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SHORT FORM ORDER

INDEX No. 09-42253

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-21-11 (#003)
MOTION DATE 10-27-11 (#004 & #005)
ADJ. DATE 10-27-11
Mot. Seq. # 003 - MD
004 - XMD
005 - MD

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FREDERICK VIGLIETTA,

Plaintiff,

- against -

ALAIN LAVOIE and STELLA LOUISE LAVOIE,

Defendants.

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Upon the following papers numbered 1 to 24 read on these motions to reargue/dismiss/impose sanctions ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7, 8 - 9 ; Notice of Cross Motion and supporting papers 10 - 16 ; Answering Affidavits and supporting papers 17 - 18, 19 - 20 ; Replying Affidavits and supporting papers 21 - 22, 23 - 24 ; Other ; it is,

ORDERED that these motions (seq. #003 & #005) by defendants Stella Lavoie and Alain Lavoie, and this motion (seq. #004) by plaintiff Frederick Viglietta are consolidated for the purposes of this determination; and it is further

ORDERED that this motion (seq. #003) by defendants Stella Lavoie and Alain Lavoie for an Order granting leave to renew and reargue their prior motion, which was denied by Order of this Court dated August 1, 2011, is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that this cross-motion (seq. #004) by plaintiff Frederick Viglietta for an Order dismissing defendants' counterclaims, striking defendants' answer, and imposing sanctions is granted only to the extent that defendants' counterclaims for defamation and an award of punitive damages are dismissed; and it is further

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ORDERED that this motion (seq. #005) by defendants for an Order imposing sanctions and awarding costs and attorney's fees based on plaintiff's alleged frivolous conduct is denied.

Plaintiff Frederick Viglietta commenced this action pursuant to Real Property Law Article 15 to compel the return of real and personal property allegedly converted by his daughter and her husband, defendants Stella Lavoie and Alain Lavoie. Plaintiff and his wife, Stella Viglietta, held title to premises known as 5 Jeffrey Lane, Lake Success, New York, as tenants by the entirety until she passed away in May 2000. Following a hospitalization for illnesses and accident-related injuries, plaintiff allegedly agreed to let defendants live at his residence rent free if they promised to help take care of him and manage his financial affairs. By his complaint, plaintiff alleges, among other things, that defendants forged his signature in connection with a fraudulent sale of his residence; that defendants used the proceeds of the sale and money taken from his bank account and safety deposit box to purchase their current residence and other personal items; that defendants did not include his name on the deed to the new residence; that defendants refused to let him back into the residence following an accident that required his hospitalization; and that defendants unlawfully cashed his pension and social security checks while he was at a rehabilitation facility. Simultaneous with the commencement of this action, plaintiff filed a notice of pendency against defendants' residence, known as 50 Annadale Road, Commack, New York. On December 17, 2009, defendants joined issue by filing an answer with counterclaims. Defendants' counterclaims includes causes of action for punitive damages, defamation and an award of punitive damages based on harm to their reputation.

By Order dated August 1, 2011, this Court denied a motion by defendants seeking, *inter alia*, dismissal of plaintiff's complaint and cancellation of a notice of pendency filed against the subject residence, as well as a cross-motion by plaintiff for an Order striking defendants' answer. Defendants now seek to renew and reargue their prior motion, and request that they be granted leave to amend their answer to include various affirmative defenses, including estoppel and Statute of Frauds, and a third counterclaim based on slander of title. Plaintiff cross-moves for an Order dismissing defendants' counterclaims, striking their answer based upon their alleged failure to respond to discovery demands, and imposing sanctions for frivolous conduct. By way of an additional motion, incorrectly labeled as a cross-motion, defendants also seek an Order imposing sanctions against plaintiff based upon his alleged frivolous conduct in connection with this motion and prolonging litigation.

A motion for leave to renew must be based on new or additional facts "not offered on the prior motion that would change the prior determination" and "shall contain a reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 (e) (2), (3); *see* ***Ramirez v Khan***, 60 AD3d 748, 874 NYS2d 257 [2d Dept 2009]; ***Lardo v Rivlab Transp. Corp.***, 46 AD3d 759, 848 NYS2d 337 [2d Dept 2007]). While a court may grant renewal upon facts known at the time of the original motion, leave to renew should be denied when the moving party fails to offer a reasonable excuse for not submitting such new facts on the prior motion (*see* ***Sobin v Tylutki***, 59 AD3d 701, 873 NYS2d 743 [2d Dept 2009]; ***Boakye-Yiadom v Roosevelt Union Free School Dist.***, 57 AD3d 929, 871 NYS2d 314 [2d Dept 2008]; ***Worrell v Parkway Estates, LLC***, 43 AD3d 436, 840 NYS2d 817 [2d Dept 2007]), as it is "not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" or who failed to assert a legal theory due to a mistaken "assumption that what was

submitted was adequate" (***Matter of Weinberg***, 132 AD2d 190, 210, 522 NYS2d 511 [1st Dept 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]; *see* ***Castillo v 711 Group, Inc.***, 55 AD3d 773, 866 NYS2d 321 [2d Dept 2008]; ***Hart v City of New York***, 5 AD3d 438, 772 NYS2d 574 [2d Dept 2004]). Conversely, a motion for leave to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, and may not be used to advance arguments different than those presented on the prior motion (CPLR 2221 (d) (2); *see* ***Mazinov v Rella***, 79 AD3d 979, 912 NYS2d 896 [2d Dept 2010]; ***Pryor v Commonwealth Land Title Ins. Co.***, 17 AD3d 434, 793 NYS2d 452 [2d Dept 2005]).

In support of the branch of the motion for renewal, defendants submit affidavits by Gloria Boyd, John Haplin and Sheldon Feinstein, as well as a copy of the 2000 federal income tax return filed by plaintiff. Defendants failed, however, to offer any reasonable justification for their failure to include such evidence in their prior motion. Rather, defendants aver that the purported new evidence was not "readily available," and that they unexpectedly came across plaintiffs' tax return while searching through their own records. Accordingly, the branch of defendants' motion seeking renewal of the motion is denied (*see* ***Sobin v Tylutki***, *supra*; ***Boakye-Yiadom v Roosevelt Union Free School Dist.***, *supra*; ***Worrell v Parkway Estates, LLC***, *supra*; ***Castillo v 711 Group, Inc.***, *supra*).

As for the branch of defendants' motion seeking reargument, defendants failed to demonstrate that the Court overlooked or misapprehended the relevant facts or law, and improperly sought to advance arguments different than those presented in the prior motion. Significantly, defendants do not argue that the Court erred with respect to its determination that judicial preemption was inapplicable, because plaintiff's bankruptcy proceeding was dismissed without a decision on the merits. Rather, they argue, based on the newly submitted tax return, that plaintiff is estopped from advancing in this case any position inconsistent with the position taken on his tax return. Therefore, the branch of defendants' motion seeking reargument of the prior determination also is denied (*see* ***Haque v Daddazio***, 84 AD3d 940, 922 NYS2d 548 [2d Dept 2011]; ***Mazinov v Rella***, *supra; **Pryor v Commonwealth Land Title Ins. Co.***, *supra*).

With regard to the branch of defendants' motion seeking leave to amend their answer to include new affirmative defenses and counterclaims, defendants waived the affirmative defenses of estoppel, payment, and the Statute of Frauds by failing to raise them either in a pre-joinder motion or in their initial answer to plaintiff's complaint (CPLR 3018 (b); CPLR 3211 (e); ***Mayers v D'Agostino***, 58 NY2d 696, 458 NYS2d 904 [1982]; ***Matter of Simonds v Kirkland***, 67 AD3d 1481, 889 NYS2d 350 [4th Dept 2009]; ***Raoul v Olde Village Hall, Inc.***, 76 AD2d 319, 430 NYS2d 214 [2d Dept 1980]; ***Blecher v Pecoral***, 16 AD2d 878, 559 NYS2d 553[2d Dept 1990]). Moreover, defendants' proposed counterclaim based on slander of title is palpably insufficient and devoid of merit, as such a cause of action does not lie where, as here, defendants failed to plead special damages resulting from the loss of a sale of the subject property (*see* ***Rosenblum v City of New York***, 8 NY3d 1, 828 NYS2d 228 [2006]; ***Hanbidge v Hunt***, 183 AD2d 700, 583 NYS2d 288 [2d Dept 1992]). Nevertheless, inasmuch as plaintiff has not demonstrated any surprise or prejudice with respect to the remainder of the proposed affirmative defenses based on failure to state a cause of action, failure to plead with particularity and failure to name all necessary parties, the branch of defendants' motion for leave to amend its answer accordingly, is

granted (*see* ***Lariviere v New York City Tr. Auth.***, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]).

However, the branch of plaintiff's cross-motion for an Order dismissing defendants' counterclaims pursuant to CPLR 3211 (a) (7) is granted to the extent that defendants' counterclaim for defamation and an award of punitive damages based upon alleged harm to their reputation is dismissed. Although defendants have submitted a copy of a newly proposed amended answer with their motion, "[i]t is the rule in the Second Department that a motion to dismiss which is addressed to the merits may not be defeated by an amended pleading" (***Livadiotakis v Tzitzikalakis***, 302 AD2d 369, 370, 753 NYS2d 898 [2d Dept 2003]; *see also* ***Treano v Fine***, 17 AD3d 449, 793 NYS2d 451 [2d Dept 2005]). Moreover, a defendant whose motion is addressed to the merits of the pleadings retains the option of applying their motion to the amended pleadings (*see* ***Sage Realty Corp. v Proskauer Rose***, 251 AD2d 35, 675 NYS2d 14, *rev'd on other grounds* at 91 NY2d 30, 66 NYS2d 985 [1997]; *see also* ***49 W. 12 Tenants Corp. v Seidenberg***, 6 AD3d 243, 774 NYS2d 339 [1st Dept 2004]; ***DiPasquale v Security Mut. Life Ins. Co. of N.Y.***, 293 AD2d 394, 740 NYS2d 626 [1st Dept 2002]).

Where, as here, a defendants' counterclaim for defamation failed to set forth the particular defamatory words, or the time, place and to whom they were made, the pleadings are deficient and dismissal of the counterclaim is warranted (*see* ***Dillon v City of New York***, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]; *see also* ***Eden Park Health Servs., Inc. v Ottley***, 87 AD2d 967, 451 NYS2d 250 [3d Dept 1982]). Dismissal of defendants' counterclaim for defamation also mandates dismissal of their counterclaim for punitive damages based on alleged harm to their reputations, as New York does not recognize a claim for punitive damages as an independent cause of action (*see* ***Rocanova v Equitable Life Assur. Socy. of U.S.***, 83 NY2d 603, 612 NYS2d 339 [1994]; ***Rose Lee Mfg. v Chemical Bank***, 186 AD2d 548, 588 NYS2d 408 [2d Dept 1992]; ***State v General Elec. Co.***, 199 AD2d 595, 604 NYS2d 355 [3d Dept 1993]; ***Nichols v Village Voice***, 57 AD2d 527, 393 NYS2d 716 [1997]). Defendants shall serve an amended answer containing the remaining affirmative defenses, along with a copy of this Order, upon plaintiff within 30 days of the entry of this Order.

Turning to the branch of plaintiff's cross-motion for an Order striking defendants' answer based on their alleged failure to appear for depositions, the nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is within the sound discretion of the court (*see* ***Pirro Group, LLC v One Point St., Inc.***, 71 AD3d 654, 655, 896 NYS2d 152 [2d Dept 2010]). However, the "sanction of striking a pleading should be imposed only where the failure to comply with court-ordered discovery is shown to be willful and contumacious" (***Giano v Ioannou***, 78 AD3d 768, 770, 911 NYS2d 398 [2d Dept 2010], *quoting* ***Byam v City of New York***, 68 AD3d 798, 801, 890 NYS2d 612 [2d Dept 2009]). "A finding that a party's conduct is willful and contumacious is warranted where the party has repeatedly failed to comply with court-ordered discovery and has offered inadequate explanations for the failures to comply" (***Giano v Ioannou***, *supra* at 771, *quoting* ***Savin v Brooklyn Mar. Park Dev. Corp.***, 61 AD3d 954, 955, 878 NYS2d 178 [2d Dept 2009]).

Here, it was not clearly demonstrated that defendants' failure to appear for depositions was willful, contumacious, or done in bad faith so as to warrant the extreme sanction of striking their answer (*see* CPLR 3126 [3]; ***Greene v Mullen***, 70 AD3d 996, 997, 893 NYS2d 895 [2d Dept 2010]; ***W.O.R.C.***

Realty Corp. v Assessor, 32 AD3d 860, 861, 823 NYS2d 407 [2d Dept 2006]). Indeed, plaintiff's own affirmation indicates that defendants have not violated any Court-Ordered discovery or deposition hearing schedule, and that the most recent date to conduct depositions was postponed due to defendants' submission of a motion seeking summary dismissal of the action. Thus, the branch of plaintiff's cross-motion seeking an Order striking defendants' answer is denied.

Lastly, the application by plaintiff for an Order, pursuant to 22 NYCRR 130-1.1, imposing sanctions and awarding costs and attorney's fees based on frivolous conduct, is denied, as is the cross-motion by defendants for the same relief. The Court finds that neither plaintiff nor defendants engaged in conduct which constitutes frivolous conduct as that term is defined in 22 NYCRR 130-1.1 (c) (*see* ***McGee v J. Dunn Constr. Corp.***, 54 AD3d 1009, 864 NYS2d 167 [2d Dept 2008]; *cf.* ***Makan Land Dev. - Three, LLC v Prokopov***, 42 AD3d 439, 839 NYS2d 787 [2d Dept 2007]; ***Mascia v Maresco***, 39 AD3d 504, 833 NYS2d 207 [2d Dept 2007]; ***Ofman v Campos***, 12 AD3d 581, 788 NYS2d 115 [2d Dept 2004], *lv dismissed* 4 NY3d 846, 797 NYS2d 422 [2005]).

Dated: February 27, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION