Palmieri v Perry, Van Etten, Rozanski & Prima Vera, LLP
2017 NY Slip Op 32694(U)
December 7, 2017
Supreme Court, Suffolk County
Docket Number: 15-18431
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX NO. 15-18431

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 30 - SUFFOLK COUNTY

PRESENT:

HON. DAVID T. REILLY
Supreme Court Justice

PAUL PALMIERI,

Plaintiff,

-against-

PERRY, VAN ETTEN, ROZANSKI & PRIMAVERA, LLP, GEOFFREY PFORR, ESQ., (Individually and in his capacity as a partner in PERRY, VAN ETTEN, ROZANSKI & PRIMAVERA, LLP),

Defendants.

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MOTION DATE: 04/20/16
SUBMITTED: 10/04/17
MOTION SEQ. NO.: 2
MOTION: MG

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Defendants dated March, 2016 and supporting papers; (2) Plaintiff's Affirmation in Opposition dated June 3, 2016 and supporting papers; (3) Defendants Reply Affirmation dated June 21, 2016; and (4) Plaintiff's Amended and Supplemental Affirmation in Opposition dated June 3, 2016 (~~and after hearing counsel in support and in opposition to the motion~~) it is

ORDERED that defendants' application for an Order dismissing the plaintiff's Complaint pursuant to Civil Practice Law and Rules (CPLR) §3211 is granted and the plaintiff's Complaint is dismissed.

In this action, plaintiff alleges causes of action sounding in, among other things, abuse of process, conspiracy, trespass, tortious interference with a contract, conversion and violation of

Judiciary Law §487 against the defendant law firm and a partner of that law firm individually.[1] The genesis of this action (Palmieri II) lies in another matter entitled *Paul Palmieri v. Town of Babylon*, Suffolk County Supreme Court, Index No. 17598-1999 (Palmieri I). In Palmieri I, which has endured its own tortured history, the plaintiff commenced an action against the Town of Babylon seeking to recover damages for alleged trespass by unspecified individuals onto his property using a public access way from a public road. Plaintiff lives near the end of Little East Neck Road which terminates at the Great South Bay. It is from that terminus that plaintiff alleges the unspecified individuals gained access to his property.

A short recitation of the procedural history of Palmieri I, as culled from the record currently before the Court, is necessary for a full understanding of the instant determination. Palmieri I was seemingly settled when the parties entered into a Stipulation dated July 17, 2004 which was filed in the County Clerk's office on August 6, 2004. According to the Stipulation, the Town agreed to erect or cause to be erected an eight (8') foot high chain-link fence having a gate secured by a lock essentially blocking off public access to plaintiff's property. The fence was to be built within sixty (60) days of the signing of the Stipulation. On July 24, 2006 the Town of Babylon moved to vacate that Stipulation based upon their contention that the proposed fence was illegal because it blocked navigable waters. A Justice of this Court [Cohalan, J.] agreed and granted that motion on June 11, 2007. Plaintiff then appealed to the Appellate Division, Second Department.

The Appellate Division reversed this Court in a decision dated November 25, 2008. At that point in the litigation rather than comply with its obligations under the Stipulation, the Town of Babylon filed a motion pursuant to CPLR §3211 seeking dismissal of the plaintiff's Complaint. That motion was denied and the decision affirmed (*see* ***Palmieri v. Town of Babylon***, 87 AD3d 625 [2011]). Of note, the Appellate Division, Second Department declined to impose sanctions against the Town of Babylon, as requested by the plaintiff. This Court is unaware of what, if anything, occurred in the next six (6) years, however, on May 16, 2014, plaintiff moved for contempt against the Town of Babylon, the Supervisor and the Town Council. It appears from the record before the Court that the defendants therein claimed that the Town's failure to erect the fence was due to the changing topography of the subject area in that Hurricane Sandy caused sufficient erosion such that the location of the proposed fence was now underwater thereby invoking the jurisdiction of the Department of Environmental Conservation (DEC). The Town defendants maintained that approval from that agency was now necessary before the fence could be erected. On July 29th and 31st, 2015 that matter came to a hearing and in a decision dated October 29, 2015 the Court [Hudson, J.] denied the application for contempt "based solely on an insufficiency of proof," but warned the parties that they should move expeditiously to fulfill the obligations imposed by the Stipulation.

Plaintiff Palmieri, by service of an Amended Summons dated October 30, 2015, commenced this separate action against the law firm (PVRP) and an individual partner within that law firm,

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[1]Plaintiff's cause of action sounding in fraud/collusion has been withdrawn.

defendant Geoffrey Pforr, Esq. (Pforr) who represented the Town of Babylon. The gravamen of the complaint is that PVRP and Pforr intentionally deprived the plaintiff of his right to have the fence built by the Town in a timely manner by claiming that the fence had to be approved by the DEC and an application would have to be submitted to that agency. The Complaint also alleges that the attorneys and the Town of Babylon conspired to deny the plaintiff the installation of the fence by fraud and deceit.

PVRP and Pforr now move to dismiss the plaintiff's Complaint on various grounds under the umbrella of CPLR §3211(a). Among the deficiencies argued by the defendants are that their defense is founded upon documentary evidence, the action may not be maintained on account of res judicata, plaintiff has failed to state a cause of action and plaintiff has failed to perfect service upon Pforr as an individual.

Plaintiff responds by initially seeking the recusal of Justice Hudson, who was assigned to this case when this motion was first submitted. That portion of the plaintiff's argument is dismissed as moot as the matter is now before the undersigned. Next, plaintiff maintains that the issues presented in this action bear little resemblance to the issues presented in the contempt proceeding in Palmieri I such that the doctrines of res judicata or collateral estoppel do not apply. In addition, plaintiff argues that he has sufficiently pled causes of action for, among other things, abuse of process, conspiracy, conversion, tortious interference with a contract and a violation of Judiciary Law §487.

Initially, with respect to the personal jurisdiction of Pforr, CPLR §308(1) provides for personal service upon a natural person and requires that service be attempted by personal delivery of the Summons to the person to be served. In the alternative, CPLR §308 (2) requires service by delivery to a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode and by mailing the Summons to the person to be served. Although there exists a presumption that proper service of process was made, if a plaintiff fails to properly serve a defendant with process, all subsequent proceedings are null and void (*see* ***Ananda Capital Partners, Inc. v Stav Elec. Sys. (1994) Ltd.***, 301 AD2d 430 [1st Dept 2003]). Service of process must be made in strict compliance with statutory methods for effecting personal service pursuant to CPLR §308 (*see* ***Estate of Waterman v Jones***, 46 AD3d 63 [2d Dept 2007]). "In the absence of proper service, no personal jurisdiction [is] acquired over [respondents]" (***Klein v Educational Loan Servicing, LLC***, 71 AD3d 957 [2d Dept 2010]).

Here, the plaintiff's attempted personal service on Pforr by leaving a copy of the Amended Summons with notice with a receptionist at PVRP. Pforr maintains that the receptionist was not authorized to accept service of process on him individually, nor was she his designated agent for service of process pursuant to CPLR §318 (Designation of agent for service). In addition, Pforr argues that service was never perfected pursuant to CPLR §308(2) in that plaintiff has failed to submit proof that a copy of the Amended Summons with Notice was mailed to him within ten (10) days of service. Plaintiff responds by arguing that Pforr, an attorney, should not be permitted to escape liability based upon a mere technicality and that he had notice of the commencement of the

action through service on PVRP.

The mandates of CPLR §308 are quite clear. Equally clear is that plaintiff has failed to show that the strict service of process requirements over the individual defendant was effectuated. Therefore, no personal jurisdiction has been acquired over Pforr and the action is dismissed as to him as an individual defendant.

Next, the doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (***Ryan v New York Tel. Co.***, 62 NY2d 494 [1984]; ***Breslin Realty Dev. Corp. v Shaw***, 72 AD3d 258 [2d Dept 2010]). Once the party seeking the benefit of collateral estoppel establishes that the identical issue was material to a prior judicial or quasi-judicial determination, the party to be estopped bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*see* ***Id.***).

With respect to the contempt application in Palmieri I, the Court [Hudson, J.]detailed the issue to be addressed at the hearing in a decision dated June 3, 2015. That decision, in sum and substance, indicated that the plaintiff alleged that the Town defendant wilfully failed to comply with the Stipulation and that the defendants were contending that their efforts towards compliance were thwarted by the effects of Hurricane Sandy thereby necessitating the intervention of the DEC. The Court further noted that the plaintiff viewed this explanation as subterfuge.

At the contempt hearing, much of the testimony adduced from the plaintiff centered around the timing of the Town's application for a permit from the DEC and the necessity of that application relative to the placement of the proposed fence. Plaintiff argued that the Town submitted the application to the DEC in an effort to stall the erection of the fence in that the application referenced a proposed fence that the Town knew would not be approved, and was not in the same location as the fence proposed in the Stipulation of Settlement. Plaintiff maintains that the application to the DEC was, therefore, unnecessary and filed to impede his rights.

After careful consideration, the Court finds that the plaintiff's causes of action sounding in tortious interference with a contract and violation of Judiciary Law §487 must be dismissed based upon the doctrine of collateral estoppel. Throughout the plaintiff's Complaint are allegations that the defendants herein engaged in a scheme with the Town of Babylon to deny the plaintiff the relief afforded him within the 2004 Stipulation of Settlement. As the Palmieri I litigation endured the torturous history evidenced by the present record before the Court, certain factors occurred which operated to stall the Town's obligation to construct the fence at issue, most notably the motions and appeals which litter the record.

Those factors culminated in the plaintiff's contempt motion in Palmieri I in which the plaintiff strenuously argued that the Town defendants intentionally refused to abide by the terms of

the Stipulation of Settlement. The only difference between the contempt motion and the instant action that the Court can discern is the name of the defendants in each action. That being said, the Court can find no evidence of collusion or tortious interference on the part of PVRP, only zealous representation of their client within the permitted bounds of attorney advocacy.

Next, in determining whether to dismiss a Complaint pursuant to CPLR §3211(a)(7), the Court must assume to be true the facts pled, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (***Dickinson v Igoni***, 76 AD3d 943 [2d Dept 2010]; ***Tsutsui v Barasch***, 67 AD3d 896 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11 [2005]). In determining if a pleading states a cause of action, "the sole criterion" for the Courts is whether "from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (***Guggenheimer v Ginzburg***, 43 NY2d 268 [1977]).

A claim for abuse of process has three essential elements: (1) regularly issued process; (2) an intent to harm without excuse or justification; and (3) use of process in a perverted manner to obtain a collateral objective (***Varela v. Investors Ins. Holding Corp.***, 185 AD2d 309 [2d Dept 1992]). In determining that there existed no collusion or toutious interference on the part of PVRP, the plaintiff's cause of action alleging abuse of process must fail. Stated otherwise the Court, as noted above, has determined that PVRP's representation of the Town of Babylon cannot be characterized in such a manner as to support the second element necessary for this cause of action, that PVRP intended to harm the plaintiff without excuse or justification.

With respect to that causes of action alleging conspiracy, trespass and conversion, based upon the sum of the foregoing, those causes of action must fail as well in that the Court has determined that the facts alleged in the Complaint cannot support the contention that PVRP engaged in a common scheme or plan to intentionally impede or forestall the erection of the fence at issue. Therefore, as a matter of law, the Complaint fails to set forth sufficient facts to demonstrate liability based upon conspiracy on the part of PVRP. In addition, PVRP cannot be held liable for the actions of unnamed individuals in trespassing upon the plaintiff's property, inasmuch as the law firm had no control over these individuals and cannot be held vicariously liable for their acts (*see generally* ***Feliberty v. Damon***, 72 NY2d 112 [1988]). Accordingly, the Court finds that the plaintiff is unable to sufficiently plead causes of action for trespass and conversion.

Insofar as the Court has found that the above causes of action must be dismissed, that cause of action alleging respondeat superior must also be dismissed. Respondeat superior is a legal principle, not an independent cause of action, but a theory that must attach to an underlying claim (***Greenberg v. JP Morgan Chase Bank, N.A.***, 2014 NY Misc. LEXIS 2011 [Sup Ct, NY County 2014]). Simply stated, upon dismissal of all of the other causes of action, there remains nothing upon which this legal theory could attach.

Finally, the Court must make two significant observations. First, according to the communication sent to the Court by both parties after the submission of the instant application, the fence at issue has been erected by the Town of Babylon according to the terms of the Stipulation of Settlement, save for the minor issue of affixing a lock to the gate. Second, in Palmieri I, the defendant Town of Babylon has submitted to the plaintiff a Stipulation Discontinuing Action With Prejudice which the plaintiff has seemingly refused to sign and which is the subject of a motion currently pending before this Court in that action.

The foregoing constitutes the decision and Order of the Court.

Dated: December 7, 2017
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION