

Ryan v Guadagnino

2020 NY Slip Op 35777(U)

December 16, 2020

Supreme Court, Richmond County

Docket Number: Index No. 100025/2017

Judge: Ralph J. Porzio

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

THOMAS RYAN and EILEEN RYAN

Index #: 100025/2017

Plaintiff(s)

-against-

DECISION & ORDER
Motions #005 and #006

VINCENT GUADAGNINO, JR., RICHMOND
SUMMIT ESTATES HOMEOWNER'S ASSOC.
INC., MICHAEL PUGLIESE, HIGH ROCK
DEVELOPMENT LLC, PUGLIESE CONSTRUCTION
CORP., MICHAEL BEZUEVSKY, ELENA BEZOFF,
EMIDIO BUONO, STEPHANIE BUONO, JOHN
GIARDINA, MARY GIARDINA, OLGA TOLMACH
ALEKSANDR TOLMACH, ANTHONY PUGLIESE,
THE RICHMOND COUNTY CLERK'S OFFICE,
Defendant(s)

PROCEDURAL HISTORY

This matter was commenced with the filing of a summons and complaint, by the Plaintiffs, Thomas Ryan and Eileen Ryan, on June 16, 2017, against the Defendant, Vincent Guadagnino, Jr. (Hereinafter "Guadagnino"). The complaint was subsequently amended as of right on July 3, 2017.

A Motion to Amend was filed on August 22, 2017, in response to a Motion to Dismiss filed by the Defendant. The Motion to Amend did not include a copy of the amended complaint, nor did the affirmation filed by the Plaintiffs include any information as to adding Defendants to the Action. After motion practice, Justice Marin issued an order granting the Plaintiffs leave to file their Second Amended Complaint, specifically stating, "Plaintiff's cross-motion to amend the Complaint is granted to the extent of *adding the homeowners association as a defendant* and adding the November 2014 property damage. Plaintiff shall serve its amended complaint within thirty days of the Notice of Entry of this order adding as a new party *the relevant homeowners association*, and with Defendant retaining its right to move to dismiss against such amended complaint. *See order of Justice Marin dated 3/26/2018.*

The Second Amended Complaint was filed on April 3, 2018, adding the parties of Richmond Summit Estate Homeowners Association, Inc., Michael Pugliese, High Rock Development LLC, and Pugliese Construction Corp. (Hereinafter the "Pugliese Defendants"). Within the Second Amended Complaint included the following causes of action: First Cause of Action: Quiet Title pursuant to RPAPL Article 15; Second Cause of Action: Trespass; Third Cause

of Action: Conversion; Fourth Cause of Action: Private Nuisance; Fifth Cause of Action: Unjust Enrichment; Sixth Cause of Action: Declaratory Judgment; Seventh Cause of Action: Slander of Title; Eighth Cause of Action: Replevin.

On March 29, 2019, Plaintiffs again filed a Motion to Amend the Complaint. The Motion was granted on May 16, 2019, and the Third Amended Complaint was filed on June 13, 2019, adding the following Defendants: Michael Bezuevsky, Elena Bezoff, Emilio Buono, Stephanie Buono, John Giardina, Mary Giardina a/k/a/ Maria Giardina, Olga Tolmach, Aleksandr Tolmach, Anthony Pugliese, and the Richmond County Clerk's Office. (Hereinafter the "Kayla Defendants"). The Complaint included the following causes of action: First Cause of Action: Reformation of Defendants' Deeds; Second Cause of Action: Recording of the Corrected Deeds; Third Cause of Action: Trespass; Fourth Cause of Action: Conversion; Fifth Cause of Action: Nuisance; Sixth Cause of Action: Unjust Enrichment; Seventh Cause of Action: Slander of Title; and Eight Cause of Action: Replevin.

On February 20, 2020, a Stipulation of Partial Discontinuance was filed as to Defendant Vincent Guadagnino, as to the First and Second Causes of Action. On December 10, 2019, the Kayla Defendants were granted summary judgment. All further Causes of Action as to the Kayla Defendants were discontinued on June 26, 2020. After the title issues were resolved between Plaintiffs, Guadagnino, and the Kayla Defendants, the only remaining parties to the action included Plaintiffs and Defendants Richmond Summit Estate Homeowners Association, Inc., Michael Pugliese, High Rock Development LLC, and Pugliese Construction Corp.

On June 26, 2020, during a virtual court conference, it was confirmed by counsel that all matters were resolved, except the case of Ryan versus the Pugliese Defendants. The Court clarified the Plaintiffs' position and remaining issues in the following colloquy:

The Court: So all the other issues, but for monetary, have been resolved; is that correct?

Mr. Fileccia: Correct.

The Court: These would be – your client would be looking for recoupment for damage done to his property allegedly by Mr. Puigliesi; is that correct?

Mr. Fileccia: Correct, your Honor.

The Court: Are there any property lines in dispute at this point?

Mr. Fileccia: I don't think it's been totally resolved, that issue, but yes, there is no more dispute on that. I think we are waiting for the final stipulation on that.

The Pugliese Defendants moved then for summary judgment on the property damage claims. Plaintiffs then cross-moved for summary judgment for property damage caused by Trespass by Encroachment and restitution damages from Unjust Enrichment and Slander of Title.

On September 30, 2020, Defendants Pugliese, High Rock, and Pugliese Development moved for Summary Judgment on the remaining issues, and further relief that the Court deems just and proper, citing mainly Statute of Limitations defenses. Plaintiffs cross-moved for Summary

Judgment for Trespass, Unjust Enrichment and Slander of title. Plaintiffs cite several defenses including tolling the Statute of Limitations and the Relation-Back doctrine. On December 2, 2020, oral arguments were held, and a partial decision was issued on the record with the Court reserving its decision on unjust enrichment. The Court's full decision is detailed herein.

DECISION

Tolling of the Statute of Limitations

The Pugliese Defendants were added as parties in the Second Amended Complaint filed on April 3, 2018. The Plaintiffs, within their Summary Judgment Memorandum of Law, as well as his Complaint, requests the tolling of the Statute of Limitations. Plaintiffs allege that between the time of the filing of his Motion to Amend and when leave was granted to amend, the Statute of Limitations should be tolled.

The Statute of Limitations period is tolled where a motion for leave to amend and serve a supplemental summons and amended complaint is made prior to the expiration of the statute of limitations and “includes a copy of the proposed amended pleadings.” *See Perez v. Paramount Comm.*, 92 NY2d 754, 756 [1999]. In the instant proceeding, no such copy of the proposed amended pleadings was filed with the Plaintiffs' August 2017 Motion to Amend.

When the Motion was granted after hearing on February 8, 2018, only the “relevant homeowners association” was approved to be added. The “joinder of an additional defendant by the filing of a supplemental summons and amended complaint may be accomplished only with prior judicial permission, and noncompliance renders the pleadings jurisdictionally defective.” *See Perez v. Paramount Communications, Inc.*, 92 NY2d 749,753 [1999]. However, such defect is deemed waived if the party never raise the improper joinder. *See Tarallo v. Gottesman*, 204 AD2d 303 [2d Dept 1994].

As the Plaintiffs failed to include a copy of their proposed amended pleadings within their August 2017 Motion to Amend, this Court is not ordering the tolling of the Statute of Limitations.

The Relation-Back Doctrine

Plaintiffs rely on the “relation-back doctrine” which is codified in CPLR 203(f), which provides “a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are united in interest.” *See Roseman v. Baranowki*, 120 A.D.3d 482 [2d Dept. 2014]. In order for the claim against added defendants to relate back to the original date of complaint, the Plaintiffs must establish that “(1) both claims arose out of the same conduct, transaction or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well.” *Id.*

The Court finds that the relation-back doctrine is not applicable in the instant case. Defendants were not on notice as to the claims filed prior to being added as parties. The Plaintiffs allege that they were, based upon the previously two actions brought against the Pugliese Defendants. Per Court records, under index number 100293/2012, Plaintiffs filed a Summons with Notice against the Pugliese Defendants, among others, with notice for causes of action including, fraud, breach of fiduciary duty, unjust enrichment, nuisance, trespass, RICO, and encroachment. Plaintiffs failed to ever serve a complaint in the action and Defendants moved to dismiss. That action was voluntarily discontinued on July 30, 2012. A new Summons with Notice was filed for the same proposed causes of action on July 30, 2012 under Index No. 102485/2012. Plaintiffs never served the Summons with Notice on the Defendants and they moved to dismiss for failure to timely serve a complaint. Justice Minardo granted their application and Plaintiffs appealed. On January 21, 2015, the Second Department reversed. Again, Plaintiffs failed to continue the action. Prior actions involving the Pugliese Defendants in 2012 does not constitute proper notice for a 2017 action.

Based upon the history between the Plaintiffs and Pugliese Defendants and taking judicial notice of the prior filings, the Court finds that there was no basis for the Defendants to know or should have known the current action would have been brought against them. There was no mistake by the Plaintiffs in bringing the 2017 action solely against the Defendant Guadagnino and leaving out the Pugliese Defendants. Therefore, the relation-back doctrine is not applicable in this matter.

Statute of Limitations: Fraud

Plaintiffs claim that the statute of limitations for these actions should be six years, as fraud is alleged. This Court disagrees. Upon reviewing the Third Amended Complaint, there is no Cause of Action for fraud, however, fraud is incidental to the claims asserted. Pursuant to CPLR §3016(b), “the circumstances constituting the wrong shall be stated in detail.” Plaintiffs’ Third Amended Complaint states at line 170, “After several alleged misrepresentations and frauds *on DOB permits and applications*, Defendants obtained approvals and completed and sold 5 homes.” Based upon this statement, Defendants’ alleged fraud was regarding the Defendants’ dealings with the Department of Buildings, to which the Plaintiffs are not a party. It is undisputed that the Department of Buildings ultimately approved the plans and issued Certificates of Occupancy to the properties developed by the Defendants, despite Plaintiffs’ objections.

“Courts will not apply the fraud statute of limitations if the fraud allegation is only incidental to the claim asserted; otherwise fraud would be used as a means to litigate stale claims.” *See Klein v. Gutman*, 12 A.D.3d 417 [2d Dept. 2004] *citing Kaufman v. Cohen*, 307 AD2d 113, 118 [2003]. The Court must “look for the reality and the essence of the action and not its mere name.” *Id.* “In determining which limitations period is applicable to a given cause of action, the court must look to the substance of the allegations, rather than to the characterizations of those allegations by the parties.” *See Potter v. Zucker Hillside Hosp.*, 176 AD3d 884, 885 [2d Dept. 2019].

This Court has looked at the Complaint as a whole, the parties' deposition testimony, as well as the admissible evidence submitted in the Summary Judgment motions. In order to prove an allegation of fraud, the Plaintiffs must "allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, *justifiable reliance by the plaintiff*, and resulting injury." *See Kaufman (emphasis added)*. Further, "a fraud cause of action may be predicated on acts of concealment where the Defendant had a duty to disclose material information." *Id.* Therefore, a failure to disclose facts that they may be required to disclose may constitute actual fraud, provided a fiduciary relationship exists and the fiduciary "possesses the requisite intent to deceive." *Id.*

In the instant action, there is no fiduciary relationship between the Plaintiffs and the Pugliese Defendants. The Pugliese Defendants obtained the Plaintiffs' neighboring property lots for the purpose of development, they split the property and it was deeded to the Kayla Defendants. The Plaintiffs' fail to meet the requirements of a cause of action for fraud, in that there was no relationship between the parties, no justifiable reliance by the Plaintiff on any misrepresentation made by the Defendants, and no duty to disclose by the Defendants. *See Kaufman*. Therefore, the six-year statute of limitations does not apply to any of the remaining causes of action.

Summary Judgment

It is well settled that a motion for summary judgment should be granted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR 3212(b). The proponent of a motion for summary judgment must make a prima facie showing by offering sufficient evidence to eliminate any material issues of fact from the case that as a matter of law the movant is entitled to summary judgment. *Winegrad v. NYU Medical Center*, 64 NY2d 851, 853 (1985).

Pursuant to CPLR 3212(b), "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." In order for the court to grant summary judgment, "it must clearly appear that no material triable issue of fact is presented" and it is not for the court to resolve issues of fact, "but merely to determine whether such issues exist." *See Rebecchi v. Whitmore*, 172 AD2d 600 [2d Dept. 1991].

Third Cause of Action: Trespass

Plaintiffs' Third Amended Complaint alleges trespass as follows: "On about between September 15, 2014, and November 15, 2014, contractors working for the Defendants continued destroying trees, cutting up the Plaintiffs driveway, uplifting Plaintiffs cars and smashing them into each other to make room for encroaching fences while bikers acted as bodyguards." Plaintiffs further stated in line 135, "Trespass cannot be determined until adjudication of the lot lines." *See Third Amended Complaint dated April 3, 2018*.

The statute of limitations for the cause of action of trespass is three years. *See CPLR 214(4)*. The Third Amended Complaint was filed in April 2018. The last allegation of property trespass

and damage was November 14, 2014. As the statute of limitations was not tolled, summary judgment on the basis of the statute of limitations is appropriate.

As to the continuing trespass allegation brought by the Plaintiffs, it is undisputed that there was a fence erected by the Pugliese Defendants on or around September 2014. This Court finds that a fence constitutes a continuing trespass, not subject to the three-year statute of limitations, however, the property owner would be the responsible party for the encroachment. It is undisputed that the Pugliese Defendants did not own the property in dispute in September 2014 and do not own the property today. Therefore, there are no triable issues of fact.

Therefore, the Court is granting Summary Judgment in favor of the Pugliese Defendants as to the Third Cause of Action of Trespass, based upon the expiration of the Statute of Limitations, which expired November 14, 2017, prior to filing of the Third Amended Complaint.

Fourth Cause of Action: Conversion.

Plaintiffs' Third Amended Complaint alleges conversion. A conversion "takes place 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." *See C&B Enterprises USA LLC v. Koegel*, 136 AD3d 957 [2d Dept. 2016]. The subject matter of conversion must constitute "identifiable tangible personal property; real property and interests in business opportunities will not suffice." *Id.* Conversion has a three-year statute of limitations.

Plaintiffs' Third Amended Complaint claims that "on August 19, 2017, Defendant's attorney stated could not return the *misappropriated property* as it was "necessary for DOB requirement among other things. The "misappropriated property" in the Third Amended Complaint Cause of Action for conversion referred to real property. Assuming arguendo that the conversion cause of action referred to the destruction of trees, cars, a shed, and gazebo, the statute of limitations applies as the alleged property destruction occurred before November 14, 2014.

Based upon the foregoing, there are no triable issues of fact and the Court is granting Summary Judgment in favor of the Pugliese Defendants as to the Fourth Cause of Action of Conversion, as the Statute of Limitations expired prior to filing of the Third Amended Complaint.

Fifth Cause of Action: Nuisance

Plaintiffs' Third Amended Complaint claims a nuisance cause of action as follows: malicious interference without plaintiffs' consent, reduced access to plaintiffs' property, diminished access to Plaintiffs' rear plot caused a diminution in plaintiffs' property value and rights to legal use of property. A defendant may be liable for a nuisance "where he intentionally and unreasonable invades a plaintiffs' interest in the private use and enjoyment of his land." *See Zimmerman v. Carmack*, 292 AD2d 601, 602 [2d Dept. 2002]. A nuisance cause of action has a three-year statute of limitations. *See CPLR 214(4)*.

The Plaintiffs claim in the Third Amended Complaint that the drywells installed by the Pugliese Defendants result in flooding in their yard during rain. Under a theory of continuing nuisance and trespass, the cause of action accrues when the damage was apparent. *See Russell v.*

Dunbar, 40 AD3d 952 [2d Dept. 2007]. Though according to the Plaintiff, the flooding is an ongoing issue, the statute of limitations the cause of action accrued when the damage became apparent, which according to the Plaintiff was at the time of the installation of the drywells. *Id.*

Considering the facts above, the parties' deposition testimony, and the competent evidence submitted, the Court is granting Summary Judgment in favor of the Defendants as to the Fifth Cause of Action of Nuisance, as the Statute of Limitations expired prior to filing of the Third Amended Complaint. Further, this Court does not find a continuing nuisance, as the damage was apparent prior to November 14, 2014, per the Plaintiff. Therefore, there are no triable issues of fact.

Sixth Cause of Action: Unjust Enrichment

Plaintiffs cross-moved for summary judgment on the Sixth Cause of Action of Unjust Enrichment. The elements for an unjust enrichment are "(1) the Defendant was enriched, (2) at the plaintiff's expense, and (3) it is against equity and good conscience to permit the Defendant to retain what is sought to be recovered." See *GFRE, Inc. v. US Bank NA*, 130 AD3d 569. 570 [2d Dept. 2015]. The theory of unjust enrichment is a "quasi-contract" claim with a six-year statute of limitations. The Court of Appeals has held, "a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, there must exist a relationship or connection between the parties that is not too attenuated." See *Georgia Malone v. Rieder*, 19 NY3d 511 [2012].

In this matter, there is no contractual, quasi-contractual or other relationship between the Plaintiffs and the Pugliese Defendants. Plaintiffs failed to plead any relationship, business or otherwise, with the Defendants.

Based upon the lack of relationship, there are no triable issues of fact as to Plaintiffs' claim of unjust enrichment and therefore summary judgment is granted to the Defendants.

Seventh Cause of Action: Slander of Title

Plaintiff brought a motion for summary judgment, and though not specifically requested, pleads within their papers for Summary Judgment as to the Slander of Title Cause of Action, as a result of the Trespass by Encroachment. The elements of slander of title are: "(1) A communication falsely casting doubt on the validity of the complainant's title; (2) reasonably calculated to cause harm; and (3) results in special damages." See *39 Coll. Point Corp. v. Transpac Capital Corp.* 27 AD3d 454 [2d Dept. 2006].

The Statute of Limitations for a cause of action of slander of title is one year. See *CPLR 215*. Plaintiffs, in their cross-motion states, "Plaintiffs did not have title marketability and insurability while encroached upon. Plaintiff has spent nearly 10 years and great expense attempting to clean up the recorded public record inconsistencies against his property that began with the Kayla Ct. development."

Considering the record presented and the deposition testimony of the parties, the cause of action for slander of title accrued prior to 2012. As the Plaintiffs failed to bring this action within one year of when the cause of action accrued, summary judgment is granted to the Defendants as

the Statute of Limitations had expired prior to the filing on April 3, 2018. *See Hanbridge v. Hunt*, 183 AD2d 700 [2d Dept. 1992].

Spoliation

Assuming that the Plaintiffs' claims survive summary judgment, they would not survive the spoliation argument made by the Pugliese Defendants. There is no question that the evidence at question no longer exists and was not properly preserved by the plaintiff, whether intentionally or negligently.

Under New York Law, "spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them." *See Kirkland v. NYCHA*, 236 AD2d 170 [1st Dept. 1997]. "Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, the court will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness." *See Iannucci v. Rose*, 8AD3d 437 [2d Dept 2004].

Plaintiffs admittedly removed damaged trees without inspection, repaired the shed without inspection, repaired the French drain system without inspection, repaired the gazebo without inspection, repainted cars and sold a third car without inspection. Plaintiffs submitted inadmissible, unverified estimates as to their property damage. Defendants have no means to inspect or evaluate the damages that they allegedly caused. Considering the deposition testimony of the parties, the record, and the competent evidence submitted, it is clear that the Defendants would be prejudiced resulting from the spoliation of evidence. Though drastic, dismissal is appropriate as a matter of fundamental fairness.

The Remaining Causes of Action

Neither party brought summary judgment motions on the following causes of action: First Cause of Action for Reformation of Deeds; Second Cause of Action for Recording the Deeds; and Eight Cause of Action for Replevin. "A Court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist as to warrant dismissal." *See US Bank Nat'l. Assn. v. Emmanuel*, 83 A.D.3d 1047 [2d Dept. 2011]. The Court, sua sponte, is dismissing the remaining causes of action against the Pugliese Defendants for the reasons detailed below.

First and Second Causes of Action

The Court has considered the record and the stipulations of discontinuance filed in this case. As the title claims have been resolved and corrected deeds are being recorded, it is appropriate to dismiss the First and Second Causes of Action against the Pugliese Defendants, as they do not own any of the property in question.

Eighth Cause of Action: Replevin

To state a cause of action for replevin, a plaintiff must allege that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the

property from the plaintiff. *See Khoury v. Khoury*, 78 A.D.3d 903 [2d Dept. 2010]. “Where replevin is sought against the party who converted the property, the cause of action accrues on the date of conversion.” *See Swain v. Brown*, 135 A.D.3d 629 [1st Dept. 2016]. As the title claims have resolved, the Defendants are not withholding the property from the Plaintiffs. Further, as replevin and conversion have the same three-year statute of limitations and this Court has granted summary judgment as to the cause of action of conversion, the cause of action for replevin is hereby dismissed.

Richmond Summit Estates

In this matter, Richmond Summit Estates was added as a Defendant in the Second Amended Complaint. Since served, Richmond Summit Estates has failed to appear. Plaintiffs have not filed any motion for default. As such, after due consideration of the record, the Court is dismissing the action against Richmond Summit Estates.

Eileen Ryan

Thomas Ryan has been the pro se Plaintiff in this matter since its commencement. He has been represented by counsel on the title issues and briefly represented by counsel on the counterclaims and other causes of action. Eileen Ryan has not appeared pro se. Thomas Ryan does not have the ability to represent another Plaintiff. As such, the Complaint of Plaintiff Eileen Ryan is hereby dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that summary judgment is granted to the Pugliese Defendants; and it is further

ORDERED that the First, Second, and Eight Causes of Action are hereby dismissed, with prejudice, as to the Pugliese Defendants; and it is further

ORDERED that the Plaintiff, Eileen Ryan’s, Complaint is hereby dismissed, with prejudice, based upon her failure to appear.

ORDERED that the Complaint is dismissed as to Summit Estates, with prejudice, as it has been more than one year since their failure to appear and no default has been entered.

This constitutes the final Decision and Order of this Court.

Date: 12/16/2020

E N T E R



HON. RALPH J. PORZIO
J.S.C.