

<b>Juarez v Trillo</b>
2020 NY Slip Op 31039(U)
March 3, 2020
Supreme Court, Bronx County
Docket Number: Index No. 32745/2019E
Judge: Fernando Tapia
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SUPREME COURT OF THE STATE OF NEW YORK  
BRONX COUNTY: Part 13

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JOSE JUAREZ,

Plaintiff(s),

-against-

Index No.: 32745/2019E

JEAN PIERRE TRILLO, PHILLIP O'HARA NASSAU ASSOCIATES, CHICAGO TITLE INSURANCE COMPANY, KROHN ROSENBAUM HAMETZ WALDMAN & WATTERS, LLP, and "JOHN DOE" and "JANE DOE," said names being fictitious, it being the intention of Plaintiff to designate any parties, corporations, agencies, entities, if any having or claiming an interest in the premises,

Defendant(s).

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**DECISION**

This is action concerns a transfer of property whereby defendant, JEAN PIERRE TRILLO is alleged to have fraudulently transferred into his name a property belonging to his grandfather, plaintiff, JOSE JUAREZ. Defendant, CHICAGO TITLE INSURANCE COMPANY ("CTIC") moves under the motion sequenced as ("No. 1") to dismiss JUAREZ claims pursuant to CPLR § § 3211 and 3016. Additionally, CTIC moves under the motion sequenced as ("No. 3") to dismiss defendant, JEAN PIERRE TRILLO's cross claim.

After careful review of the motion papers, CTIC's motion sequenced as ("No. 1") to dismiss JUAREZ claims is **GRANTED** in part and **DENIED** in part. CTIC's motion sequenced as ("No. 3") to dismiss TRILLO's cross claim against it is **GRANTED** in its entirety.

**FACTUAL BACKGROUND**

JUAREZ alleges on or about September 17, 2004 TRILLO forged his name onto an instrument transferring to himself ownership of a property located at 1907 Patterson Avenue,

Bronx, New York 10473.<sup>1</sup> As a result of the transfer, JUAREZ commenced the instant action by filing a summons and complaint on October 27, 2019.<sup>2</sup>

### LATE PAPERS

In its reply, CTIC contends this Court should not accept JUAREZ's opposition because his papers were filed 7 days late without explanation as to their untimeliness. In a sur-reply submitted to the Court, JUAREZ maintains he had good cause for submitting an untimely opposition as his counsel's office mistook the final submission date of December 23, 2019 as the final day to submit opposition papers.

A court has discretion to consider untimely papers, and it is proper for a court to exercise its discretion and hear untimely opposition papers where there is no prejudice by such delay, and the moving party has an opportunity to submit its reply.<sup>3</sup> While sur-replies generally should not be considered, a trial court has authority to regulate motion practice and the discretion to accept any late or sur-reply papers for "good cause."<sup>4</sup> Further, inadvertent law office failures constitute a reasonable excuse for late submissions if such delay is minimal, unintentional with no evidence of willful neglect, and there is no prejudice to the opposing party.<sup>5</sup>

Although sur-replies are generally not accepted, JUAREZ's sur-reply presents no new arguments and only seeks to address why he has good cause for his late submission. JUAREZ's excuse for delay is reasonable as his counsel maintains her office mistook the final submission date of December 23, 2019 for the final date to submit opposition papers, originally set for

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<sup>1</sup> JUAREZ's Complaint, ¶ 13

<sup>2</sup> JUAREZ's Counsel's Affirmation in Support, Ex. A

<sup>3</sup> See, *Navarez v. Wadsworth*, 165 A.D.3d 407, (1<sup>st</sup> Dep't 2018); citing, *Serradilla v. Lords Corp.*, 117 A.D.3d 648 (1<sup>st</sup> Dep't 2014); See also, *Sanchez v. Steele*, 149 A.D.3d 458 (1<sup>st</sup> Dep't 2017).

<sup>4</sup> See, *Indian Harbor Ins. Co. v. Alma Tower, LLC*, 165 A.D.3d 549 (1<sup>st</sup> Dep't 2018); citing, *U.S. Bank Trust, N.A. v. Rudick*, 156 A.D.3d 841 (2<sup>nd</sup> Dep't 2017).

<sup>5</sup> See, *Chevalier v. 368 E. 148<sup>th</sup> St. Assoc., LLC*, 80 A.D.3d 411 (1<sup>st</sup> Dep't 2011).

December 16, 2019.<sup>6</sup> As JUAREZ's opposition was filed only 7 days late the delay was minimal. Considering it suffered no prejudice, and the fact CTIC was still able to file its reply, it is proper for this court to accept JUAREZ's papers as his delay was *de minimis*.

#### STANDING TO FORECLOSE

CTIC argues JUAREZ's first claim seeking a declaratory judgment restricting any foreclosure on the subject property should be dismissed since it has no interest in the subject property, and because no party has defaulted on a mortgage for the subject property. In his opposition, JUAREZ failed to address CTIC's argument regarding its standing to foreclose.

"The right of [a] plaintiff to foreclose [is] dependent upon his acquiring a title to the bond to secure which the mortgage was given."<sup>7</sup> Further, a foreclosure action may not be commenced where no party has defaulted on a mortgage loan.<sup>8</sup>

As CTIC maintains it lacks any interest in a mortgage for the subject property, it thus lacks any standing to commence a foreclosure action. Additionally, no justiciable controversy exists for a foreclosure action since no party has alleged any default on a mortgage for the subject property. Thus, as JUAREZ's first cause of action are not applicable to the facts here, his declaratory judgment claim must be dismissed.

#### FRAUD IN THE INDUCEMENT & CONCEALMENT

CTIC maintains JUAREZ's claims for fraud in the inducement, fraud in the concealment, and punitive damages must be dismissed since his allegations have not been plead with any particularity, and because those claims are barred by the statute of limitations. In opposition, JUAREZ argues his allegations cannot be plead with more specificity without further discovery,

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<sup>6</sup> See, Atterbery Aff'd, ¶ 2.

<sup>7</sup> *Manne v. Carlson*, 49 A.D. 276 (1<sup>st</sup> Dep't 1900).

<sup>8</sup> See, *Acocella v. Wells Fargo Bank, NA*, 139 A.D.3d 647 (2<sup>nd</sup> Dep't 2016).



and that the statute of limitations is not an applicable defense for claims against forged deeds. In reply, CTIC contends JUAREZ has failed to indicate what evidence he believes CTIC has for discovery, and that JUAREZ failed to establish that his claims for fraud were timely.

CPLR § 3211(a)(5) provides, “a party may move for judgment dismissing one or more causes of action asserted against him on the grounds: (5) the cause of action may not be maintained because of... [the] statute of limitations...” Generally, allegations of fraud must be brought at most six years from the date the alleged fraud, or no more than two years from when a reasonably diligent plaintiff could discover the fraud.<sup>9</sup> However, claims for fraud against a forged deed are not subject to a statute of limitations defense.<sup>10</sup> “A forged deed [containing] a fraudulent signature is distinguished from a deed where the signature and authority for conveyance are acquired by fraudulent means... A forged deed is void not merely voidable. That legal status cannot be changed, regardless of how long it may take for the forgery to be uncovered. A statute of limitations ‘does not make an agreement that was void at its inception valid by the mere passage of time.’”<sup>11</sup>

CPLR § 3211(a)(7) provides, “a party may move for judgment dismissing one or more causes of action asserted against him on the grounds: (7) the pleading fails to state a cause of action...” CPLR § 3016(b) further provides in pertinent part, “Where a cause of action... is based upon misrepresentation [or] fraud... the circumstances constituting the wrong shall be stated in detail.” However, “[CPLR § 3016(b)] should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the

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<sup>9</sup> *MBI Int’l Holdings, Inc. v. Barclays Bank PLC*, 151 A.D.3d 108 (1<sup>st</sup> Dep’t 2017).

<sup>10</sup> *Faison v. Lewis*, 25 N.Y.3d 220 (2015)

<sup>11</sup> *Id.* at 25 N.Y.3d 220 (2015); quoting, *Riverside Syndicate, Inc. v. Munroe*, 10 N.Y.3d 18 (1<sup>st</sup> Dep’t 2008); citing, *Pacchiana v. Pacchiana*, 94 A.D.2d 721 (2<sup>nd</sup> Dep’t 1983); *See also, Marden v. Dorothy*, 160 N.Y. 39 (1899).

circumstances constituting a fraud.”<sup>12</sup> Where the pleadings of a fraud are unique in fact, the allegations in a plaintiff’s complaint, “should not be read to require plaintiffs to ‘state the details of the individual defendants’ personal participation, in or actual knowledge of, the alleged concealment as those facts are peculiarly within their knowledge.’”<sup>13</sup> Further, punitive damages may not be recovered for fraud unless “the fraud, [is] aimed at the public generally...”<sup>14</sup>

Here, as JUAREZ’s complaint alleges his signature was forged onto a fraudulent deed, the deed itself may be void, not just voidable.<sup>15</sup> Consequently, as forged deeds cannot become valid regardless of how much time has passed, JUAREZ’s claim cannot be barred by the statute of limitations. Further, given the unique nature of the alleged fraudulent transfer, JUAREZ’s claims need not require his pleadings to specify every detail of each defendants’ knowledge and degree of participation. However, JUAREZ’s claim for punitive damages cannot be maintained as the nature of the fraud alleged appears restricted to the instant property dispute amongst family members rather than a scheme to forge fraudulent deeds aimed at the general public.

#### INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

CTIC argues JUAREZ’s claim for intentional infliction of emotional distress should be dismissed because he failed to allege outrageous conduct which could sustain such a claim. In his opposition, JUAREZ raised no arguments with respect to his claim for intentional infliction of emotional distress.

Liability for intentional infliction of emotional distress “has been found only where the conduct [alleged] has been so outrageous in character, and so extreme in degree, as to go beyond

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<sup>12</sup> *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486 (2008).

<sup>13</sup> *Id.*

<sup>14</sup> *Walker v. Sheldon*, 10 N.Y.2d 401 (1961).

<sup>15</sup> Plaintiff’s Complaint, ¶ 40.

all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>16</sup>

JUAREZ’s pleadings for intentional infliction of emotional distress fail to allege with any specificity that CTIC performed conduct which rose to the level of outrageousness that go beyond all possible bounds of decency. In fact, JUAREZ’s claim appears contradictory as his pleadings specifically alleges, he never even met with CTIC.<sup>17</sup> Consequently, JUAREZ’s intentional infliction of emotional distress cannot be maintained against CTIC.

#### SLANDER OF TITLE

CTIC maintains JUAREZ’s claim for slander of title must be dismissed since he failed to allege any special damages in his pleadings. In his opposition, JUAREZ raised no arguments against CTIC’s motion to dismiss his claim for slander of title.

Pleadings for a slander of title claim must allege there was a false in fact communication which cast doubt on the validity of the title, which was reasonably calculated to cause harm resulting in special damages.<sup>18</sup> Moreover, a claimant seeking special damages must specify the dollar amount to which he believes he is entitled for recovery, and such pleadings may not be plead with round figures without any itemization.<sup>19</sup>

As slander of title claims result in special damages, JUAREZ’s pleadings must present itemized figures for such recovery. However, not only does JUAREZ’s claim for slander of title

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<sup>16</sup> *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993); quoting, *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293 (1983).

<sup>17</sup> Plaintiff’s Complaint ¶ 20.

<sup>18</sup> *See, Galasso v. Saltzman*, 42 A.D.3d 310 (1st Dep’t 2007)

<sup>19</sup> *See, McKay v. West Seneca*, 41 N.Y.2d 931 (1977); *See also, Drug Research Corp. v. Curtis Publishing Co.*, 7 N.Y.2d 435 (1960).



fail to itemize his damages, it also fails to allege any sort of dollar amount for his claim.<sup>20</sup>

Consequently, JUAREZ's claim for slander of title must be dismissed.

### QUIET TITLE

CTIC contends JUAREZ's cause of action to quiet title must be dismissed as it has conceded it has no interest in the subject property. CTIC further argues JUAREZ's quiet title claim cannot be maintained since he failed to name Municipal Credit Union ("MCU") as a necessary party as MCU holds an interest in a mortgage in the subject property. In its opposition, JUAREZ failed to make any arguments against CTIC's motion to dismiss his quiet title claim.

CPLR § 3211(a)(10) provides in part "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (10) the court should not proceed in the absence of a person who should be party." In a title action, dismissal is warranted where a plaintiff fails to join a necessary party who has an interest in the subject property via secured mortgage.<sup>21</sup>

CTIC conceded it has no interest in the subject property, and as the mortgage shows MCU has an interest in the subject property as a mortgagee, JUAREZ's quiet title claim must be dismissed for failure to join MCU as a necessary party.<sup>22</sup>

### DECLARATORY RELIEF

CTIC asserts JUAREZ's claim for declaratory relief seeking a judicial determination that he is the rightful owner of the subject property in fee simple must be dismissed as the remedy sought for declaratory relief is duplicative to the remedy for his quiet title claim. In his

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<sup>20</sup> Plaintiff's Complaint, Pg. 16.

<sup>21</sup> *Katz v. East-Ville Realty Co.*, 249 A.D.2d 243 (1<sup>st</sup> Dep't 1998); *See also, Syracuse Sav. Bank v. Yorkshire Ins. Co.*, 301 N.Y. 403 (1950).

<sup>22</sup> Vissing Aff'd, ¶ 4; *See also*, CTIC's Counsel's Affirmation in Support, Ex. H.



opposition, JUAREZ failed to assert any arguments against CTIC's motion to dismiss his claim for declaratory relief.

Where the relief sought for several claims in a complaint is duplicative, it is proper for a court to dismiss any duplicative causes of action.<sup>23</sup>

While CTIC is correct in asserting that the reliefs sought for JUAREZ's claims to quiet title and for declaratory relief are duplicative, this Court however cannot dismiss JUAREZ's claim on such grounds. As this Court has found above JUAREZ cannot maintain his quiet title claim, CTIC's argument to dismiss JUAREZ's declaratory relief claim solely on the grounds of duplicity is now moot.

#### INDEMNIFICATION

CTIC contends TRILLO's cross claim seeking indemnification against it should be dismissed as the title insurance policy does not cover against claims for fraud alleged to have been committed by the insurer. In opposition, TRILLO argues it is too early in litigation to dismiss his cross claim based on the title insurance policy. TRILLO further asserts since CTIC's title agent, defendant, PHILLIP O'HARA NASSAU ASSOCIATES notarized the documents for the closing, any potential loss or fraud could be attributed to CTIC. Additionally, in his opposition, JUAREZ claims the sale of his property was not an arm's length transaction and asserts the insurance policy does not meet the criteria for documentary evidence. In reply, CTIC maintains even if its agent acted fraudulently, TRILLO would not be entitled to indemnification as any fraudulent act by its title agent would be outside the scope of any agency relationship.

CPLR § 3211(a)(1) provides, "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon

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<sup>23</sup> *Wildenstein v. 5H & Co, Inc.*, 97 A.D.3d 488 (1<sup>st</sup> Dep't 2012)

documentary evidence..." On a motion to dismiss, "The court must accept the facts alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference."<sup>24</sup> "However, factual allegations that do not state a viable cause of action... or [that are] clearly contradicted by documentary evidence are not entitled to such considerations."<sup>25</sup> Further, "A paper will only qualify as "documentary evidence" if it satisfies the following criteria: (1) it is unambiguous; (2) it is of undeniable authenticity; and (3) its contents are essentially undeniable."<sup>26</sup>

An insurer's duty to defend is measured against the allegations of the pleadings, and its duty to indemnify is determined by the actual basis of liability to a third person.<sup>27</sup> "A declaration that an insurer is without the obligation to defend a pending action could be made only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy."<sup>28</sup> Further, title insurers are not liable for the fraudulent acts of their title agents where there is no allegation that the insurer took part in, or was aware of any fraudulent activity committed by their agents.<sup>29</sup>

JUAREZ's argument regarding the credibility of the title insurance policy as documentary evidence is without merit as TRILLO, the party who is insured by the agreement failed to contest the policy's ambiguity, deniability, and authenticity in his opposition. Further, the policy in question explicitly excludes from coverage adverse claims and other matters created

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<sup>24</sup> *Amaro v. Gani Realty Corp.*, 60 A.D.3d 491 (1<sup>st</sup> Dep't 2009).

<sup>25</sup> *Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233 (1<sup>st</sup> Dep't 1994).

<sup>26</sup> Siegel's Practices 6<sup>th</sup> Edition § 259

<sup>27</sup> *Servidone Constr. Corp. v. Security Ins. Co.*, 64 N.Y.2d 419 (1985).

<sup>28</sup> *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.*, 65 A.D.3d 872 (1<sup>st</sup> Dep't 2009); quoting, *Spoor-Lasher Co. v. Aetna Casualty & Surety Co.*, 39 N.Y.2d 875 (1976).

<sup>29</sup> See, *DLJ Mtge. Capital, inc. v. Kontogiannis*, 102 A.D.3d 489 (1<sup>st</sup> Dep't 2013).

by the insured (TRILLO), and unknown to the insurer (CTIC).<sup>30</sup> Thus, as JUAREZ's claims allege TRILLO caused the fraudulent transfer, and as TRILLO has not allege any wrongdoing or knowledge of fraud on CTIC's part, CTIC has no duty to defend or indemnify TRILLO.

### CONCLUSION

Accordingly, it is

ORDERED that CHICAGO TITLE INSURANCE COMPANY's motion sequenced as ("No. 1") to dismiss JOSE JUAREZ's claims is **GRANTED** in part; it is further

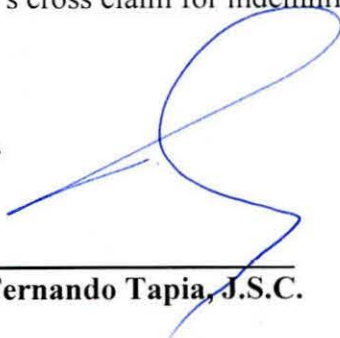
ORDERED that JOSE JUAREZ's claims for: declaratory judgment on standing to foreclose; slander of title; quiet title; and punitive damages are dismissed against all defendants. JOSE JUAREZ's claim for intentional infliction of emotional distress is dismissed solely against defendant, CHICAGO TITLE INSURANCE COMPANY; it is further

ORDERED that the portion of CHICAGO TITLE INSURANCE COMPANY's motion sequenced as ("No. 1") to dismiss JOSE JUAREZ's claims for: fraud in the concealment; fraud in the inducement; and declaratory relief seeking title in fee simple is **DENIED**; and it is further

ORDERED that defendant, CHICAGO TITLE INSURANCE COMPANY's motion sequenced as ("No. 3") to dismiss JEAN PIERRE TRILLO's cross claim for indemnification is **GRANTED**.

This constitutes the decision and order of this Court.

Dated: March 03, 2020  
Bronx, NY

  
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Hon. Fernando Tapia, J.S.C.

<sup>30</sup> See, TRILLO's Counsel's Affirmation in Opposition, Ex. A.