

**Manteiga v DePaola**

2011 NY Slip Op 33193(U)

November 30, 2011

Sup Ct, Suffolk County

Docket Number: 16432-2011

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

COPY

**Present: HON. EMILY PINES**  
J. S. C.

Original Motion Date: 08-15-2011  
Motion Submit Date: 09-06-2011  
Motion Sequence No.: 001 MOTD

FINAL  
 NON FINAL

\_\_\_\_\_ X  
**MANUEL MANTEIGA,**

**Plaintiff,**

**-against-**

**DENISE DEPAOLA and MICHAEL NOLAN,**  
**Defendants.**

\_\_\_\_\_ X

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**ORDERED** that the defendants' motion (motion sequence # 001) to dismiss the Verified Complaint is granted in part and denied in part, as set forth herein.

**BACKGROUND**

Plaintiff Manuel Manteiga ("Manteiga") commenced this action against defendants Denise DePaola ("DePaola") and Michael M. Nolan ("Nolan") for, among other things, fraud, the imposition of a constructive trust, slander on title, unjust enrichment, conversion, breach of fiduciary duty, misconduct by a notary public, and negligence. Defendants now move to dismiss

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the Verified Complaint pursuant to CPLR 3211(a)(7) and for costs and legal fees.

According to the Verified Complaint, Manteiga and DePaola began dating in April 2010. In August 2010 DePaola transferred title to a parcel of real property in Pennsylvania (“Property”) that she owned alone, to herself and Manteiga as tenants in common. By October 8, 2010, Manteiga and DePaola had broken up and were no longer dating. On November 16, 2010, a deed was recorded in Pennsylvania reflecting a purported transfer by Manteiga of his rights, title and interest in the Property back to DePaola on October 26, 2010. Manteiga claims that he did not sign the deed or knowingly execute any document purporting to be a deed from him to DePaola, and that he did not execute a power of attorney or other instrument authorizing anyone to act on his behalf in connection with the Property. He states that his signature on the deed is a forgery and that he did not execute the deed in the presence of Nolan, the notary on the deed, on October 26, 2010 or at any other time. Manteiga alleges that he did not become aware of the purported transfer back to DePaola until May 2011. He claims that both DePaola and Nolan knew the deed was a forgery, that it was obtained by false pretenses or other surreptitious means, and that by recording the deed Manteiga was divested of his ownership rights in the Property.

The first cause of action seeks the imposition of a constructive trust and a direction that DePaola transfer title back to Manteiga and DePaola as tenants in common. The second cause of action is brought pursuant to “Article 15 of the Premises Actions and Proceedings Law to compel a determination of claims” to the Property and seeks a decree or order that DePaola reconvey the Property to Manteiga and DePaola as tenants in common. The third cause of action is brought “[p]ursuant to RPL § 329” for a declaration or judgment cancelling, vacating and discharging the deed. The fourth cause of action is for slander on title and seeks compensatory damages. The fifth cause of action alleges that DePaola has been unjustly enriched by the transfer and seeks compensatory damages. The sixth cause of action is asserted against DePaola for conversion and seeks compensatory damages. The seventh cause of action alleges that DePaola breached her fiduciary duty to Manteiga and seeks compensatory damages. The eighth cause of action is for fraud and seeks compensatory and punitive damages. The ninth cause of action is asserted pursuant to Executive Law § 135 and alleges that Nolan engaged in misconduct as a notary public by signing a false certification and statement in the acknowledgment of the deed. The tenth cause of action is asserted against Nolan for his purported negligence as a notary public in connection with the transfer. The eleventh cause of action alleges that Nolan



aided and abetted DePaola in converting Manteiga's rights, title and interest in the Property. The twelfth cause of action alleges that Nolan aided and abetted DePaola in breaching her fiduciary duty to Manteiga as a tenant in common. The thirteenth cause of action alleges that DePaola and Nolan conspired to defraud Manteiga out of his ownership in the Property.

In support of their motion, the defendants argue, among other things, that the first (fraud/constructive trust), fifth (unjust enrichment), and eighth (fraud) causes of action are fatally defective because it has not been alleged that Manteiga transferred any property interest to DePaola in reliance on any promise or representation that DePaola made, and because his equitable claims are barred by the doctrine of unclean hands. Defendants further argue that because there is no valid fraud claim, the thirteenth cause of action (conspiracy to commit fraud), must also be dismissed. Next, defendants argue that the second and third causes of action (seeking cancellation of the deed and reconveyance of the Property) should be dismissed because this Court lacks jurisdiction to grant relief with respect to out-of-state real property. Defendants contend that the fourth cause of action (slander of title) should be dismissed because Manteiga has failed to plead that he sustained special damages. With regard to the sixth cause of action for conversion, Defendants argue that it should be dismissed because conversion claims do not apply to real estate and because DePaola's interest in the Property was no less than Manteiga's. Defendants contend that the seventh cause of action (breach of fiduciary duty) should be dismissed because a tenancy in common does not create a fiduciary relationship. Because the Verified Complaint fails to state causes of action for fraud and breach of fiduciary duty, Defendants contend that the eleventh and twelfth causes of action (aiding and abetting conversion and breach of fiduciary duty) should also be dismissed. Defendants also argue that the ninth (notary misconduct) and tenth causes of action (negligence) against Nolan should be dismissed because Manteiga has not alleged and cannot prove that he suffered any compensable injury as a result of losing his ownership interest in the Property. Finally, Defendants argue that this action is frivolous and, therefore, Manteiga should be sanctioned and they should be awarded costs and attorneys' fees.

In opposition to the motion, Manteiga states, among other things, that he commenced this action after learning that DePaola forged his name to the deed and was attempting to sell the Property. He argues that the Verified Complaint properly states the causes of action asserted therein.

## DISCUSSION

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7):

[t]he complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

*(Symbol Tech., Inc. v. Deloitte & Touche, LLP, 69 AD3d 191, 193-195 [2d Dept 2009]).*

“In order to state a cause of action to impose a constructive trust, a plaintiff must allege (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment” (*Zane v. Minion, 63 AD3d 1151, 1152 [2d Dept 2009]*). Here, a review of the Verified Complaint reveals that the first cause of action fails to allege any of the foregoing elements. Therefore, the first cause of action fails to state a cause of action to impose a constructive trust and is dismissed.

Defendants argue that this Court lacks subject matter jurisdiction over the second and third causes of action seeking conveyance of the Property because it is located in Pennsylvania. Although defendants couch this argument as being made under CPLR 3211(a)(7), it is CPLR 3211(a)(2) that allows for a motion to dismiss on the ground that the court lacks subject matter jurisdiction. In any event, the Defendants’ contention is without merit. Since this Court has in personam jurisdiction over the parties, it has equity jurisdiction over their rights with respect to foreign realty (*Ralske v. Ralske, 85 AD2d 598, 599 [2d Dept 1981]*). Thus, the motion to dismiss the second and third causes of action is denied.



“Special damages are an element of a cause of action for slander of title based upon the recording of an unfounded claim . . .” (*Rosenbaum v. City of New York*, 8 NY3d 1, 12 [2006]). “[T]he pleading of special damages is a prerequisite for slander of title” (*Pelc v. Berg*, 68 AD3d 1672, 1674 [4<sup>th</sup> Dept 2009]). Special damages must be alleged with sufficient particularity (*Lesesne v Lesesne*, 292 AD2d 507, 509 [2d Dept. 2002]). Here, in his fourth cause of action, Manteiga only alleges that he sustained “damages” as a result of DePaola’s conduct. Because special damages, i.e. pecuniary damage, have not been pleaded with particularity, the complaint fails to state a cause of action for slander of title and the motion to dismiss the fourth cause of action is granted.

To state a claim based on unjust enrichment, an equitable doctrine, “[a] plaintiff must show that (1) defendant was enriched (2) at plaintiff’s expense, and (3) that it is against equity and good conscience to permit ... defendant to retain what is sought to be recovered” (*Lake Minnewaska Mtn. Houses v. Rekis*, 259 AD2d 797, 798 [3<sup>rd</sup> Dept 1999][citation and internal quotation marks omitted]). Here, the fifth cause of action alleges that DePaola was enriched at the expense of Manteiga by transferring title to the Premises to herself. Thus, a cause of action to recover damages for unjust enrichment has been properly stated (*see Cohn v. Rothman-Goodman Mgt. Corp.*, 155 AD2d 579, 581 [2d Dept. 1989]), and the motion to dismiss the fifth cause of action is denied.

Manteiga consents to withdraw the sixth cause of action for conversion. Therefore, the motion to dismiss the sixth cause of action is denied as moot.

A cause of action alleging breach of fiduciary duty is predicated on the existence of a fiduciary relationship between the parties (*Guarino v. North Country Mtge. Banking Corp.*, 79 AD3d 805, 807 [2d Dept. 2010]). Here, the seventh cause of action alleges that a fiduciary relationship existed between Manteiga and DePaola by virtue of being tenants in common in the Property. Co-tenants owe each other a fiduciary duty and may not ordinarily purchase or acquire an adverse title to or encumbrance against the common property without the other’s consent (*Snyder v. Puente De Brooklyn Realty Corp.*, 297 AD2d 432, 435-436 [3<sup>rd</sup> Dept 2002]; *see Jemzura v. Jemzura*, 36 NY2d 496, 502-503 [1975]). Thus, the motion to dismiss the seventh cause of action is denied.

A cause of action for fraud must allege a misrepresentation or omission of a material fact

which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance by such party on the misrepresentation or material omission, and injury resulting therefrom (*Ross v. Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]). Here, the Verified Complaint does not allege, in detail (CPLR 3016[b]), any misrepresentation by DePaola made for the purpose of inducing Manteiga to rely upon it, or justifiable reliance by Manteiga. Therefore, the motion to dismiss the eighth cause of action is granted.

Defendants contention that the ninth and tenth causes of action “should be dismissed for failure to state a cause of action because they are inherently lacking in merit in that Manteiga has not pleaded – and cannot prove – that he suffered any monetary damages” is without merit. Such an argument is more appropriately made on a motion for summary judgment, not a motion to dismiss for failure to state a cause of action. In any event, because the ninth and tenth causes of action allege that Manteiga sustained compensatory damages as a result of Nolan’s alleged misconduct/negligence as a notary in connection with the Property, they sufficiently state causes of action. Contrary to Defendants’ contention, Manteiga is not required, at the pleading stage, to provide a rationale for his alleged damages.

Manteiga consents to withdraw the eleventh cause of action for aiding and abetting conversion. Therefore, the motion to dismiss the eleventh cause of action is denied as moot.

A cause of action for aiding and abetting a breach of fiduciary duty does not lie unless there is a viable breach of fiduciary duty claim (*Kassover v. Prism Venture Partners, LLC*, 53 AD3d 444, 449 [1<sup>st</sup> Dept 2008]). Here, Defendants argue that Manteiga’s claim for aiding and abetting a breach of fiduciary duty must be dismissed because the seventh cause of action fails to state a cause of action for breach of fiduciary duty. However, as stated above, the seventh cause of action sufficiently states a cause of action for breach of fiduciary duty based on the alleged fiduciary relationship between Manteiga and DePaola by virtue of being tenants in common in the Property. Therefore, Defendants’ motion to dismiss the twelfth cause of action is denied.

“New York does not recognize civil conspiracy to commit a tort as an independent cause of action; rather, such a claim stands or falls with the underlying tort” (*Scott v. Fields*, 85 AD3d 756, 757 [2d Dept. 2011]). Since the viability of the cause of action for conspiracy to commit

fraud is derivative of the underlying tort of fraud, and the latter claim is dismissed (see above), the thirteenth cause of action alleging a civil conspiracy also must be dismissed.

Based upon the foregoing, that branch of the Defendants' motion seeking sanctions because this action is purportedly frivolous is denied.

This constitutes the *DECISION* and *ORDER* of the Court.

**Dated: November 30, 2011**  
**Riverhead, New York**

  
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EMILY PINES  
J. S. C.

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