

Manzollilo v Pichichero
2024 NY Slip Op 35659(U)
October 21, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 615205/2021
Judge: Vincent J. Martorana
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Short Form Order

INDEX NO: 615205/2021

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

ANTHONY L. MANZOLILLO and GLADYS S.
MANZOLILLO,

Plaintiffs,

- against-

PATRICK PICHICHERO, JR. A/K/A PATRICK
M. PICHICHERO, JR., KATHLEEN A.
PICHICHERO A/K/A KATHLEEN A.
MANZOLILLO-PICHICHERO,Defendants.

ORIG. RETURN DATE: 05/23/24

ADJOURNED DATE: 06/06/24

MOTION SEQ. NO.: 004 - MotD

PLTF'S/PET'S ATTY:

The Frank Law Firm P.C.

333 Glen Head Road, Suite 145

Old Brookville, New York 11545

DEFT'S/RESP'S ATTY:

Gerard Glass & Associates, P.C.

72 East Main Street, Suite 3

Babylon, New York 11702

Upon efiled documents numbered 118-127; it is

ORDERED that Defendants' motion seeking leave to amend their answer, pursuant to CPLR §3025(b), is granted in part and denied in part, as set forth below; and it is further

ORDERED that Defendants shall revise their proposed amended answer and file and serve it as set forth below.

Plaintiffs' complaint alleges that Defendants, who are Plaintiffs' adult daughter and son-in-law, took advantage of Plaintiffs, converted funds belonging to them, diverted Plaintiff Anthony Manzolillo's pension checks, inappropriately obtained title to Plaintiffs' home, pressured them into signing certain estate documents and other related acts. Plaintiffs assert twelve causes of action. Their first cause of action is against Defendant Patrick Pichichero, Jr. a/k/a Patrick M. Pichichero, Jr. ("Patrick") seeks a constructive trust on 421 South 7th Street, Lindenhurst, New York ("South 7th St premises"). Plaintiffs resided at the South 7th St premises at the time that suit was filed and Patrick's name was on the deed. Plaintiffs' second cause of action is asserted against both defendants, seeking a constructive trust on premises owned by Defendants, 95 North Monroe Avenue, Lindenhurst, New York ("95 Monroe premises"). Plaintiffs alleged that they had paid off the mortgage in exchange for a life estate for their eldest daughter Linda, but the life estate was not conveyed. Plaintiffs' third cause of action against both Defendants was for equitable subrogation on 95 Monroe. These first three causes of action were dismissed by order of the Honorable William Condon.

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Defendants previously brought a motion seeking to dismiss Plaintiffs' first, second, and third causes of action and to discharge the notices of pendency filed against the South 7th Street premises and the 95 Monroe premises. Such motion was denied by order of the Honorable William Condon, dated July 5, 2022. A subsequent motion by Defendants sought an order granting leave to reargue and a grant of the prior motion to dismiss. Defendants' motion was "granted in its entirety" by order of Justice Condon dated December 13, 2022. Justice Condon's December 13, 2022 order has been appealed, but there is no stay. As all of the causes of action which involved real property were dismissed, Defendants subsequently brought a motion to cancel the notices of pendency, which was granted by this court's order dated February 1, 2024.

Plaintiffs' remaining claims include a fourth cause of action as against both Defendants for conversion; a fifth cause of action against both Defendants for conspiracy to commit conversion with respect to cash and a 2013 Ford Explorer vehicle; a sixth cause of action against Defendant Kathleen A. Pichichero a/k/a Kathleen A. Manzolillo-Pichichero ("Kathleen") for embezzlement, in allegedly using a power of attorney to access Plaintiffs' funds for her own purposes; a seventh cause of action against both defendants for conspiracy to commit embezzlement; an eighth cause of action as against Defendant Kathleen for fraud for allegedly misrepresenting to New Jersey Transit that Plaintiff Anthony was mentally incompetent and causing his pension payments to be diverted to her; a ninth cause of action against both Defendants for conspiracy to commit fraud; a tenth cause of action against Defendant Kathleen for fraud and forgery in allegedly presenting a falsified letter to Plaintiff's estate attorneys in order to obtain Plaintiffs' legal records; an eleventh cause of action as against Defendant Kathleen for breach of fiduciary duty as attorney in fact; and a twelfth cause of action as against both Defendants, seeking an accounting. Issue has been joined as to both Defendants.

Defendants now move, pursuant to CPLR§3025(b), seeking leave to amend their Answer to assert counterclaims. Defendants assert that, after the within action was filed, Plaintiffs stopped paying real estate taxes, sewer taxes and property insurance on the property located at 421 South 7th Street. It is alleged that paying those charges constituted Plaintiffs' payments for use and occupancy. Defendants claim that Plaintiffs moved to North Carolina in 2022, but that they refuse to allow Defendants access to the home. Defendants assert that Plaintiffs are still in possession of the property and that a non-payment proceeding was brought in Second District Court; however the proceeding was dismissed by order of the Honorable James F. Matthews, dated February 27, 2024. The dismissal appears to be predicated upon the fact that the within action is pending and the claims alleged herein arise out of the same subject matter. The District Court also noted that Anthony and Gladys Manzolillo have not resided at the premises for two years. Judge Matthews stated that this absence from the premises contradicts the allegations of possession, and that the District Court therefore lacked subject matter jurisdiction. Counsel for Patrick and Kathleen Pichichero expresses surprise at this conclusion, stating, "[t]o be clear, Plaintiffs vacated but they still are in physical possession of 421 South 7th. The proceeding would not have been commenced in Second District Court if Plaintiffs were not in possession."

It is also alleged by Defendants that Plaintiffs' actions in filing a Notice of Pendency against the premises at 95 North Monroe, Lindenhurst New York, rendered the premises unmarketable, unrentable and unmortgageable. At the time the notice of pendency was filed, Defendants were in the process of refinancing the property in order to renovate and rent it. All plans stopped as a result of Plaintiffs' actions. Defendants argue that Plaintiffs' allegation that their daughter, Linda

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Brodmerkel, had a life estate in the property at 95 North Monroe, would obligate her to pay taxes and insurance, but that Defendants themselves have been saddled with such obligation, along with maintenance costs.

Defendants state that they did not initially wish to sue their parents but that Plaintiffs' insistence upon controlling the property without paying any of the carrying charges has made counterclaims necessary. Defendants wish to assert counterclaims which include: a first counterclaim for possession of 421 South 7th Street, a second counterclaim to recover the fair value of use and occupancy of 421 South 7th Street, a third counterclaim for abuse of process rising from an alleged improper filing of a notice of pendency against both properties, a fourth counterclaim for breach of contract (alleging that Plaintiff orally agreed to pay the taxes and insurance while in possession of 421 South 7th Street, which would constitute their "rent"), a fifth counterclaim for slander of title in "falsely cast[ing] doubt on the validity of Defendants' title" to both properties, causing "special and extraordinary damages," a sixth counterclaim for unjust enrichment in that "Plaintiffs have been unjustly enriched by virtue of their misconduct at the Defendants expense," a seventh counterclaim for ejectment, alleging that "Plaintiffs occupy 421 South 7th with no legal right to do so." Defendants seek money damages and equitable relief.

Plaintiffs oppose Defendants' motion based upon procedural and substantive grounds. The procedural errors as asserted here, to the extent that they exist, are not prejudicial and the court declines to deny Defendants' motion on this basis. Plaintiffs also assert that they expect to ultimately prevail with respect to all of the proposed counterclaims; however they assert that certain of the proposed claims are patently devoid of merit and that Defendants' motion should be denied with respect to those claims.

Leave to amend pleadings should be freely granted absent surprise or prejudice (CPLR §3025[b]; *McCasky, Davies and Associates, Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755, 463 NYS2d 434 [1983]; *Rosicki, Rosicki & Assocs., P.C. v. Cochems*, 59 AD3d 512, 514, 873 NYS2d 184 [2d Dept. 2009]). In determining a motion seeking leave to amend a pleading, the court need not consider the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face (*Rosicki, supra*; *Bank of Smithtown v. 219 Sagg Main, LLC*, 107 AD3d 654, 655, 968 NYS2d 95, 97 [2d Dept. 2013]; *Lucido v. Mancuso*, 49 AD3d 220, 227, 851 NYS2d 238 [2d Dept. 2008]; *Siddiqui v. Smith*, 207 AD3d 681, 682, 173 NYS3d 23, 24 [2d Dept. 2022]). "No evidentiary showing of merit is required under CPLR 3025(b)" (*Lucido v. Mancuso, supra*; *Siddiqui v. Smith, supra*). A motion to amend should be denied when the lack of merit of the proposed amendment is clear and free from doubt (*Lucido v. Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept. 2008]).

Plaintiff asserts that Defendants' third and fifth counterclaims both essentially claim abuse of process based upon the filing of the notices of pendency on the properties, and that these claims must fail because the filings were proper.

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v. Suozzi*, 63 NY2d 113, 117-18, 469 NE2d 1324, 1327 [1984]; see also *McMahan v. McMahan*, 164 AD3d 1486, 84 NYS3d 510 [2d Dept. 2018]; *Perini v. Leo*, 147 AD3d 877, 47 NYS3d 101 [2d Dept. 2017]; *Bd. of Ed. of*

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Farmingdale Union Free Sch. Dist. v. Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO, 38 NY2d 397, 403–04, 380 NYS2d 635 [1975]). The process at issue must involve an unlawful interference with one's person or property (***Lynn v. McCormick***, 153 AD3d 688, 688–89, 60 NYS3d 316, 317–18 [2d Dept. 2017]; ***Curiano, supra***; ***Perini, supra***). Filing of a summons and complaint to commence a civil action is not considered abuse of process even if an ulterior motive is alleged in bringing suit (***Curiano v. Suozzi, supra***; ***Perini v. Leo, supra***).

Plaintiffs argue that their first, second, and third causes of action alleged in the complaint had asserted a constructive trust and equitable subrogation, and that CPLR §6501(a) provides, in part,

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, incumbrance of, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property.

Therefore, Plaintiffs conclude that filing of the notices of pendency was appropriate, rendering the abuse of process claim meritless.

Filing a notice of pendency is proper where the claims asserted would affect the title to, incumbrance of, or the possession, use or enjoyment of, real property. This weighs against the validity of the abuse of process claim. Defendants allege that filing of the notices of pendency caused them harm, in that they had been in the process of refinancing in order to do renovations, were unable to secure the financing and have been unable to renovate or rent the properties. However Defendants have “failed to allege facts to suggest that the filing of the notice[s] of pendency w[ere] intended to harm [them] without justification, and that the notice of pendency was misused for an improper collateral purpose subsequent to its filing” (***Schilt v. Matherson***, 104 AD3d 668, 669, 960 NYS2d 460, 461–62 [2d Dept. 2013]; see also ***Goldman v. Citicore I, LLC***, 149 AD3d 1042, 1045, 53 NYS3d 142, 146 [2d Dept. 2017]). “[A] malicious motive alone does not give rise to a cause of action to recover damages for abuse of process,” nor does an assertion that a suit was filed in order to gain tactical advantage (***Goldman v. Citicore I, LLC, supra*** at 257). Filing of a summons and complaint cannot form the basis of an abuse of process claim, and the filing of the notices of pendency was permissible under CPLR §6501(a). Therefore, Defendants’ proposed third counterclaim alleging abuse of process is insufficient on its face.

Defendants’ proposed fifth counterclaim is for slander of title. The elements of a cause of action for 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) resulting in special damages” (***39 Coll. Point Corp. v. Transpac Cap. Corp.***, 27 AD3d 454, 454–56, 810 NYS2d 520, 521–22 [2d Dept. 2006] (quoting ***Brown v. Bethlehem Terrace Assoc.***, 136 AD2d 222, 224)). Wrongfully filing a document for recording that clouds the title of another is an act that may constitute slander of title if provable damages result (***39 Coll. Point Corp., supra***; ***Terrace Hotel Co. v. State***, 19 NY2d 526, 227 NE2d 846 [1967]; ***Hanbidge v. Hunt***, 183 AD2d 700, 583 NYS2d 288 [2d Dept. 1992]). In stating a cause of action for slander of title, special damages must be alleged with sufficient particularity (***Collision Plan Unlimited, Inc. v. Bankers Tr. Co.***, 63 NY2d 827, 831, 472 NE2d 28, 29 [2d Dept. 1984]; ***39 Coll. Point Corp., supra***; ***Bibbo v. 31-30, LLC***, 105 AD3d 791, 963 NYS2d 303 [2d Dept. 2013]); the cause of action does not accrue until such damages are incurred (***Rosenbaum v. City of New York***, 8 NY3d 1, 12, 861 NE2d 43, 49 [2006]; ***Hanbidge, supra***).

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Special damages are the loss of something having economic or pecuniary value (*El Jamal v. Weil*, 116 AD3d 732, 986 NYS2d 146 [2d Dept 2014]; *Elias v. Massimillo*, 166 AD3d 726, 85 NYS3d 775 [2d Dept. 2018]; *Lieberman v. Gelstein*, 80 NY2d 429, 590 NYS2d 857 [1992]). Here, the filed documents were a summons and complaint and a notice of pendency based upon a claim affecting real property, as discussed above. Defendants' proposed fifth counterclaim alleging slander of title is insufficient on its face.

Plaintiffs also object to Defendants' proposed sixth counterclaim for unjust enrichment and fourth counterclaim for breach of contract. Plaintiffs assert that the breach of contract claim is duplicative of the use and occupancy claim.

The breach of contract claim asserts that "Plaintiffs and Defendants had an oral agreement in which Plaintiffs paid the taxes and insurance for 421 South 7th Street as rent for whatever time they were in possession which agreement the Plaintiffs breached." The use and occupancy claim states, "During the time that litigation has been ongoing, Defendants have also been deprived of payment of use and occupancy or rent for 421 South 7th as a direct consequence of Plaintiffs' action over Defendants' objections." These claims may both be asserted.

In the absence of legal citation on this point by the parties, the court draws an analogy to claims for breach of contract and quasi-contract. It has been held that, "[a]lthough the existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi contract, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" (*Goldman v. Simon Property Grp., Inc.*, 58 AD3d 208, 220, 869 NYS2d 125, 134 [2d Dept. 2008] (internal citations omitted); see also *Zuccarini v. Ziff-Davis Media, Inc.*, 306 AD2d 404, 762 NYS2d 621 [2d Dept. 2003]; *Old Salem Dev. Grp., Ltd. v. Town of Fishkill*, 301 AD2d 639, 754 NYS2d 333 [2d Dept. 2003]). Additionally, where a party pleads alternate theories of breach of contract and quasi contract, the latter claims may stand where there is no express contract or where the contract is too vague to be enforceable (*UETA Latinamerica, Inc. v. Zafir*, 129 AD3d 704, 705-06, 10 NYS3d 566, 567-68 [2d Dept. 2015]; *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 388-89, 521 NYS2d 653 [1987]) or where condition precedent to contract is not met and no contract is actually formed (*Bedoya v. Rodriguez*, 186 AD3d 1308, 1309, 131 NYS3d 45, 48 [2d Dept. 2020]). The court views the breach of contract and use and occupancy claims in this vein. Furthermore, it is not unusual to have a contract apply to a claim for a particular time period and a use and occupancy claim apply to another time period in the same action. Both would be permissible in such instance. Therefore, neither the breach of contract, nor the use and occupancy claim, will be found as lacking in merit on this basis.

Plaintiff also challenges the unjust enrichment claim, stating that it is duplicative of the breach of contract and abuse of process claims. As the abuse of process claim is being disallowed, this argument is not considered. As to Plaintiffs' objection based upon the breach of contract claim, the unjust enrichment claim will be permitted under the rationale set forth above. The remainder of the counterclaims are not specifically objected to and the court does not find them to be palpably insufficient or patently devoid of merit on their face.

Based upon the foregoing, Defendants' motion to amend is granted in part and denied in part.

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Defendants may amend their answer to include the counterclaims presented except for the third and fifth proposed counterclaims. Defendants shall file an amended answer, substantially in the form submitted with their motion, except that the slander of title and abuse of process counterclaims shall be removed. The amended answer, as revised, shall be filed via NYSCEF within twenty (20) days of entry of the within order. Also within twenty (20) days of entry of the within order, Defendants shall serve a copy of this order with notice of entry and a copy of the revised amended answer upon Plaintiffs' counsel in a manner consistent with CPLR §2103. This shall constitute service of the amended answer. Service of any reply to counterclaims shall be governed by the relevant provisions of the CPLR.

Dated: October 21, 2024
Riverhead, New York



VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION