecting real property located at The Lenox Condominium, 380 Lenox Avenue, Unit

3G, New York, New York (Block 1727, Lot 1016) (NYSCEF Doc No. 12) is declared a nullity, cancelled and vacated; and it is further

ORDERED that the court otherwise adheres to its previous order that granted plaintiffs' motion to dismiss defendants' second, third and fourth counterclaims (motion sequence no. 001) and the second, third and fourth counterclaims are dismissed; and it is further

ORDERED, ADJUDGED and DECLARED that a motion having been made by plaintiffs to declare a notice of pendency enforceable, and a motion having been made by defendant EDM Lenox, LLC, an aggrieved person, to cancel a notice of pendency herein, filed in the office of the County Clerk of New York County on August 10, 2018 affecting real property located at The Lenox Condominium, 380 Lenox Avenue, Unit 3G, New York, New York (Block 1727, Lot 1016) (NYSCEF Doc No. 12), and notice of such motion having been given as directed by the court, and due deliberation having been had thereon, and the court having determined that cancellation is appropriate; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the County Clerk of New York County, upon service upon him of a copy of this order with notice of entry, shall cancel and strike from the records the aforesaid notice of pendency; and it is further

ORDERED that plaintiffs shall reimburse defendant EDM Lenox, LLC for the costs and expenses occasioned by the filing and cancellation, together with the regular costs of the action, to be determined by a referee as described further below; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this matter having come before this court on February 8, 2019 on motion of the defendants for summary judgment, and the plaintiffs having been represented in connection therewith by N. Ari Weisbrot, Esq., and the defendants having been represented by Richard E. Carmen, Esq., and, pursuant to CPLR 4317, the court having on its own motion determined to consider the appointment of a referee to determine as follows, it appearing to the court that a reference to determine on consent is proper and appropriate pursuant to CPLR 4317 (b) in that an issue of damages

separately triable and not requiring a trial by jury is involved, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the amount of costs and expenses defendant EDM Lenox, LLC may recover from plaintiffs occasioned by the filing and cancellation of the notice of pendency, together with the regular costs of the action;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for defendant EDM Lenox, LLC shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that defendant EDM Lenox, LLC shall serve a pre-hearing memorandum within 24 days from the date of this order and plaintiffs shall serve objections to the pre-hearing memorandum within 20 days from service of defendants' papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that plaintiffs shall serve a Verified Reply to the first counterclaim by filing such pleading with the New York State Court Electronic Court Filing within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit a proposed preliminary conference order and/or a competing preliminary discovery conference to 59nyef@nycourts.gov and to NYSCEF on or before October 23, 2020.

DECISION

1. Motion for Reargument

Plaintiffs David M. Lehmann and Caryn Aviva Lehmann move for reargument of this Court's January 9, 2020 order (see Lehmann v Lenox, 2020 WL 109667 [Sup Ct, NY Co 2020]), which, inter alia,

denied plaintiffs' cross motion for summary judgment their breach of contract claim, granted defendant EDM Lenox, LLC's (EDM) motion for summary judgment on their first counterclaim seeking release of a $145,000 contract deposit, and dismissed the complaint as against all defendants.

The purpose of reargument is to provide "a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied principles of law" (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]; see CPLR § 2221[d][2]). The procedure is "not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted" (Matter of Setters v Al Props. & Devs. (USA) Corp., 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citation omitted]). Nor may a motion for reargument be based on new facts (Independent Chem. Corp. v Puthanpurayil, 165 AD3d 578, 578 [1st Dept 2018]).

In support of their motion, plaintiffs first contend that the Court erred by failing to find that defendant's extension of the deadline to obtain financing also necessarily extended the deadline to apply for it. However, plaintiffs never raised this argument in the course of the prior motions and cite no authority in support of it on this one. As the Court noted, plaintiffs failed to submit any evidence that they submitted a mortgage

application by the May 1, 2018 deadline, and their request for an extension of the loan commitment date did not include a request to extend the application date (Lehmann, 2020 WL 109667, *10).

Second, plaintiffs argue that whether the application date was extended raises a question of fact requiring discovery, which discovery would have supposedly revealed that there were discussions that took place before plaintiffs submitted their formal application on May 15, 2018. This argument is also a new one that may not be considered on reargument, and plaintiffs do not explain why such evidence of negotiations would not have already been in their possession. Furthermore, the argument is irrelevant insofar as the contract required the actual submission of an application by May 1, 2018, not merely efforts to submit one.

Third, plaintiffs contend that their delay in applying was not a material breach, and that materiality is a question for the trier of fact. Once again, plaintiffs failed to raise this issue on the prior motions, arguing only that there was no breach at all. Furthermore, the argument lacks merit because the contract expressly conditioned the right of cancellation on compliance with the fixed deadline for the submission of the application.

Plaintiffs' fourth argument, that EDM waived plaintiffs' breach by scheduling a closing, is likewise new. It is also without merit, as the closing merely served demonstrate that

defendant was ready, willing and able to sell the property provided that plaintiffs, having repudiated their obligation to timely apply for financing, were willing to pay cash.

Plaintiffs next insist that the liquidated damages clause was unenforceable penalty. Apart from being newly-raised, the argument is foreclosed by Maxton Builders, Inc. v Lo Galbo, 68 NY2d 373 [1986]). Contrary to plaintiffs' insistence, Burns v Reiser Bros., Inc., 173 AD3d 1314 [3d Dept 2019]) does not require a different result. In that case, the Third Department (not First Department as indicated by plaintiffs) found that that forfeiture of the payments constituting approximately 69% of the total contract amount was facially disproportionate any claimed actual damages, and specifically noted that the liquidated damages approved of in Maxton represented, as here, only 10% of the sales price (Burns, 173 AD3d 1314, 1317 & fn.3).

As their final argument, plaintiffs object to the Court's award of costs and expenses in connection with the filing cancellation of the notice of pendency, urging that the lien was not filed in bad faith. However, as the Court explained, such an award need not be conditioned on a showing of bad faith (Lehmann, 2020 WL 109667, *12).

A. Reargument Motion

Nonetheless, a review of the documents filed in this action reveals that, in lieu of serving and filing a Reply to the

counterclaims asserted in defendants' Verified Answer, plaintiffs filed a pre-Reply motion to dismiss such counterclaims (Mot. Seq. No. 002). Consolidated with such motion was defendants' motion for summary judgment on such counterclaims (Mot. Seq. No. 001).

With respect to defendants' pre-Reply motion for summary judgment on their counterclaims, as stated by the First Department in Westchester Exp., Inc. State Ins. Fund (151 AD2d 357 [1st Dept. 1980]): "As a matter of practice summary judgment under CPLR 3212(a) would not lie, because issue had not been joined on the counterclaim".

In Four Seasons Hotels Ltd v Vinnik, (127 AD2d 310, 320-321 [1st Dept. 1987]), the appeals panel reasoned:

> "summary judgment is unavailable to either side prior to joinder of issue absent CPLR 3212(c) notice. Such notice must come directly from the court and should fairly advise as to the issues it deems dispositive of the action. We respectfully disagree with Second Department authority holding that notice of CPLR 3211(c) treatment need not necessarily be given by the court when such treatment is requested by one of the parties, i.e., that the request itself can constitute the "adequate notice" required by the statute. The parties are free to submit whatever evidentiary material they desire on a CPLR 3211(a) motion. They do so however without any assurance that the court will, in its discretion, consider it as it would on a CPLR 3212 motion. Unless the court gives express notice of its intention to do so, either party should be able to rest assured that, no matter the quantity or quality of the documentary evidentiary material submitted by the other party, there will be no fact finding or framing of factual issues for trial on a CPLR 3211(a)(7) motion (citations omitted).
>
> "There are, however, exceptions to the requirement of notice. If the action involves no issues of fact, but

> only issues of law fully appreciated and argued by both sides, it is proper for the court to grant summary judgment to either side without giving notice of its intention to do so. Such is oft-times the case in declaratory judgment actions....".

As issue was never joined on defendants' counterclaims herein, except with respect the plaintiffs' cause of action for declaratory judgment concerning the notice of pendency, this court erred in granting defendants' motion for summary judgment (Mot. Seq. No. 001). Therefore, on such grounds, which are different from those urged by the plaintiffs on their herein motion to reargue, this court is compelled to vacate its prior order dated January 6, 2020, to the extent that pre-Reply, it granted summary judgment on defendants' defenses to plaintiffs' claims of breach of contract.

1. Motion and Cross Motion for Summary Judgment (Motion Seq. No. 002)

On a motion to dismiss brought under CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (see JF Capital Advisors, LLC v Lightstone Group, LLC, 25 NY3d 759, 764 [2015]). A motion to dismiss will be denied "if from its four corners factual allegations are discerned

which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]). "[F]actual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . are not entitled to such consideration" (Mamoon v Dot Net Inc., 135 AD3d 656, 658 [1st Dept 2016] [internal quotation marks and citation omitted]). Moreover, "[w]hen documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted]).

2. "Count Five" of the Complaint: "Enforcement of Lien"

In "Count Five" of plaintiffs' complaint, labeled "Enforcement of Lien", plaintiffs alleged "Plaintiffs are entitled to a Lien on the Unit pending the outcome of this action." Although not labelled as such, such "count" sounds in declaratory judgment.

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could

be claimed." A declaratory judgment action requires an actual controversy (see Long Is. Light. Co. v Allianz Underwriters Ins. Co., 35 AD3d 253 [1st Dept 2006], appeal dismissed 8 NY3d 956 [2007]). On a motion seeking to dismiss a declaratory judgment claim, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him" (Law Research Serv. v Honeywell, Inc., 31 AD2d 900, 900 [1st Dept 1969] [collecting cases]). Here, the allegations in "count five", contested by defendants' affidavits, plead the existence of a justiciable controversy as to whether the notice of pendency is enforceable.

Relief on a declaratory judgment claim is limited to a declaration of the parties' legal rights based on the facts presented (see Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 100 [1st Dept 2009], lv denied 15 NY3d 703 [2010]). Moreover, the remedy on a motion to dismiss a properly brought declaratory judgment action is not dismissal, but a declaration in favor of the movant. See Fillman v Axel, 63 AD2d 876 (1st Dept. 1978).

Nowhere in their Verified Complaint do plaintiffs seek specific performance under the contract. On that basis, their filing of the notice of pendency was unjustified and therefore such lien unenforceable, as a matter of law, and defendants are entitled to summary judgment in their favor.

As the Court of Appeals stated in 5303 Realty Corp. v O&Y Equity Corp., 64 NY2d 313 (1984):

> "The courts have been frequently confronted by attempts to file a notice of pendency in controversies that more or less referred to real property, but which did not necessarily seek to directly affect title to or possession of the land. In the absence of this direct relationship, the remedy was denied. . . ."a trespass action seeking money damages only did not justify a notice of pendency as the judgment would not affect title to or possession of the realty."(citations omitted).

See also PK Restaurant, LLC v Lifshutz, (183 AD3d 434, 439 [1st Dept. 2016]).

3. First Counterclaim

In their first counterclaim, defendants seek a judgment declaring that they are entitled to the funds held in escrow, a release of those funds from escrow, and a cancellation of the Contract.

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (see Long Is. Light. Co. v Allianz Underwriters Ins. Co., 35 AD3d 253 [1st Dept 2006], appeal dismissed 8 NY3d 956 [2007]). On a motion seeking to dismiss a declaratory judgment claim, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory

judgment, and not whether the plaintiff is entitled to a declaration favorable to him" (Law Research Serv. v Honeywell, Inc., 31 AD2d 900, 900 [1st Dept 1969] [collecting cases]).

Here, defendants' first counterclaim seeking a declaratory judgment is unnecessary and inappropriate as defendants have an adequate alternative remedy in another form of action, i.e., their affirmative defenses to complaint counts two and three. See Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 54 (1st Dept. 1988]).

However, the first counterclaim also alleges that "Plaintiffs breach the Contract of Sale by not pursuing their application in good faith and by refusing to close after Plaintiffs received a purported declination letter from their supposed, proposed Recognized Institutional Lender" and "inasmuch as Plaintiffs breached their contractual obligations, the entire down payment must be released to Defendant EDM as liquidated damages", which allegations state a viable counterclaim for breach of contract. Therefore, the first counterclaim shall be dismissed only to the extent that it seeks a declaratory judgment, but plaintiffs' motion to dismiss such counterclaim is denied to the extent that such counterclaim seeks damages for breach of contract.

4. Second Counterclaim

The second counterclaim alleges that plaintiffs have maliciously and intentionally interfered with EDM Lenox's business relations by filing a notice of pendency.

"The purpose of the notice of pendency is 'to afford constructive notice from the time of the filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action'" (2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp., 58 AD3d 158, 161 [1st Dept 2008], lv denied 11 NY3d 716 [2008] [internal quotation marks and citation omitted]). Plaintiffs rely on Paragraph 12 of the Contract, which provides that the Contract Deposit shall be a lien on the Premises (NYSCEF Doc No. 16 at 12), thereby offering justification for the filing of the notice of pendency. Defendants counter that plaintiffs ignored the rest of the subject paragraph stating that the "lien shall not continue after default by Purchaser hereunder" (id.). Furthermore, as discussed above, plaintiffs pled a cause of action for money damages, not specific performance, and "[w]here the cause of action asserts money damages arising out of a breach of contract, the complaint will be insufficient to justify a lis pendens" (Borrero v East Harlem Council for Human Servs., 165 AD2d 807, 808 [1st Dept 1990]).

While defendants attack the merits of the notice of pendency, they failed to address the sufficiency of the second counterclaim.

A claim for tortious interference with business relations requires the following:

> "(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party"

(Amaranth LLC v J.P. Morgan Chase & Co., 71 AD3d 40, 47 [1st Dept 2009], lv dismissed in part, denied in part 14 NY3d 736 [2010]). The party's sole motive must be to inflict injury using wrongful means (see Ticketmaster Corp. v Lidsky, 245 AD2d 142, 143 [1st Dept 1997] [citation omitted]). Wrongful means for purposes of a tortious inference claim refers to "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 191 [1980]). Defendants have not alleged that plaintiffs' conduct was directed at a party with which defendants had a relationship (see Carvel Corp. v Noonan, 3 NY3d 182, 192 [2004]), or that plaintiffs intentionally procured a contract breach without justification (see Dermot Co. Inc. v 200 Haven Co., 58 AD3d 497, 497 [1st Dept 2009]). Nor may defendants salvage the counterclaim by alleging that they had pled claims for slander of title or abuse of process. The mere filing of the notice of pendency does not give rise to a cause of action for

slander of title (see Seidman v Industrial Recycling Props., Inc., 83 AD3d 1040, 1041 [2d Dept 2011]). The counterclaim also fails to plead the elements necessary to sustain a cause of action for abuse of process, which are regularly issued civil or criminal process, an intent to do harm without justification, and a party's use of legitimate process to seek a collateral objective or advantage (see Curiano v Suozzi, 63 NY2d 113, 116 [1984], citing Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO, 38 NY2d 397, 403 [1975]). Therefore, the second counterclaim must be dismissed.

5. Third Counterclaim

The third counterclaim alleges that the causes of action against Hartig should be dismissed because Hartig, the designated escrow agent on the Contract, bears no liability as a stakeholder. Defendants also seek an award of sanctions pursuant to 22 NYCRR 130-1.1 for plaintiffs' frivolous conduct.

Even after affording the third counterclaim every favorable inference, as the court must, defendants fail to plead a cognizable, affirmative claim against plaintiffs. To the extent the counterclaim could be interpreted to assert a claim for monetary sanctions, it is settled that there is "no independent cause of action for sanctions under section 130-1.1" (306 W. 11th LLC v ACG Credit Co., II, LLC, 90 AD3d 552, 554 [1st Dept 2011] [citation omitted]). Accordingly, plaintiffs' motion to dismiss

shall be granted to the extent of dismissing the third counterclaim.

6. Fourth Counterclaim for Attorneys' Fees

Defendants' fourth counterclaim seeks the recovery of its reasonable attorneys' fees as the prevailing party in this litigation. Attorneys' fees that are recoverable under a contract provision constitute "an element of contract damages if a breach . . . is proven" (Pier 59 Studios L.P. v Chelsea Piers L.P., 27 AD3d 217, 217 [1st Dept 2006], citing Burke v Crosson, 85 NY2d 10, 17-18 [1995]). As such, a claim for attorneys' fees cannot be maintained as a separate cause of action (see La Porta v Alacra, Inc., 142 AD3d 851, 853 [1st Dept 2016]). Thus, the fourth counterclaim is dismissed.

7. The Sixth Cause of Action for Conversion

A cause of action for conversion arises when "someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 [2006], citing State of New York v Seventh Regiment Fund, 98 NY2d 249, 259 [2002]). A claim for conversion is redundant of a breach of contract where plaintiff fails to plead independent facts sufficient to give rise to tort liability (see Kopel v Bandwidth Tech. Corp., 56 AD3d 320, 320

[1st Dept 2008]). As plaintiffs plead no such independent facts, defendants are entitled to dismissal of the sixth cause of action.

8. The Seventh Cause of Action for Unjust Enrichment

Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (Abacus Fed. Sav. Bank v Lim, 75 AD3d 472, 473 [1st Dept 2010]). To state a claim for unjust enrichment, a "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Kramer*, 142 AD3d at 442 [internal quotation marks and citation omitted]). A plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue" (Hochman v LaRea, 14 AD3d 653, 654-655 [2d Dept 2005]). However, where a valid and enforceable written contract governing the subject matter exists, a plaintiff is precluded from recovery on a quasi-contract claim (see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987]). The existence of the Contract precludes plaintiffs from sustaining a claim for unjust enrichment. Therefore, the seventh cause of action must be dismissed.

9. Vacating the Notice of Pendency

In view of the foregoing, the notice of pendency must be cancelled (*see* CPLR 6514 [a]). CPLR 6514 (c) provides that "[t]he court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." Such an award may include "counsel fees which flow from the wrongful filing and cancellation of such notice" (No. 1 Funding Ctr., Inc. v H&G Operating Corp., 48 AD3d 908, 911 [3d Dept 2008] [stating that "[t]he purpose of CPLR 6514 (c) is to reimburse a party for costs and expenses incurred as a result of a wrongful filing of a notice of pendency"]). Therefore, defendants may recover their reasonable attorneys' fees (id.; see also Josefsson v Keller, 141 AD2d 700, 701 [2d Dept 1988] [cancelling a notice of pendency and awarding the defendant seller costs and expenses, including attorneys' fees and disbursements]). The court need not condition an award upon a showing of bad faith (see Knopf v Sanford, 132 AD3d 416, 418 [1st Dept 2015]), which is a necessary element under CPLR 6514 (b) (see 551 W. Chelsea Partners LLC v 556 Holding LLC, 40 AD3d 546, 548 [1st Dept 2007]). Although defendants have not provided proof of their costs incurred in defending the action (see Saul v Vidokle, 151 AD3d 780, 782 [2d Dept 2017] [denying the defendant costs in the absence of documentary proof to support an award]), this issue is set down

for a hearing to determine the amount of fees defendant EDM Lenox may recover from plaintiffs.

10/13/ 2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE