

Del Vecchio v Gangi
2024 NY Slip Op 35553(U)
April 8, 2024
Supreme Court, Nassau County
Docket Number: Index No. 611263/2022
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

STEVEN M. DEL VECCHIO,

Plaintiff,

- against -

CLAIRE GANGI and EZIO SCALDAFFERI,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 611263/2022
Motion Seq. Nos.: 05, 06
Motion Dates: 10/20/2023
10/20/2023

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 05), Affirmation and Exhibits	<u>1</u>
Notice of Cross-Motion (Seq. No. 06) and Affidavit	<u>2</u>
Affirmation in Opposition to Cross-Motion (Seq. No. 06) and in Support of Motion (Seq. No. 05) and Exhibits, and Affidavits	<u>3</u>
Affirmation in Reply to Cross-Motion (Seq. No. 06) and Memorandum of Law	<u>4</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants move (Seq. No. 05), pursuant to CPLR § 602(a), for an order consolidating the above captioned action ("Action 1") with Nassau County Supreme Court action, *Ezio Scaldaferrri and Claire Gangi v. Steven M. Del Vecchio*, Index No. 610776/2023 ("Action 2"), for all purposes.

Plaintiff opposes the motion (Seq. No. 05) and cross-moves (Seq. No. 06), for an order striking defendants' Verified Answer with Counterclaims based upon improper verification and improper certification; and cross-moves, pursuant to CPLR § 3212(b), for an order dismissing defendants' Fourth Affirmative Defense, First Counterclaim and Second Counterclaim, with prejudice; and cross-moves for an order sanctioning each defendant, individually,

and their attorney, Vincent Nofi, Esq., for frivolous conduct respecting said Verified Answer and Counterclaim and the instant motion to consolidate (Seq. No. 05). Defendants oppose the cross-motion (Seq. No. 06).

In support of defendants' motion (Seq. No. 05), their counsel asserts, in pertinent part, that, "Action No. 1 was commenced by plaintiff, STEVEN M. DEL VECCHIO, against the defendants, CLAIRE GANGI and EZIO SCALDAFERRI, by the filing of a Summons and Complaint on August 24, 2022.... Defendants in Action No. 1 subsequently filed their Answer, with Counterclaims, on August 22, 2023, and plaintiff filed his Reply to Counterclaims on September 7, 2023.... No discovery has yet been demanded or completed in Action No. 1. Action No. 2 was commenced by the plaintiffs, EZIO SCALDAFERRI and CLAIRE GANGI, against the defendant, STEVEN M. DEL VECCHIO, by the filing of a Summons with Notice on July 7, 2023. The defendant has appeared in Action No. 2, pro se, and demanded service of a Complaint by Notice and Demand dated August 16, 2023. Plaintiffs filed their Complaint in Action No. 2 on September 6, 2023. As of this date, no Answer has yet been served by the defendant in Action No. 2.... No discovery has yet been demanded or completed in Action No. 2. Action No. 1 is presently assigned to the Hon. Denise L. Sher of this Court. Action No. 2, also venued in Supreme Court, Nassau County, has yet to be assigned, although a RJJ was recently filed." *See* Defendants' Affirmation in Support of Motion (Seq. No. 05) Exhibits A and B.

Counsel for defendants further asserts, in pertinent part, that, "[t]he parties are next-door neighbors in the Village of Bayville, Nassau County, with CLAIRE GANGI and EZIO SCALDAFERRI residing at 9 Oak Point Drive North, and STEVEN M. DEL VECCHIO

residing at 7 Oak Point Drive North. The two adjoining properties share a common boundary line and both homes overlook the Long Island Sound. In Action No. 1, the plaintiff, STEVEN M. DEL VECCHIO, has asserted nine (9) causes of action against his neighbors, CLAIRE GANGI and EZIO SCALDAFERRI for: nuisance (FIRST and SIXTH); trespass (SECOND); assault (THIRD and SEVENTH); breach of contract (FOURTH); promissory estoppel (FIFTH); quiet title (EIGHTH); and ejectment (NINTH). Those claims arise out of several alleged illegal fireworks displays; an alleged noisy pool pump; an alleged failure to perform a promise to properly restore/repair a bulkhead on plaintiff's property; and an alleged encroachment onto plaintiff's property by a portion of defendants' fence along the parties' common boundary line.... Action No. 2 was subsequently commenced by plaintiffs, EZIO SCALDAFERRI and CLAIRE GANGI, against defendant, STEVEN M. DEL VECCHIO, on July 7, 2023, asserting three causes of action for: defamation (FIRST); tortious interference with prospective business opportunity (SECOND); and intentional infliction of emotional distress (THIRD). Those causes of action arise out of a letter written by the defendant, STEVEN M. DEL VECCHIO, to the members of the parties' Home Owners Association ('HOA') on or about July 11, 2022. The plaintiffs in Action No. 2 seek redress for several of the statements made by Mr. Del Vecchio in his letter of July 11, 2022 to the HOA, which directly concern, and are related to, several of his causes of action in Action No. 1. As can be seen, the two actions involve the same parties and involve many of the same factual allegations and conduct central to both actions... The defendants/movants seek an Order granting a 'true' or 'organic' consolidation, which the Complaint in Action No. 2 amending, and being substituted for, the 'SECOND' counterclaim asserted by CLAIRE GANGI and

EZIO SCALDAFERRI in Action No. 1. Specifically, it is proposed that the plaintiff's entire Complaint in Action No. 2 become the defendants' 'SECOND' counterclaim in Action No. 1, and that, upon consolidation, Action No. 2 would be discontinued. That process would thereby maintain the status of CLAIRE GANGI and EZIO SCALDAFERRI, as defendants, and STEVEN M. DEL VECCHIO, as plaintiff, with no party being both a plaintiff and defendant."

Defendant Ezio Scaldaferrri submits an Affidavit in further support of the motion to consolidate (Seq. No. 05). *See* Defendants' Scaldaferrri Reply Affidavit to Motion (Seq. No. 05).

In opposition to defendants' cross-motion (Seq. No. 05), plaintiff argues, in pertinent part, that, "[t]he defendants move to consolidate their separate action No. 2 with this action. This action was commenced over a year ago and a brief has now been filed with the Appellate Division for a review of the June 29, 2023 Decision which dismissed all nine of plaintiff's causes of action. On plaintiff's motion to re-argue to restore the Eighth and Ninth Causes of Action, no opposition was offered because the defendants had conceded in the motion papers that they did not move to dismiss those two causes of action. Hence, those causes of action were restored to the complaint by 'So-Ordered' Stipulation. These two restored causes of action are real property claims i.e., to quiet title and for ejectment. Those are the only causes of action remaining in the verified complaint at the moment. Thus the defendants were compelled to answer the Eighth and Ninth Cause of Action in the Verified Complaint. They answered and counterclaimed (as stated above) and a Reply has been served. Thus, the pleadings are complete in this action. The UNVERIFIED complaint in the action #2 alleges causes of action that have absolutely nothing to do with my real property claims. The causes of action in action #2 brought by the defendants are:

1. Defamation; 2. Tortious interference with prospective business opportunities; and

3. Infliction of emotion distress. The defendants' causes of action are specious on their face, are legally deficient and are retaliatory in nature. They will be dealt with in time by the appropriate application in that second action. These causes of action have nothing to do with my real property claims. The foregoing being so, it is hard to fathom Mr. Nofi's conclusory and false statement that the two actions 'involve many of the same factual allegations and conduct central to both actions'.... He failed to point out any of those alleged 'same factual allegations and conduct' because they do not exist. Their purported causes of action have nothing to do with my property claims. Similarly, Mr. Nofi makes the false conclusory statement citing a case where 'both actions came out of the same circumstance' ... which is not true here, nor will 'proof with respect to each action overlap' in this case.... Mr. Nofi does not point out factually how the property claims, and their proof and circumstances will overlap with the defendants' alleged tort claims in the second action. They are not connected and they do not overlap.

This is a fabricated argument. One of the motives for the defendants' motion to consolidate is revealed in paragraph 19 of Mr. Nofi's affirmation. What the defendants want to achieve by this consolidation motion is to improperly amend the wholly deficient 'verified answer with counterclaims', filed in this action and discussed above. Consolidation is not a remedy to repair or replace a defective and patently frivolous pleading but that is precisely what the defendants seek. The defendants' motion is only to consolidate and not amend their second counterclaim filed in this action. Yet, Mr. Nofi seeks to slip in what is a disguised impermissible motion to amend the verified answer with counterclaims.... This is totally improper. The verified Reply to defendant's verified answer with counterclaims in this action points out

in great detail frivolous and deceitful conduct on the part of the defendants, and this latest request by them to 'consolidate' is just more of the same. Mr. Nofi does not even offer a reason for the 'discontinuance' of the second counterclaim asserted by the defendants because he knows that it is defective, frivolous and sanctionable and that it is so stated in the Reply.

He does not even discuss the nature of the existing second counterclaim because he wants to trick the court into unwittingly getting rid of it. He gives no proper legal basis for the court to do what he wants the court to do which is to permit an unverified complaint in action #2 to be transformed into a counterclaim in this action where pleadings must be verified.

This is an underhanded and devious attempt by these defendants both to jettison their frivolous second counterclaim and replace it because it was exposed as frivolous in the Reply in this action,; and (2) to sneak in a unverified complaint containing three separate causes of action and somehow magically combine them into one counterclaim and re-plead it as a 'new counterclaim' in place of the frivolous counterclaim in an action where the pleadings must be verified. This is the epitome of deceptive and sanctionable practice. In their apparent desperation to remedy their defective pleadings in this action, the defendants do not even attempt to suggest a legal basis for their request to convert their unverified complaint alleging three causes of action in action #2 into a single second counterclaim to be interposed as one single unverified second counterclaim. That is legally impossible. Only desperate litigants cognizant of their misconduct would believe that three unverified causes of action can be lawfully squashed into a 'second counterclaim' and stuck into a completely unrelated existing action here the pleadings must be verified. In addition to the foregoing showing that consolidation cannot be done, if it were to be done, it will further prejudice me.

First, I want to move ahead on my real property claims in this action. The defendants admitted

that their fence encroached on my property. They admitted that to me, and to the court, both through counsel and in person. Now, in their answer they falsely deny the encroachment. They want to delay this proceeding. Second, all of the pleadings have been served and filed in this action. In action #2 today I am filing my verified answer and counterclaim and I am verifying that pleading to compel Gangi & Scaldaferrri to reply to their reply to that answer and counterclaim. The counterclaim has nothing whatsoever to do with my real property claims in this action. Thus, the pleadings in the action #2 which the defendants seek to consolidate have not even yet been completed. There has been an RJI filed in action #2 but as of the time I executed this affidavit, it remains pending. That makes consolidation even more inappropriate. Every day that goes by I am damaged by the defendants' encroachment. I am in the process of arranging for an expert to prepare a report on this encroachment and the property line after which a summary judgment motion will follow together with a request for damages and sanctions which will include the frivolous denial of the encroachment in the defendants' answer as aforesaid. Third, in the action #2, the defendants (plaintiffs in that action) have put their mental and emotional states in issue as well as their economic condition all of which they claim were damaged by my conduct. If their complaint in that action survives preliminary motions, the discovery in that case would be complex and lengthy. This will prolong the litigation in my action if the actions are consolidated. This is vastly different from the defined and uncomplicated issues in the encroachment based causes of action. The defendants and Mr. Nofi are keenly aware of this and it is their intent to delay which is another improper reason for their consolidation effort."

The Court notes that, since the filing of these motions (Seq. Nos. 05 and 06), a Decision and Order has been rendered by the Appellate Division, Second Department, on March 13, 2024. *See* NYSCEF Document No. 112. Said Decision and Order reversed the Decision and Order of this Court with respect to the dismissal of the First, Second and Sixth Causes of Action of plaintiff's Verified Complaint. *See id.* Due to the reinstatement of these Causes of Action, defendants, therefore, filed a Verified Amended Answer with Counterclaim. *See* NYSCEF Document No. 113.

Consequently, defendants' motion (Seq. No. 05), pursuant to CPLR § 602(a), for an order consolidating Action 1 with Action 2, Nassau County Supreme Court action, *Ezio Scaldaferrri and Claire Gangi v. Steven M. Del Vecchio*, Index No. 610776/2023, for all purposes, is hereby **DENIED**.

Plaintiff's cross-motion (Seq. No. 06), for an order striking defendants' Verified Answer with Counterclaims based upon improper verification and improper certification; and, pursuant to CPLR § 3212(b), for an order dismissing defendants' Fourth Affirmative Defense, First Counterclaim and Second Counterclaim, with prejudice, is also hereby **DENIED**.

22 NYCRR 130-1.1 deals with Costs and Sanctions. It reads, in pertinent part, that

“(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in

this Part, which shall be payable as provided in section 130-1.3 of this Subpart....

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both....

(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, Including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.”

“Pursuant to 22 NYCRR 130–1.1, sanctions may be imposed against a party or the party’s attorney for frivolous conduct.” *Keyspan Generation, LLC v. Nassau County*, 118 A.D.3d 949, 991 N.Y.S.2d 46 (2d Dept. 2014). “Conduct during litigation, ... is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing

law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false.” *Id. quoting Mascia v. Maresco*, 39 A.D.3d 504, 833 N.Y.S.2d 207 (2d Dept. 2007). “The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court’s sound discretion.” *Matter of Khan-Soleil v. Rashad*, 111 A.D.3d 727, 974 N.Y.S.2d 798 (2d Dept. 2013). The Court has carefully reviewed the record before it and, guided by the foregoing precepts, hereby declines to impose sanctions upon defendants and their counsel as requested by plaintiff. *See id.*

Accordingly, the branch of plaintiff’s cross-motion (Seq. No. 06), for an order sanctioning each defendant, individually, and their attorney, Vincent Nofi, Esq., for frivolous conduct respecting said Verified Answer and Counterclaim and the instant motion to consolidate (Seq. No. 05), is hereby **DENIED**.

All parties shall appear for a Conference in IAS Part 30, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on **May 7, 2024**, at 9:00 a.m.

This constitutes the Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 8, 2024

ENTERED

Apr 12 2024

NASSAU COUNTY
COUNTY CLERK’S OFFICE