Vichie v Wheat
2026 NY Slip Op 31222(U)
March 27, 2026
Supreme Court, New York County
Docket Number: Index No. 160975/2025
Judge: Matthew V. Grieco
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MATTHEW V. GRIECO** **PART** **30M**

Justice

----------X

TRENT VICHIE, SHANNON DAWSON,

Plaintiff,

- v -

THOMAS WHEAT, VIRGINIA SWANSON,

Defendant.

INDEX NO. 160975/2025

MOTION DATE 09/25/2025, 09/25/2025, 12/25/2025

MOTION SEQ. NO. 001 001 002

DECISION + ORDER ON MOTIONS AND CROSS-MOTION

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 11, 12, 13, 14, 15

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISSAL and cross-motion for SANCTIONS.

Upon the foregoing documents, and for the reasons stated *infra*, plaintiffs' motion to dismiss the counterclaims is granted, defendants' motion to dismiss the complaint is granted in part, and both parties' requests for sanctions are denied.

Plaintiffs, Trent Vichie and Shannon Dawson, commenced this action on August 18, 2025, asserting causes of action for conversion, fraud, conspiracy to commit conversion and fraud, aiding and abetting conversion and fraud, breach of fiduciary duty, unjust enrichment, replevin, trespass, assault, intentional and negligent infliction of emotional distress, negligence, and prima facie tort, against defendant Thomas Wheat, their former domestic house manager, and defendant Virginia Swanson, Wheat's mother (NYSCEF Doc. No. 1).

Defendants, pro se, answered and Wheat counterclaimed for abuse of process, prima facie tort, and tortious interference with prospective business relations (NYSCEF Doc. Nos. 2-3).

I. Plaintiffs' Motion to Dismiss the Counterclaims

In Motion Seq. 1, plaintiffs move pursuant to CPLR 3211(a)(7) to dismiss the counterclaims (NYSCEF Doc. Nos. 5-6). In response, Wheat withdraws the second and third counterclaims, but requests sanctions under 22 NYCRR 130-1.1 for plaintiffs' filing a frivolous action and then seeking dismissal of the remaining counterclaim (NYSCEF Doc. Nos. 12-13); he also asks that the Court "[d]etermine that this action falls within the protections of Civil Rights Law §§ 70-a and 76-a and preserve Defendant's entitlement to statutory and punitive remedies" (NYSCEF Doc. No. 13 at 6).

On a motion to dismiss counterclaims under CPLR 3211(a)(7), for failure to state a cause of action, "the court must afford the pleadings a liberal construction, accept the allegations of the [counterclaims] as true and provide [the non-moving party] ... 'the benefit of every possible favorable inference'" (*AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Taxi Tours Inc. v Go New York Tours, Inc.*, 41 NY3d 991, 993 [2024] [motion to dismiss counterclaims]). "Whether a [pleader] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Taxi Tours Inc.*, 41 NY3d at 993). The non-movant can submit affidavits or other evidence to remedy any defects in the pleading (*see Leon*, 84 NY2d at 88; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635-636 [1976]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated

one, and, 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, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In light of Wheat's "withdrawal" of his second and third counterclaims, they are both dismissed.

As to the first counterclaim, the elements of abuse of process are: "(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, 116 [1984]).

The Court of Appeals has clarified that "the process used must involve 'an unlawful interference with one's person or property'" (*id.*, quoting *Williams v Williams*, 23 NY2d 592, 596 [1969]). The mere commencement of a civil action by summons and complaint "is not legally considered process capable of being abused," and a malicious motive in bringing it does not, alone, give rise to a cause of action for abuse of process; the process must have been improperly used after it was issued (*Curiano*, 63 NY2d at 116-117).

Wheat alleges only that plaintiffs "commenced this action not to adjudicate legitimate claims, but to weaponize the machinery of the courts as an instrument of retaliation" to preempt an action he had planned to bring (NYSCEF Doc. No. 2 at 4, 7), and argues in his papers opposing the motion that plaintiffs brought and continue to pursue this action despite knowing that the fraud claims are not sustainable and to somehow inflict "reputational and economic harm" (NYSCEF Doc. No. 13 at 3-4).

Wheat has not articulated how plaintiffs used the process "in a perverted manner to obtain a collateral objective" (*Curiano*, 63 NY2d at 116). The first counterclaim is therefore dismissed (*see Hammond v Equinox Holdings LLC*, 219 AD3d 406 [1st Dept 2023] [conclusory allegations that the plaintiff continued the litigation for the wrongful purpose of coercing the defendant to drop his earlier-filed lawsuit insufficient to sustain abuse of process counterclaim], *lv denied* 41 NY3d 997 [2024]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990] [abuse of process counterclaim failed to state a cause of action where the defendant alleged only that the plaintiff's service of a summons and complaint comprised a baseless action for legal fees that caused the defendant the expense of defending against the action and that the suit was instituted to coerce a settlement]). Consequently, plaintiffs' motion to dismiss the counterclaims was not frivolous within the meaning of 22 NYCRR 130-1.1(c), and Wheat's request for sanctions is denied.

Wheat's arguments as to Civil Rights Law §§ 70-a and 76-a (anti-SLAPP law) for defending against this action are more properly addressed in Point II, infra, regarding his motion to dismiss the complaint.

II. Defendants' Motion to Dismiss the Complaint and Plaintiffs' Cross-Motion for Sanctions

In Motion Seq. 2, defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint (NYSCEF Doc. Nos. 16-19, 23). Plaintiffs cross-move for sanctions (NYSCEF Doc. Nos. 20-21).

The standards governing dismissal under CPLR 3211(a)(7) have been set forth in Point I, supra.

In assessing the complaint under CPLR 3211(a)(1), a defense founded upon documentary evidence, "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Leon*, 84 NY2d at 88; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006] ["the documents relied on must definitively dispose of plaintiff's claim"]). Judicial records, such as judgments and orders, qualify as "documentary," as do "'the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence'" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014], quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C3211:10 at 22; *see JAK Advisors, LLC v Bauer*, 245 AD3d 437, 438 [1st Dept 2026] [electronic communications, such as emails, text messages, and WhatsApp messages, can suffice as documentary evidence]). The salient requirement is that the "document's" content be "essentially undeniable" (*Amsterdam Hospitality Group, LLC*, 120 AD3d at 432). Neither an affidavit nor a deposition can ordinarily qualify (*see id.*).

1. Procedural Issues

Initially, although the motion is broadly titled as requesting dismissal of the complaint, a complete reading reflects that it only seeks dismissal of "all claims premised on the four checks made payable to Defendant Viriginia Swanson" (*see* NYSCEF Doc. No. 22 at 5-6 [reply memorandum of law]; Doc. No. 19 at 1-3 [images of the four checks]); it also seeks dismissal of any other claims against Swanson. The complaint is challenging to parse, but the check-related claims appear to fall within

some of the causes of action (asserted against Wheat, Swanson, or both) for fraud, conversion, conspiracy, aiding and abetting, breach of fiduciary duty, and unjust enrichment; the (non-check-related causes of action) for negligent infliction of emotional distress and prima facie tort are asserted against "All Defendants" (NYSCEF Doc. No. 1).

Plaintiffs preliminarily argue that the CPLR 3211(a)(1) component of the motion is procedurally defective because defendants filed an answer before making the motion. However, CPLR 3211(e) states that such a motion "is waived unless raised *either* by such motion *or in the responsive pleading*" (emphasis added) (*see M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1 [1st Dept 2020], *lv dismiss* 36 NY3d 1086 [2021]). Defendants expressly asserted CPLR 3211(a)(1) in their answer (NYSCEF Doc. No. 2 at 2, 6-8).

Next, plaintiffs contend that Wheat, pro se, cannot represent Swanson on the dismissal motion. Swanson, herself pro se, submitted an affidavit effectively joining in the motion and specifically requesting dismissal of the claims against her (NYSCEF Doc. No. 18). There has been no surprise or other prejudice to plaintiffs, and the Court will deem Swanson as joining in the motion (*see* CPLR 2001 [court may overlook a mistake, omission, defect, or irregularity]).

2. Claims Regarding the Four Checks

Turning to the substance of the motion, defendants argue, in sum, that there could be no fraud, deceit, or other impropriety regarding the four checks, made out to Swanson and totalling $119,291, because they were all signed by plaintiff Dawson. The complaint and plaintiffs' response, however, allege that Wheat forged Dawson's signature or misled her into thinking the checks were to pay various household expenses that had never in fact been incurred. At this pleading stage, the complaint's allegations

must be accepted as true (*see AG Capital Funding Partners, L.P.*, 5 NY3d at 591) and the images of the checks (NYSCEF Doc. No. 19 at 1-3) do not conclusively resolve those issues (*Goshen*, 98 NY2d at 326). Accordingly, the portion of defendants' motion to dismiss all claims pertaining to the four identified checks is denied.

It is noted that the 8th and 15th causes of action, asserted against "All Defendants," are for civil conspiracy to commit conversion and fraud, respectively (NYSCEF Doc. No. 1 at 18, 22). New York does not recognize an independent cause of action for conspiracy, although the allegations of conspiracy are permitted to connect the actions of separate defendants with an otherwise actionable tort (*see Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 969 [1986]). Those two causes of action are therefore dismissed, and the allegations in the complaint charging conspiracy are deemed part of the remaining causes of action to which they are relevant (*see Hoag v Chancellor, Inc.*, 246 AD2d 224, 230 [1st Dept 1998]).

As to Swanson, the complaint alleges that she participated in and benefited from a scheme to "divert hundreds of thousands – if not millions – of dollars from Plaintiffs' bank accounts," not just the four identified checks (NYSCEF Doc. No. 1 ¶¶ 94-118). The detailed allegations (*see* CPLR 3016[b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]) support the claims against Swanson for conversion, fraud, unjust enrichment, aiding and abetting fraud, and aiding and abetting conversion (NYSCEF Doc. No. 1 at 18-19, 21-23, 28-29).[1] Her affidavit statement that she lacked any intent,

---

[1] "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 [2006]).

The elements of fraud are: (1) a misrepresentation or a material omission of fact, (2) which is either untrue and known to be untrue or recklessly made, (3) made for the

and that any payments made to her were either gifts from her son or reimbursement for charges on her credit card for the benefit of plaintiffs (NYSCEF Doc. No. 18), does not constitute documentary evidence (*see Amsterdam Hospitality Group, LLC*, 120 AD3d at 432) or demonstrate how the pleadings are deficient.

3. Breach of Fiduciary Duty Claim Against Swanson

The 24th cause of action, for breach of fiduciary duty (NYSCEF Doc. No. 1 at 27), must be dismissed insofar as it is asserted against Swanson.

The elements of that claim are: "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Golobe v Mielnicki*, 44 NY3d 86, 93 [2025] [internal quotes and cite omitted]). A "fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation," which relationship "is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc.*, 5 NY3d at 19 [internal quotes and cite omitted]). "Stated differently, [a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (*AG Capital Funding Partners,*

---

purpose of inducing the other party to rely upon it, (4) justifiable reliance of the other party on the misrepresentation or material omission, and (5) injury (*Golobe v Mielnicki*, 44 NY3d 86, 92 [2025]).

For unjust enrichment, the complaint must allege that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Aiding and abetting fraud or conversion requires commission of the underlying tort by the primary tortfeasor, the aider and abettor's actual knowledge of the underlying tort, and the aider and abettor's substantial assistance in the achievement of the underlying tort (*see William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 503 [1st Dept 2018]).

L.P. v State St. Bank & Trust Co., 11 NY3d 146, 158 [2008] [internal quotes and cite omitted; brackets in original]).

Not only do plaintiffs fail to allege a fiduciary relationship with Swanson, they affirmatively state in the complaint that they never employed her, never received any goods or services from her, and never even met her, and thus that they had no relationship at all with her (NYSCEF Doc. No. 1 ¶¶ 104, 202). Her status as a "purported employee" (NYSCEF Doc. No. 1 ¶ 247), allegedly to create a façade to justify the unearned payments or transfers Wheat made to her, did not create a fiduciary relationship (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561 [2009] [plaintiffs did not allege that they had direct contact or any relationship, contractual or otherwise, with the defendant; fiduciary duties limited partnership's attorney owed to the entity did not extend to the limited partners]).

4. Other Claims Against Swanson

Unlike Wheat, as to whom the complaint alleges a campaign of harassment and intimidation, the only factual allegations against Swanson revolve around her participation in a scheme to pilfer funds from plaintiffs. The claims against her for negligent infliction of emotional distress (21st) and prima facie tort (29th) do not fall within that framework (NYSCEF Doc. No. 1 at 26, 29).

The Court of Appeals has identified "three narrow instances" where a plaintiff can recover for negligent infliction of emotional distress: (1) "false reports of a family member's death or serious illness, or the mishandling of a family member's remains"; (2) "where a defendant's breach of a duty of care unreasonably places the plaintiff in fear of physical harm, resulting in emotional harm with 'physical manifestations'"; and (3) where the plaintiff "suffer[s] emotional injury upon witnessing a physical injury to an

immediate family member while the plaintiff is in the 'zone of danger' created by the defendant's negligent conduct" (*SanMiguel v Grimaldi*, ___ NY3d ___, 2025 NY Slip Op 05780 [2025] [internal quotes and cites omitted]). None of those circumstances applies to Swanson; the claim is dismissed as against her.

The elements of prima facie tort are: "(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful" (*Curiano*, 63 NY2d at 117). Prima facie tort "is neither a catch-all alternative for every cause of action which cannot stand on its legs, nor will the existence of a traditional tort foreclose alternative pleading of prima facie tort" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983] [internal quotes and cite omitted]). However, "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act" (*id.*). That is, "'the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another'" (*id.*, quoting *Beardsley v Kilmer*, 236 NY 80, 90 [1923]).

The complaint here is replete with allegations that Swanson acted to enrich herself, and thus she did not acted exclusively with malevolent intent to inflict harm (*see Burns Jackson Miller Summit & Spitzer*, 59 NY2d at 333; *Cohen's W. 14th St. Corp. v Parker 14th Assoc.*, 125 AD2d 249 [1st Dept 1986] [apparent from the face of the complaint that the defendant had an economic interest and was not, therefore, motivated solely by malevolence]; *Squire Records v Vanguard Recording Socy.*, 25 AD2d 190, 191-192 [1st Dept 1966] [no recovery in prima facie tort where other motives such as profit, self-interest, or business advantage are present], *affd* 19 NY2d 797 [1967]; *see also Princes Point, LLC v AKRF Engineering, P.C.*, 94 AD3d 588, 589 [1st

Dept 2012] [allegation of malevolence was contrary to the complaint's allegation concerning defendants' alleged profit motives]). The prima facie tort claim is dismissed as against Swanson.

5. Anti-SLAPP Arguments

In opposing plaintiffs' motion to dismiss the counterclaims (Motion Seq. 1), Wheat also asks for a "[d]etermin[ation] that this action falls within the protections of Civil Rights Law §§ 70-a and 76-a and preserve Defendant's entitlement to statutory and punitive remedies" (NYSCEF Doc. No. 13 at 6). In conjunction with his motion to dismiss the complaint (Motion Seq. 2), he states: "While Defendant does not seek sanctions at this stage, he expressly reserves all rights to seek fee-shifting, compensatory damages, punitive damages, and costs under Civil Rights Law § 70-a upon dismissal" (NYSCEF Doc. No. 23 at 7); he does not mention the issue in his reply papers (NYSCEF Doc. No. 22).

The anti-SLAPP (Strategic Lawsuits Against Public Participation) law is codified at Civil Rights Law §§ 70-a and 76-a and is designed to protect citizens from targeted litigation for their participation in public affairs (*see Gottwald v Sebert*, 40 NY3d 240, 250-251 [2023]; *Reeves v Associated Newspapers, Ltd.*, 232 AD3d 10 [1st Dept 2024], *lv dismissed* 44 NY3d 990 [2025]). The law shields activity "involving public petition and participation," defined as: "(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition" (Civil Rights Law § 76-a[1][a]); "'[p]ublic interest' shall be construed broadly, and shall mean any subject other than a purely private matter"

(Civil Rights Law § 76-a[1][d]). Civil Rights Law § 70-a provides for a claim, cross-claim, or counterclaim to recover damages, including attorneys' fees, for a SLAPP violation. In addition, CPLR 3211(g) affords a procedure for summary dismissal of a SLAPP suit (*see Kohler v West End 84 Units LLC*, 241 AD3d 1123 [1st Dept 2025]; *Reeves*, 232 AD3d at 12).

Wheat does not move to dismiss under CPLR 3211(g) or for leave to amend his answer, but only advances a placeholder "reservation of rights." To the extent he seeks a "determination" that plaintiffs' suit constitutes a SLAPP action, the anti-SLAPP law, as set forth *supra*, does not make provision for a declaratory judgment, and this Court will not issue an advisory opinion (*see Cuomo v Long Island Lighting Co.*, 71 NY2d 349, 354-358 [1988]).

6. Plaintiffs' Cross-Motion for Sanctions

Plaintiffs cross-move for sanctions against Wheat (NYSCEF Doc. No. 21 at 12-13), based on his citation in his moving papers to one inapplicable case and one apparently fictitious case (NYSCEF Doc. No. 23 at 6). In reply, Wheat apologizes for the citations, which he attributes to "inadvertent" "errors" (NYSCEF Doc. No. 22 at 6).

The Court does not find that Wheat's actions were frivolous within the meaning of 22 NYCRR 130-1.1, although he is cautioned to verify any legal or factual citations he might make in the future.

It is therefore

ORDERED that plaintiffs' motion to dismiss the counterclaims (Motion Seq. 1) is granted; and it is further

ORDERED that defendant Wheat's request for sanctions under 22 NYCRR 130-1.1 (Motion Seq. 1) is denied; and it is further

ORDERED that defendants' motion to dismiss "all claims premised on the four checks made payable to Defendant Viriginia Swanson" (Motion Seq. 2) is granted only to the extent that the 8th and 15th causes of action (civil conspiracy to commit conversion and fraud, respectively) are dismissed, although the allegations in the complaint charging conspiracy are deemed part of the remaining causes of action to which they are relevant; and it is further

ORDERED that defendant Swanson's motion to dismiss all claims as against her (Motion Seq. 2) is granted only to the extent that the 24th cause of action (breach of fiduciary duty), 21st cause of action (negligent infliction of emotional distress), and 29th cause of action (prima facie tort), are dismissed as against her; and it is further

ORDERED that plaintiffs' cross-motion for sanctions under 22 NYCRR 130-1.1 (Motion Seq. 2) is denied; and it is further

ORDERED that counsel and the pro se litigants are directed to appear for a preliminary conference in Room 623, 111 Centre Street, New York, New York, on April 14, 2026, at 10:00 AM.

This constitutes the decision and order of the Court.

3/27/2026
DATE

MATTHEW V. GRIECO, 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