SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Acting Justice

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FIRST MAJESTIC SILVER CORPORATION,

Plaintiff,

- v -

JUAN MANUAL DAVILA HEITZ and ELIZABETH HEITZ

Defendants.

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INDEX NO. 158792/2018

MOTION DATE

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 35-50 were read on this motion and cross-motion to DISMISS/AMEND PLEADINGS.

Upon the foregoing documents, the motion and cross-motion are decided as follows:

Plaintiff First Majestic Silver Corporation ("First Majestic") is an entity incorporated and with its principal place of business in Canada. Plaintiff secured a judgment after trial in the Supreme Court of British Columbia against non-parties Hector Davila Santos ("Santos") and Minerales Y Minas Mexicanas, SA de CV ("Minerales") in the amount of CDN $81,030,360.60. Plaintiff commenced a proceeding in New York State Supreme Court, New York County titled *First Majestic v Santos et al*, Index No. 652471/2015 seeking summary judgment in lieu of complaint on the Canadian judgment. The motion was denied without prejudice and Plaintiff filed a complaint containing a single cause of action to enforce the judgment pursuant to Article 53 of the Civil Practice Law and Rules. By order dated September 28, 2018, Plaintiff's motion for summary judgment was granted and on October 17, 2017 a judgment was entered with the New York County Clerk against the Defendants, jointly and severally, in the amount of US $64,918,410.07.

As part of its efforts to enforce this judgment, Plaintiff enlisted the New York City Sheriff to auction Defendant Santos' one-third [1/3] interest in a condominium located at 20 Clinton Street, Unit 6F, New York, New York. Santos, Defendant Elizabeth Heitz ("EH"), his wife, and Defendant Juan Manual Davila Heitz ("JH"), his son, acquired the unit on April 4, 2012 and took title as joint tenants with rights of survivorship. Plaintiff was the winning bidder at the sale and took a Sheriff's deed on May 18, 2018 upon payment of $200,000.00.

Plaintiff commenced the within action pleading causes of action for partition as well as for an accounting of the rents, profits and sale proceeds. Defendant JH answered and raised fourteen [14] affirmative defenses. Defendant EH answered separately and pled thirteen [13] affirmative defenses, including an affirmative defenses of lack of personal jurisdiction and that Plaintiff lacked the legal capacity to sue pursuant to Business Corporation Law (BCL) §1312. Defendant EH also asserted three counterclaims: [1] for a declaratory judgment that Plaintiff is not entitled to maintain this action, that Plaintiff is not entitled to a partition by sale and that EH is entitled to recover from Plaintiff its *pro rata* share of the expenses for the premises; [2] that Plaintiff engaged in abuse of process by intentionally and

improperly commencing this action against EH and seeks compensatory and punitive damages; and [3] that Plaintiff owes its *pro rata* share of the property's expenses to EH.

Now, Defendants move collectively to dismiss the complaint pursuant to CPLR §3211[a][3] based on Defendant EH's affirmative defense of lack of capacity pursuant to BCL §1312. In the alternative, Defendants move pursuant to CPLR §3211[a][7] to dismiss Plaintiff's second cause of action for an accounting and for leave to permit Defendant JH to amend his answer to duplicate the affirmative defenses and counterclaims raised by Defendant EH. Plaintiff opposes the motion and cross-moves pursuant to CPLR §§3211[a][1] and [a][7] to dismiss Defendant EH's counterclaims and to dismiss her personal jurisdictional defense.

As to the branch of Defendants' motion to dismiss the complaint based upon Plaintiff's supposed lack of capacity to sue, Business Corporation Law §1312[a] reads:

> "A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation."

"A defendant relying upon Business Corporation Law §1312[a] as a statutory barrier to Plaintiff's lawsuit 'bears the burden of proving that the [plaintiff-corporation's] business activities in New York 'were not just casual or occasional,' but 'so systematic and regular as to manifest continuity of activity in the jurisdiction'" (*Highfill, Inc., v Bruce and Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008] *quoting S&T v Spectrum Cabinet Sales*, 247 AD2d 373 [2d Dept 1998] *quoting Peter Matthews, Ltd., v Robert Mabey, Inc.*, 117 AD2d 943, 944 [3d Dept 1986]). As part of their burden, Movants must overcome a presumption that Plaintiff "are doing business where they were incorporated and not in New York" (*Nick v Greenfield*, 299 AD2d 172, 173 [1st Dept 2002]).

In support of this branch of the motion, other than Plaintiff's activity to enforce the judgment, Defendants merely point to Plaintiff's part ownership of the condominium as proof of Plaintiff's activity in the jurisdiction. Such isolated activity is not "systematic and regular" so to constitute "doing business" under BCL §1312 since it fails to establish that the activity is "essential to its corporate business" (*S&T v Spectrum Cabinet Sales,* 247 AD2d at 374; *see Guangzhou Sanhua Plastic Co., Ltd., v Fine Line Products Corp.*, 165 AD3d 899, 901 [2d Dept 2018]; *Gemstar Canada, Inc., v George A. Fuller Co., Inc.,* 127 AD3d 689 [2d Dept 2015]; *see also Airtran New York, LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 212 [1st Dept 2007]). As such, Defendants have failed to rebut the presumption that Plaintiff did not do business in New York (*Gemstar Canada, Inc., v George A. Fuller Co., Inc.,* supra at 691; *see also Engineering and Technical Resources, Inc., v Xcel Development Corp.*, 139 AD3d 661, 662 [2d Dept 2016]).

Accordingly, this branch of Defendants' motion is denied irrespective of the sufficiency of Plaintiff's opposing papers (*see Deutsche Bank National Trust Company v Benson*, 179 AD3d 767, 768 [2d Dept 2020]).

As for the branch of Defendants' motion to dismiss Plaintiff's second cause of action for an accounting, on a motion pursuant to CPLR §3211[a][7] the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see e.g. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*298 Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the Defendant (*see Guggenheimer*, *supra*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, *supra*; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

In its complaint, First Majestic asserts it is a one-third fee owner of the subject condominium and has a right to possess the property. Because the condominium is incapable of being physically partitioned, Plaintiff claims it should be sold at the direction of the Court and the net proceeds of the sale should be equally distributed to the now three tenants-in-common (*see* RPAPL §901[1]; *Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]). Unless the parties waive same, an accounting is customarily part and parcel of a partition proceeding (*see Worthing v Cossar*, 93 AD2d 515 [2d Dept 1983]["A partition action, although statutory (*see* RPAPL Article 9), is equitable in nature and an accounting of the income and expenses of the property sought to be partitioned is a necessary incident thereof"]; *see also Khotylev v Spektor*, 165 AD3d 1088, 1090 [2d Dept 2018]). In its opposition, Plaintiff provides factual details, including that Defendant JH solely resides in this two-bedroom condominium to the exclusion of Plaintiff, requiring an accounting for payment of rent and taxes (*see Quinones v Schaap*, 91 AD3d 739, 740 [2d Dept 2012]["a Court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects"]). Here, since Defendants do not expressly seek dismissal the partition cause of action, the branch of the motion to dismiss the accounting cause of action is inapposite. If Plaintiff prevails on its partition by sale cause of action, an accounting is required. In any event, Defendants also seek an accounting in their counterclaims as part of their claim to recover from Plaintiff a *pro rata* share of the property's expenses.

Accordingly, the branch of Defendants' motion to dismiss the accounting cause of action is denied (*see Holley v Hinson-Holley*, 1010 AD3d 1084 [2d Dept 2012]).

As for the branch of Defendants' motion to amend Defendant JH's answer to include further affirmative defenses and new counterclaims, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Oppedisano v D'Agostino*, 196 AD3d 497, 498 [2d Dept 2021], *quoting Wells Fargo Bank, N.A. v Spatafore,* 183 AD3d 853, 853 [2d Dept 2020] [internal citations and quotation marks omitted]). Presently, Defendant JH seeks to amend his answer to include an affirmative defense pursuant to BCL §1312 as well as the same counterclaims as asserted by Defendant EH in her amended answer.

Based upon the Court's determination supra that BCL §1312 does not bar Plaintiff's claims, Defendant JH's proposed affirmative defense based on this statute is patently devoid of merit (*see U.S. Bank N.A. v Lent*, 193 AD3d 1098 [2d Dept 2021]; *Hong Qin Jiang v Li Wan Wu*, 179 AD3d 1041, 1042-1043 [2d Dept 2020]).

Concerning the counterclaims, Defendant JH's first claim for a declaration Plaintiff is not entitled to maintain this action or seek a sale is also patently devoid of merit since Plaintiff, as an undisputed partial owner of the property, can seek this relief pursuant to statute (*see* RPAPL §901, *et seq*; *Prand Corp. v Gardiner*, 176 AD3d 1127 [2d Dept 2019]). However, the portion the proposed counterclaim that Defendant JH is entitled to recover from Plaintiff its *pro rata* share of expenses for the premises states a claim and leave to assert that counterclaim is granted.

As to the proposed counterclaim of abuse of process, that cause of action has "three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*see Perry v McMahan*, 164 AD3d 1486, 1488 [2d Dept 2018] *citing Curiano v Suozzi,* 63 NY2d 113, 116 [1984]). Defendant JH's arguments that the Plaintiff's claims are "unjustified", without factual support and wrongly brought against him are without merit. It is uncontroverted Defendant JH is a one-third owner in possession of the property at issue. Hence, absent from this counterclaim is any indication that there is unlawful interference with person or property substantiating this claim (*id.; Williams v Williams,* 23 NY2d 592, 596 [1969]). Moreover, contrary to Defendant's assertion, "[f]rivolous litigation requiring a party to expend legal fees is not a sufficient basis for a cause of action sounding in abuse of process" (*Perry v McMahan*, *supra*; *Marks v Marks,* 113 AD2d 744 [2d Dept 1985]).

Accordingly, the branch of Defendant JH's motion to assert a counterclaim of abuse of process is denied because, as pled, it is patently devoid of merit.

Defendant JH's proposed third counterclaim, titled "Contribution," repeats what was asserted in the first proposed counterclaim that, "Plaintiff is responsible for a *pro rata* share of Expenses." Since the amendment to add this counterclaim was already granted, JH's proposed amendment to add the third counterclaim is denied as duplicative (*see Bleakley Platt & Schmidt, LLP v Barbera*, 136 AD3d 725, 726 [2d Dept 2016]; *Calastri v Overlock*, 125 AD3d 554, 555 [1st Dept 2015]).

By its cross-motion, in addition to seeking dismissal of Defendant EH's counterclaims pursuant to CPLR §3211[a][7], Plaintiff seeks dismissal based upon documentary evidence pursuant to CPLR §3211[a][1]. A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes the pleader's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* Higgitt, *CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers,* 83 New York State Bar Journal 32, 34-35 [2011]).

In support of its motion, Plaintiff's proof consists solely of proof of tax payments it purportedly made to the City of New York in 2018 and 2019 as well as copies of e-mails sent to Defendant's counsel seeking Defendants' repayment of their share of the taxes paid. Since these documents do not

"decisively refute" Defendant EH's allegations regarding all the expenses associated with the property, this branch of the motion is denied.

As Defendant EH's counterclaims are identical to Defendant JH's proposed counterclaims, the fate of the former counterclaims follows the Court's determinations supra regarding the latter.

The branch of Plaintiff's cross-motion which seeks dismissal of all personal jurisdictional defenses interposed by Defendant EH as untimely pursuant to CPLR §3211[e] is granted without opposition. Defendant EH filed her answer on NYSCEF on April 28, 2021 and to date has not moved to dismiss the complaint on this ground (*see* CPLR §3211[e]; *Deutsche Bank National Trust Company v Jorgensen*, 185 AD3d 784, 785 [2d Dept 2020]).

Accordingly, it is

ORDERED that the branch of the motion by Defendants Elizabeth Heitz and Juan Manual Davila Heitz to dismiss the complaint is denied, and it is

ORDERED that the branch of the motion by Defendant Juan Manual Davila Heitz to amend his answer is granted to the extent that he may include the counterclaim that he is entitled to recover from Plaintiff his *pro rata* share of expenses related to the subject property, otherwise this branch of the motion is denied, and it is

ORDERED that Defendant Juan Manual Davila Heitz shall serve and file an amended answer in accordance with the limitations stated in this decision and order within 30 days of the e-filing of this order, and it is

ORDERED that the branch of Plaintiff First Majestic Silver Corporation's cross-motion to dismiss Defendant Elizabeth Heitz's counterclaims is granted to the extent that the portions of the first counterclaim, other than that she is entitled to recover from Plaintiff her *pro rata* share of expenses related to the subject property, are dismissed as are the second and third counterclaims, and it is

ORDERED that the branch of Plaintiff's cross-motion to dismiss Defendant Elizabeth Heitz's fourth affirmative defense alleging lack of personal jurisdictional defense is granted, and it is

ORDERED, that all parties will appear for a virtual preliminary conference on **December 7, 2022 at 10:20 am** via Microsoft Teams. Part Clerk Tamika Wright (tswright@nycourt.gov) will forward all appearing parties an invitation to the conference.

11/12/2021
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE