

Leidel v Annicelli

2012 NY Slip Op 31831(U)

June 6, 2012

Supreme Court, New York County

Docket Number: 102456/2010

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. SALIANN SCARPULLA PART 19
J.S.C.

PETER A. LEIDEL and PAMELA LEIDEL,

Plaintiffs,

- v -

INDEX NO. 102456/2010
MOTION DATE _____
MOTION Seq. No. 003

JOHN P. ANNICELLI, d/b/a
OLD STONE HILL ROAD ASSOCIATES,
NEW YORK SMSA LIMITED PARTNERSHIP, and
OLD STONE HILL ROAD ASSOCIATES,

FILED

JUL 11 2012

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for _____

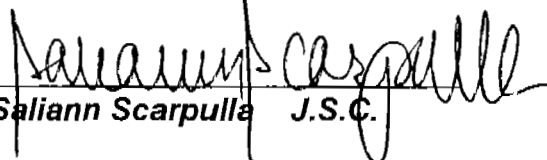
Notice of Motion/Petition/Order to Show Cause — Affidavits — Exhibits
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is hereby ordered that the summary judgment motion by defendants John P. Annicelli, d/b/a Old Stone Hill Road Associates, New York SMSA Limited Partnership, and Old Stone Hill Road Associates, and the cross-motion for summary judgment by plaintiffs Peter A. Leidel and Pamela Leidel, are decided in accordance with the accompanying memorandum decision.

Dated: June 6, 2012


Saliann Scarpulla J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
PETER A. LEIDEL and PAMELA LEIDEL,

Plaintiffs,

- against-

Index No.: 102456/2010
Submission Date: 03/14/2012

JOHN P. ANNICELLI, d/b/a
OLD STONE HILL ROAD ASSOCIATES,
NEW YORK SMSA LIMITED PARTNERSHIP, and
OLD STONE HILL ROAD ASSOCIATES,

Defendants.

----- X

For Plaintiff:
Steven R. Haffner, Esq.
18-15 215th Street, Suite 4J
Bayside, NY 11360

For Defendant John P. Annicelli, d/b/a
Old Stone Hill Road Associates:
Michael F.X. Ryan, Esq.
3005 East Main Street
Cortlandt Manor, NY 10567

For Defendant New York SMSA Partnership:
Snyder & Snyder, LLP
94 White Plains Road
Tarrytown, NY 10591

FILED

JUL 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Aff in Support and	
Mem of Law	2
Mem of Law in Opp	3
Reply Mem of Law	4

HON. SALIANN SCARPULLA, J.:

In this unjust enrichment action, defendants John P. Annicelli, d/b/a Old Stone Hill Road Associates, New York SMSA Limited Partnership ("Verizon"), and Old Stone Hill

Road Associates (“Old Stone”) (collectively “defendants”) move (1) pursuant to CPLR 3211(a)(5) to dismiss the complaint based on res judicata, collateral estoppel and/or statute of limitations, (ii) pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action, and (iii) pursuant to CPLR 3212 for summary judgment. Plaintiffs Peter A. Leidel and Pamela Leidel (the “Leidels”) cross-move for summary judgment on the issue of liability. On March 14, 2012, on the record, the Court denied the Leidels’ cross-motion for a default judgment and granted defendants’ cross-motion to compel the Leidels to accept defendants’ late answer.

The Leidels and Old Stone own parcels of land in Pound Ridge, New York that are subject to a restrictive covenant prohibiting commercial construction. On November 17, 1998, Verizon entered into a lease agreement with Old Stone for the construction of cellular telephone tower (the “tower”) on one of Old Stone’s lots. The purpose of the tower was to provide cellular telephone service in Pound Ridge and surrounding areas.

In June, 2000, the Leidels, along with several other owners of adjacent parcels, commenced an action in New York Supreme Court, Westchester County, alleging that the tower violated the restrictive covenant. *See Chambers v. Old Stone Hill Rd. Assocs.*, 1 N.Y.3d 424, 429 (2004). On November 14, 2001, the Supreme Court held that the defendants were required to remove the tower because the tower violated the restrictive covenant (the “2001 order”). Thereafter, the Appellate Division and Court of Appeals affirmed the 2001 order. *See Chambers v. Old Stone Hill Rd. Assocs.*, 303 A.D.2d 536

(2d Dept. 2003); *Chambers*, 1 N.Y.3d at 429. The Court of Appeals noted in its order (the “2004 order”) that the plaintiffs had consented to “a reasonable time period” for the tower’s relocation. *Chambers*, 1 N.Y.3d at 435.

In May and November, 2007, the Leidels made two separate motions (the “2007 motions”) to hold Old Stone and Verizon in contempt for failure to comply with the 2001 order. In those motions, the Leidels also sought monetary damages for diminution of the use, occupancy and enjoyment of their residence, as well as any rents and profits defendants gained from the tower’s operation. Supreme Court denied the motions on the grounds that the Leidels failed to show that defendants had disobeyed the 2004 order.

In October, 2009, the Second Department affirmed the Supreme Court’s denial of the 2007 motions (the “2009 order”), stating that “the record supports the ... conclusion that Verizon proceeded diligently and in good faith to obtain a building permit to construct the replacement facility and dismantle the original facility.” *Chambers v. Old Stone Hill Rd. Assoc.*, 66 A.D.3d 944, 946 (2d Dept. 2009). The Second Department further noted that “[t]he Leidel plaintiffs’ failure to establish that they suffered any injury or compensable damages also warranted denial of their motions.” *Chambers*, 66 A.D.3d at 946.

Though defendants removed the tower in July, 2007, the Leidels commenced this action in February 2010 to recover “the rents, proceeds, fees and profits” defendants gained through their operation of the tower after the 2004 order. In their complaint, the

Leidels plead causes of action for quasi-contract, constructive trust and unjust enrichment.¹ The Leidels do not plead in their complaint that they suffered any specific quantifiable damages. Instead, the Leidels allege that allowing defendants to benefit from the tower's operation would be inequitable and that therefore defendants should disgorge any profit in favor of the Leidels.

On July 30, 2010, defendants served their Verified Answer. In their Answer, defendants assert various affirmative defenses, including failure to state a cause of action, res judicata, collateral estoppel and the statute of limitations.

Defendants now move to dismiss and/or for summary judgment, arguing that the 2001 order and 2009 order bar the Leidels' claims. Specifically, defendants contend that this action is barred under res judicata because the Leidels' claims arise out of the same transaction underlying the 2001 order and 2009 order. Defendants further argue that the Leidels are estopped under the 2009 order from arguing that they are entitled to monetary damages as a result of defendants' operation of the tower.

Defendants also maintain that the Leidels have failed to state a cause of action for unjust enrichment, constructive trust or quasi-contract, because defendants did not benefit at the Leidels' expense, and because a valid contract in the form of a restrictive covenant already existed between the Leidels and defendants. Lastly, defendants argue that the

¹In June 2011, this Court denied defendants' motion to change venue to Westchester County. *See Leidel v. Annicelli*, 2011 N.Y. Misc. LEXIS 2960 (Sup. Ct. NY Cty. 2011).

complaint is time-barred because they constructed the tower in 2000, outside the six-year statute of limitations for unjust enrichment and constructive trust claims.

In opposition, and in support of their cross-motion for summary judgment, the Leidels argue that the Court may not consider defendants' CPLR 3211 motion because it is untimely, or defendants' CPLR 3212 motion because issue has not been joined. The Leidels also contend that defendants improperly assert CPLR 3211(a) grounds for dismissal in the CPLR 3212 motion.

In addressing the substance of the motions, the Leidels maintain that they are not barred under the doctrine of *res judicata* from prosecuting this action because the claims here arise from acts and events which occurred after the 2001 order. The Leidels argue that this action is not precluded by the 2009 order because that order was non-final. They further maintain that they are not collaterally estopped by the 2009 because the damages issue was not necessary to the determination of that order, and their burden of proof was higher there.

The Leidels further contend that they have stated causes of action for unjust enrichment, constructive trust and quasi-contract because defendants should not, in good equity, retain the benefits of their wrongful construction of the tower. Lastly, the Leidels argue that this action is not time-barred because the complaint here relates to defendants' conduct after the 2004 order.

Discussion

As an initial matter, the Court rejects the Leidels' argument that defendants' summary judgment motion is premature pursuant to CPLR 3212(a) because issue has not been joined. Issue has been joined, as defendants served their Verified Answer on July 30, 2010 and the Court previously granted defendants' motion to compel the Leidels to accept their Answer. Further, because defendants asserted CPLR 3211(a) grounds for dismissal in their Answer, defendants may raise them in a CPLR 3212 summary judgment motion. *See Houston v. Trans Union Credit Info. Co.*, 154 A.D.2d 312, 313 (1st Dept. 1989). The Court will thus address the merits of the parties' motions for summary judgment.

On a motion to dismiss a complaint for failure to state a cause of action, the sole inquiry is whether, according the facts alleged in the complaint every favorable inference, any cognizable cause of action can be made out. *See Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dept. 2006).

Here, even after according the complaint the required favorable inference, the Leidels have failed to state a cause of action for unjust enrichment. In an unjust enrichment claim, a plaintiff must show that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against good equity and good conscience to allow the defendant to retain what plaintiff seeks to recover. *Mandarin Trading Ltd v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). A plaintiff must also allege mutual dealings with the

defendant to state a cause of action for unjust enrichment. *Georgia Malone & Co., Inc. v. Rieder*, 2012 NY LEXIS 1890, at *7-8 (June 28, 2012). First, the Leidels have not alleged any relationship of mutual dealing with defendants. Further, the Leidels have not alleged that they suffered any specific, identifiable damages because of defendants' failure to timely remove the tower.² See *Chambers*, 66 A.D.3d at 946; see also *Smith v. Chase Manhattan Bank, USA, N.A.*, 293 A.D.2d 598, 600 (2d Dept. 2002). Thus, the Court dismisses the unjust enrichment cause of action.

The Leidels have also failed to state a cause of action for a constructive trust. A constructive trust may be imposed where a party acquired property under circumstances in which it would be inequitable to allow that party to retain it. *Cruz v. McAneney*, 31 A.D.3d 54, 58-59 (2d Dep't. 2006). The elements of a constructive trust are "(1) a confidential or fiduciary relation[ship], (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." *Shark v. Kosmalski*, 40 N.Y.2d 119, 121 (1976). Though courts apply these factors flexibly, see *Cruz*, 31 A.D.3d at 59, there must be a promise,

² The Leidels maintain in their opposition that "it defies human experience and common sense" to argue that they did not suffer any damages from the construction of a 120-foot tower in their high-end residential area. Review of their complaint, however, shows that the Leidels have not alleged any loss in their complaint, but demand that defendants disgorge their alleged ill-gotten gains. Further, this argument is moot as defendants have already removed the tower, and the Leidels do not allege any attempt to sell or rent their property at a lower value before defendants removed the tower. See *Coleman v. Daines*, 79 A.D.3d 554, 558 (1st Dept. 2010).

either express or implied, for the Court to impose a constructive trust. *See Scivoletti v. Marsala*, 61 N.Y.2d 806, 808 (1984).

Here, the Leidels maintain that it would be inequitable to allow the defendants to retain the benefits of their violation of the restrictive covenant, thus the Court should impose a constructive trust on these proceeds. However, the Leidels fail to plead any confidential or fiduciary relationship between the parties, any promise by defendants, or any transfer in reliance thereon. Accordingly, the Court dismisses their constructive trust claim. *See Liselli v. Liselli*, 263 A.D.2d 468, 469 (2d Dept. 1999).

Lastly, the Court dismisses the Leidels' quasi-contract cause of action. "[T]o recover under a theory of quasi contract, a plaintiff must be able to prove that performance was rendered for the defendant, resulting in its unjust enrichment." *Metropolitan Electric Mfg. Co. v. Herbert Constr. Co.*, 183 A.D.2d 758, 759 (2d Dept. 1991); *see also Kagan v. K-Tel Entm't*, 172 A.D.2d 375, 376 (1st Dept. 1991). As the Leidels do not allege that they conferred any service or benefit on defendants, their quasi-contract claim fails as a matter of law. *See Outrigger Constr. Co. v. Bank Leumi Trust Co.*, 240 A.D.2d 382, 382 (2d Dept. 1997).³

In accordance with the foregoing, it is hereby

³Because the Court holds that the Leidels have failed to state a cause of action to recover revenue defendants gained from the tower, the Court does not address whether their claims are barred by res judicata, collateral estoppel or the statute of limitations, or whether the restrictive covenant bars equitable relief as a matter of law.

ORDERED that the motion to dismiss and/or for summary judgment by defendants John P. Annicelli, d/b/a Old Stone Hill Road Associates, New York SMSA Limited Partnership, and Old Stone Hill Road Associates, is granted; and it is further

ORDERED that the cross-motion for summary judgment by plaintiffs Peter A. Leidel and Pamela Leidel is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

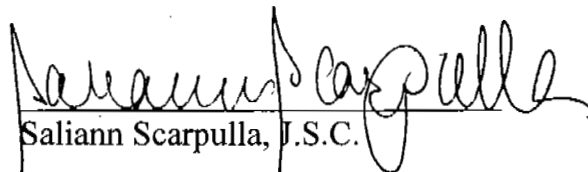
Dated: New York, New York
July 10, 2012

FILED

JUL 11 2012

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Saliann Scarpulla, J.S.C.