Glyn v Parisi
2022 NY Slip Op 35094(U)
May 11, 2022
Supreme Court, Queens County
Docket Number: Index No. 702837/2019
Judge: Joseph Risi
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA PART 3

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DAVID R. GLYN and BRIAN P. FLAHERTY, AS CO-EXECUTOR OF THE ESTATE OF MICHAEL PARISIA/K/A MICHAEL A. PARISI, DECEASED, TENANT IN COMMON,

Plaintiffs,

-against-

JOSEPH PARISI A/K/A JOSEPH M. PARISI, AS TENANT IN COMMON; CAMILLE PARISI, AS TENANT IN COMMON; MJC ENTERPRISES I, LLC; MJD HOLDINGS, LLC, AS TENANT IN COMMON; MICHAEL DURANTE A/K/A MICHAEL N. DURANTE; MICHELLE DURANTE A/K/A MICHELLE SALERNO; ROSEMARIE DURANTE A/K/A ROSEMARIE MELCHIORRE; TWIN FORKS FUNDING LLC; AN SHUN AUTO REPAIR INC.; BRAKE SERVICE, INC. A/K/A THE BRAKE SERVICE GROUP NYC; IDEAL PLUMBING CORP.; KWICK TOWING & RECOVERY; HYLAN DATACOM & ELECTRICAL LLC A/K/A HYLAN DATACOM & ELECTRICAL INC.; KINGSLAND PARKING LLC; KALMAN DOLGIN & AFFILIATES, INC.; RIDGEWOOD SAVINGS BANK, SUCCESSOR BY ACQUISITION OF CITY AND SUBURBAN FEDERAL SAVINGS BANK;
"JOHN DOE" and "JANE DOE" ##1-20, being any unknown heirs, distributees or beneficiaries entitled to a share in the interests of the record ownership, or any unknown parties in interest who individually or by their predecessors or by inheritance or otherwise would claim an interest in the subject premises or share of the beneficial distributions to be made through partition and sale of the subject premises or having a possessory interest in the property as tenant in fee, for life, by curtesy, estate or for years;

Defendants.

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Index Number: 702837/2019

Motion Date: December 14, 2021

Motion Sequence #6

AMENDED DECISION/ORDER

FILED

5/17/2022
12:37 PM

COUNTY CLERK
QUEENS COUNTY

The following papers read on this motion by defendants MJD Holdings LLC ("MJD"), Michael Durante, and Michelle Durante, a/k/a Michelle Salerno for an order dismissing the cross claims of co-defendant MJC Enterprises I, LLC.

	Papers Numbered
Amended Notice of Motion-Affirmation-Affidavits-Exhibits..........	EF 345-374
Opposing Affirmation-Exhibits..	EF 375-385
Reply Affirmation-Affidavits of Service-Exhibit..............................	EF 386-391

Upon the foregoing papers, this motion is determined as follows:

At the time of her death in 1979, Carmela A. Parisi owned six commercial/industrial properties known as 54-21 48th Street, Flushing, New York, Block 2556, Lot 1(Parcel 1); 48-14 54th Avenue, Flushing, New York, Block 2556, Lot 22 (Parcel 2); 54-37 48th Street, Flushing, New York, Block 2557, Lot 80 (Parcel 3); 54-65 48th Street, Flushing, New York, Block 2557, Lot 70 (Parcel 4); 54-35 48th Street, Flushing New York Block 2557, Lot 75(Parcel 5); and 54-66 48th Street, Flushing, New York, Block 2546, Lot 66 (Parcel 6).

Pursuant to the Last Will and Testament of Carmela Parisi, Parcels 1 through 5 passed to her daughter Marie Parisi, and to her son Joseph S. Parisi as Trustee, for his children, Michael, Camille and Joseph, as tenants in common. Parcel 5 was held in the Trust by for Joseph S. Parisi as Trustee, for his children, Michael, Camille and Joseph, as tenants in common. The Trust established under Carmela Parisi's will provided that Joseph S. Parisi was to transfer said real property to Camille, Michael and Joseph, when the youngest child attained the age of 28. Although Joseph, the youngest child, attained the age of 28 in 1994, the siblings' interests in the six properties were not transferred to them at that time.

On March 12, 2007, Joseph S. Parisi transferred the Trust's interest in the six jointly owned real properties to MJC Enterprises I, LLC ("MJC"). Also on March 12, 2007, Marie J. Durante transferred her interests in the five jointly held real properties to MJD Holdings, LLC ("MJD").

Litigation in the Queens County Surrogate's Court pertaining to the Estate of Carmela Parisi was not finally settled until 2017. Joseph S. Parisi's wife Marie died in 1998, and Joseph S. Parisi died in 2008. The estates of both Joseph S. Parisi and Marie Parisi also generated litigation in the Surrogate's Court. Michael A. Parisi, a New Jersey resident, died on December 5, 2015. Marie J. Durante, a New Jersey resident, died in 2018.

In an order dated December 6, 2016, the Honorable Peter J. Kelly, Judge of the Surrogate's Court, Queens County, granted Camille Parisi's motion for partial summary judgment in the proceeding related to Carmela Parisi's estate and declared each of the deeds between Joseph S. Parisi, as trustee, and MJC which purported to convey to MJC an undivided one-half interest in each of the five properties to be null and void ab initio, cancelled and set aside said deeds, and declared that Camille Parisi, the estate of the post-decedent Michael Parisi and Joseph M. Parisi to be the owner, in fee simple absolute, of an undivided one-sixth interest in five real properties.

With respect to the sixth property, Judge Kelly declared that the deed between Joseph M. Parisi, as trustee, which purported to convey to MJC the property identified as Block 2557, Lot 75, and known as 54-35 48th Street, Maspeth, New York, null and void ab initio and cancelled and set aside said deed, and declared Camille Parisi, the estate of the post-decedent Michael Parisi and Joseph M. Parisi to be owner, in fee simple absolute of an undivided one-third interest in said real property.

Plaintiff commenced the within on February 15, 2019. The verified complaint alleges causes of action for partition of each of the six real properties in which the estate of Michael A. Parisi has an ownership interest in as a tenant-in-common; for conversion and declaratory judgment against defendants Michael Durante and MJD; for the appointment of a referee to ascertain to ascertain the rights, equities and interests of the parties and to conduct an accounting before the referee; for an accounting before the referee; to conduct a valuation of the real properties, and to recover legal fees.

Defendants MJD, Michael Durante and Michelle Durante served a verified answer and interposed 18 affirmative defenses, and 9 counterclaims against the plaintiff or the Estate of Michael Parisi. Plaintiff served verified reply to the counterclaims.

Defendant MJC served a verified answer. MJC served a verified reply to the verified counterclaims of defendants MJD, Michael Durante and Michelle Durante, and interposed 11 affirmative defenses, and cross claims against MJD, Michael Durante, Michelle Durante and Twin Forks Funding LLC.

MJC in its cross claims alleges that it is a one-half owner of Parcels 1, 2, 3and 4, and that MJD, Michael Durante and Michelle Durante without authorization or consent assumed control over said properties.

In its first cross claim for declaratory judgment MJC alleges that MJD, Michael Durante and Michelle Durante obtained a mortgage against Parcel 1 and Parcel 4 from co-defendant Twin Fork Funding LLC in the amount of $325,000, without MJC's knowledge and consent. MJC seeks a declaration to the effect that said mortgage only encumbers MJD, Michael Durante and Michelle Durante's one-half tenancy in common interest in Parcels 1 and 4, and that the lender's security interest in said properties is limited to MJD, Michael Durante and Michelle Durante's interest in said properties.

In its second cross claim for an accounting, MJC alleges that in August 2015, MJD Michael Durante and Michelle Durante wrested control of the management of Parcels 1, 2, 3 and 4, and took control of the books and records of said properties, and that MJC is unable to determine whether said co-defendants remitted to MJC "its complete share of all lease payments due and owing from lessees of space" at said properties. MJC alleges that its demand for access to the books and records for said properties has been refused and ignored and that it has not been provided with full information regarding said properties.

The third cross claim for breach of fiduciary duty alleges that MJD, Michael Durante and Michelle Durante breached their fiduciary duty to MJC by taking control of the books and records and management of Parcels 1-4; by giving a mortgage on Parcels 1 and 4 in connection with a loan; by commencing construction on Parcel 4 without MJC's consent; and by denying access to the books and records of the alleged joint properties.

The fourth cross claim for conversion alleges that since MJD, Michael Durante and Michelle Durante took control of the management of Parcels 1-4, MJC is unable to determine whether they remitted to MJC its complete share of the lease payments for Parcels 1-4, and that MJC has the right to immediate possession and ownership of said lease payments.

The fifth cross claim for unjust enrichment alleges that since MJD, Michael Durante and Michelle Durante took control of the management of Parcels 1-4, they have failed to remit to MJC its complete share of all lease payments due and owning from the leased spaces at the jointly owned properties.

The sixth cause of action seeks the appointment of a temporary receiver to manage the property, collect rents from lessees of the jointly owned properties, and to distribute to MJC and MJD Michael Durante and Michelle Durante their respective shares of the net rental proceeds after satisfying all debts and obligations of the jointly owned properties.

As MJC's cross claims against MJD, Michael Durante and Michelle Durante do not contain a demand for an answer, and as no answer was provided, said cross claims are "deemed denied or avoided" (CPLR §3011).

Various other defendants have served answers and interposed counterclaims and cross claims which are not the subject of the within motion. It is noted that on February 20, 2020, this Court appointed a referee to hear and report on the rights and interests of the parties regarding the partition or sale of the properties. The Referee issued and filed a report on May 11, 2020, in which she recommended that the properties be sold due to the discord between the owners.

Defendants MJD, Michael Durante and Michelle Durante seek to dismiss MJC's cross claims insofar as asserted against them on the grounds of failure to state a cause of action, pursuant to CPLR §3211(a)(7), lack of standing and res judicata.

MJC, in opposition, acknowledges that it does not have any ownership interest in the subject real properties. MJC, however, asserts that its cross claims are based on an entitlement to receive rents under certain leases relating to the properties, which it asserts the movants have acknowledged. It asserts that its cross claims for an accounting and conversion are properly pled and are supported by the movant's assignment of rents to a lender in connection with the mortgage, without notice to or consent from, MJC or its members. It is further asserted that MJC must remain a party to this action for partition purposes since according to public records it is still listed as a record owner of the properties and plaintiffs and defendants have asserted claims against it.

On a motion to dismiss pursuant to CPLR §3211(a)(7), "the standard is whether the pleading states a cause of action" (*Sokol v Leader*, 74 AD3d 1180, 1180–1181[2d Dept 2010], and, "[i]n considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (id. at 1181[internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). When the moving party submits evidentiary material in support of his or her motion, "the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one' " (*Sokol v Leader*, 74 AD3d at 1181–1182, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, "a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' " (*Sokol v Leader*, 74 AD3d at 1182, quoting *Guggenheimer v Ginzburg*, 43 NY2d at 275; *see Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662 [2d Dept 2021]).

MJC's does not dispute that Judge Kelly determined in the Surrogate's Court proceeding that the deeds purporting to transfer an ownership interest to MJC were null and void, ab initio. MJC does not allege the existence of a fiduciary relationship between itself and the movants based upon something other than the alleged joint ownership of the Parcels 1-4. As MJC concedes that it does not have an ownership interest in Parcels 1-4, no justiciable controversy exists between it and the movants with respect to the loans and mortgages, CEMA, and the terms of said agreements entered into by the mortgagors and the lender (CPLR 3001; *see James v Alderton Dock Yards*, 256 NY 298 [1931]; *see also Belli v New York City Department of Transportation*, 200 AD3d 402 [2d Dept 2021]). Therefore, that branch of the motion which seeks to dismiss the first cross claim for declaratory judgment on the grounds of failure to state a cause of action, is granted.

" 'The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest'" (*Dee v Rakower*, 112 AD3d 204, 213-14 [2d Dept 2013], quoting *Lawrence v Kennedy*, 95 AD3d 955, 958 [2d Dept 2012], quoting *Palazzo v Palazzo*, 121 AD2d 261, 265[1st 1986]). Here the second cross claim for an accounting is predicated upon an alleged fiduciary relationship between MJC and the movants arising out of MJC's joint ownership of the properties. MJC's alleges that it is entitled to receive a share of the rents under the terms of the leases agreements unilaterally entered into by the movants and tenants at Parcels 1-4. MJC, however, admittedly has no ownership interest in the properties and has not alleged any the existence of any other fiduciary relationship between the parties that would give rise to an action for an accounting. Therefore, that branch of the motion which seeks to dismiss the second cross claim for an accounting on the grounds of failure to state a cause of action, is granted.

The third cross claim for breach of fiduciary duty is also predicated upon an alleged fiduciary relationship between MJC and the movants arising out of MJC's joint ownership of the properties. However, MJC admittedly has no ownership interest in the properties and does not allege the existence of any other fiduciary relationship between the parties with respect to the management and control of Parcels 1-4, which would give rise to an action for breach of fiduciary duty. Therefore, that branch of the motion which seeks to dismiss said cross claim on the grounds of failure to state a cause of action is granted.

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" (*Colavito v New York Organ Donor Network, Inc*., 8 NY3d 43, 49–50 [2006]). In order " '[t]o establish a cause of action to recover damages for conversion, [the] plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights' " (*National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920, 920 [2d Dept 2012], quoting *Cusack v American Defense Sys., Inc*., 86 AD3d 586, 587 [2d Dept 2011]; *see Berkovits v Berkovits*, 190 AD3d 911 [2d Dept 2021]). "Money, if specifically identifiable, may be the subject of a conversion action" (*Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP*, 130 AD3d 1543, 1544–1545 [4th Dept 2015] [internal quotation marks omitted]; *see Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017]). "[C]onversion occurs when funds designated for a particular purpose are used for an unauthorized purpose" (*East Schodack Fire Co., Inc. v Milkewicz*, 140 AD3d 1255, 1256 [3d Dept 2016], quoting *Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]; *see Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017]).

Here, MJC's allegation that it has an immediate right to possession of its share of lease payments from the rentals of Parcels 1-4, is predicated upon its joint ownership of said parcels. However, MJC, admittedly has no ownership in said real property, and does not otherwise allege that it is entitled to a share of the rents of said properties. Furthermore, MJC does not allege that the movants have exercised dominion and control over property belonging to MJC. Rather, at most MJC alleges that it is unable to ascertain whether the movants remitted said funds to it. As these allegations are insufficient to state a cause of action for conversion, that branch of the motion which seeks to dismiss the fourth cross claim for conversion, is granted.

To establish a claim for unjust enrichment cause of action, a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see Paramount Film Distrib. Corp. v State of New York*, [1972]). "[T]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*id*.; *see Dee v Rakower*, 112 AD3d 204). Here, MJC's claim for unjust enrichment is predicated upon its allegation that as a joint owner of Parcels 1-4, it is entitled to a share of all lease payments due and owing from the lessees of space rented at said properties, and that the movants have failed to remit to MJC its complete share of said rental payments. MJC, however, admittedly has no ownership interest in Parcels 1-4. Furthermore, as MJC failed to allege that the movants were enriched at its expense, it has failed to sufficiently allege a cause of action for unjust enrichment (*see Dee v Rakower*, 112 AD3d at 214; *Clifford R. Gray, Inc. v LeChase Constr. Servs*., LLC, 31 AD3d 983, 988 [3d Dept 2006]). Therefore, that branch of the motion which seeks to dismiss the fifth cross claim based on unjust enrichment, is granted.

CPLR §6401(a) permits the court, upon a motion by a person with an "apparent interest" in property, to appoint a temporary receiver of that property where "there is danger" that it will be "materially injured or destroyed." However, the appointment of a temporary receiver "is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits" (*Schachner v Sikowitz*, 94 AD2d 709, 709 [2d Dept 1983]; *see Manning-Kranes v Manning-Franzman*, 175 AD3d 1403, 1403-04 [2d Dept 2019]; *Vardaris*

Tech, Inc. v Paleros Inc., 49 AD3d 631, 632 [2d Dept 2008]). "Therefore, a motion seeking such appointment 'should be granted only where the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests' " (*Schachner v Sikowitz*, 94 AD2d at 709, quoting *Vardaris Tech, Inc. v Paleros* Inc., 49 AD3d at 632, quoting *Lee v 183 Port Richmond Ave. Realty*, 303 AD2d 379, 380 [2d Dept 2003]).

MJC's sixth cross claim for the appointment of a receiver is predicated upon its alleged joint ownership of Parcels 1-4 and rights allegedly flowing from said joint ownership of Parcels 1-4. However, as MJC admittedly has no ownership interest in Parcels 1-4, it has no apparent interest in said real properties. Therefore, that branch of the motion which seeks to dismiss the sixth cross claim for the appointment of a temporary receiver is granted, as it fails to state a cause of action.

In view of the foregoing, MJD, Michael Durante and Michelle Durante's motion to dismiss all of MJC's cross claims insofar as asserted against them is granted in its entirety.

This is the decision and order of the Court.

Date: May 11, 2022

Hon. Joseph Risi, A.J.S.C.

FILED

5/17/2022
12:37 PM

COUNTY CLERK
QUEENS COUNTY