SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 624669/2023

MAURICIO E. OCAMPO LOPEZ a/k/a MAURICIO OCAMPO,

Plaintiff,

-against-

MICHAEL O'SULLIVAN, HAMPTON DREAM PROPERTIES LLC, WILLIAM GRAUSSO, GRAUSSO & FOY, LLP, IVAN YOUNG, IVAN YOUNG, P.C., WISDOM FUNDING USA LLC, BANKWELL BANK, A& D MORTGAGE LLC, CHRISTOPHER THOMPSON, SOUTH FORK REALTY MANAGEMENT CORP., and JOSEPH MATONES,

Defendants.

Counsel of Record via NYSCEF

MOTION DATE:		10/10/23
SUBMITTED:		07/24/24
MOTION SEQ. NO.:		1, 8, 9, 10, 11 & 12
MOTION DEC:	001	MG
	008	MotD
	009	MotD
	010	MG
	011	MD
	012	MD

Upon the reading and filing of the following papers in this matter: (1) Order to Show Cause [Seq. # 001] by Plaintiff, e-filed on October 10, 2023, and supporting papers; (2) Notice of Motion [Seq. # 008] by Defendant South Fork, e-filed on March 25, 2024, and supporting papers; (3) Plaintiff's Affirmation in Opposition to Defendant South Fork's Motion to Dismiss, e-filed on May 23, 2024, and supporting papers; (4) Defendant South Fork's Reply Memorandum of Law, e-filed on May 14, 2024; (5) Notice of Motion [Seq. # 009] by Plaintiff, e-filed on March 29, 2024, and supporting papers; (6) Defendant Grausso & Foy's Affirmation in Opposition to Plaintiff's Motion to Dismiss, e-filed on May 8, 2024, and supporting papers; (7) Plaintiff's Affirmation in Reply, e-filed on May 14, 2024, and supporting papers; (8) Notice of Motion [Seq. # 010] by Plaintiff, e-filed on March 29, 2024, and supporting papers;

(9) Plaintiff's Affirmation in Reply, e-filed on May 14, 2024, and supporting papers; (10) Notice of Motion [Seq. # 011] by Defendant Grausso, e-filed on April 17, 2024, and supporting papers; (11) Plaintiff's Affirmation in Opposition to Defendant Grausso's Motion to Dismiss, e-filed on April 24, 2024, and supporting papers; (12) Notice of Motion [Seq. # 012] by Defendant Grausso, e-filed on April 17, 2024, and supporting papers; and (13) Plaintiff's Affirmation in Opposition to Defendant Grausso's Motion for Summary Judgment, e-filed on April 23, 2024, and supporting papers; ~~(and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that Motion Seq. Nos. 001, 008, 009, 010, 011 and 012 are consolidated for the purpose of this determination; and it is further

ORDERED that the motion by defendant South Fork for an order dismissing the complaint pursuant to CPLR § 3211(a)(1),(7) and (8) [Mot. Seq. No. 008] is GRANTED in part and DENIED in part, to the extent indicated herein; and it is further

ORDERED that the motion by plaintiff for an order dismissing the counterclaim and first affirmative defense by defendant Grausso & Foy LLP pursuant to CPLR § 3211(a)(7) [Mot. Seq. No. 009] is GRANTED in part, and DENIED in part, to the extent indicated herein; and it is further

ORDERED that the motion by plaintiff for an order dismissing the defendant William Grausso's counterclaim and first affirmative defense pursuant to CPLR § 3211(a)(7) [Mot. Seq. No. 010] is GRANTED, to the extent indicated herein; and it is further

ORDERED that the motion by defendant William Grausso for an order dismissing the complaint pursuant to CPLR § 3211(a)(7) [Mot. Seq. No. 011] is DENIED, to the extent indicated herein; and it is further

ORDERED that the motion by defendant William Grausso for an order granting summary judgment and dismissing the complaint pursuant to CPLR § 3212 [Mot. Seq. No. 012] is DENIED, as moot; and it is further

ORDERED that application by plaintiff for a preliminary injunction brought on by Order to Show Cause [Mot. Seq. No. 001] is GRANTED, to the extent indicated herein.

Plaintiff, Mauricio E. Ocampo Lopez a/k/a Mauricio Ocampo (hereinafter Ocampo) moved by Order to Show Cause to temporarily (CPLR 6313) and preliminarily (CPLR 6311) enjoin the defendants Michael O'Sullivan (hereinafter O'Sullivan), Hampton Dream Properties LLC (hereinafter Hampton), William Grausso (hereinafter Grausso), Grausso & Foy, LLP (hereinafter Law Firm), Ivan Young, Ivan Young, P.C., Wisdom Funding USA LLC (hereinafter Wisdom Funding), Bankwell Bank (hereinafter Bankwell), A & D Mortgage LLC, South Fork Realty Management Corp. (hereinafter South Fork Realty) and Joseph Matones (hereinafter Matones) from taking any action to remove him from the premises 144 Fort Pond Boulevard, East Hampton, New York or encumbering or transferring title to the subject property. (**Motion Seq. 001**).

Thereafter the following motions were interposed:[1]

Movant	**Motion Sequence No.**	**CPLR Provision**
South Fork	008	3211(a)(1),(7) and (8)
Plaintiff ag. Grausso Foy LLP	009	3211(a)(7) Counterclaim and 1st affirmative defense
Plaintiff ag. Grausso	010	3211(a)(7) Counterclaim and 1st affirmative defense
William Grausso	011	3211(a)7
William Grausso	012	3212 summary judgment

Plaintiff commenced this action with the filing of a summons and complaint on October 4, 2023. After various defendants interposed motions to dismiss plaintiff moved to amend his complaint. This Court by Order dated March 4, 2024 denied the prior motions to dismiss without prejudice and granted plaintiff's motion to amend the complaint. On March 5, 2024, plaintiff filed his amended complaint asserting causes of action sounding in, among other things, fraud, conspiracy to commit fraud, conversion, unjust enrichment and for a declaratory judgment as to the ownership of real property.

This action seeks money damages for fraud, an annulment and cancellation of any deed adverse to plaintiff's claim of title owner to the subject premises, and an annulment and cancellation of any existing mortgage against the property; in the alternative, plaintiff claims a constructive trust over the property, a permanent injunction enjoining the defendants from taking any action to remove plaintiff from the property. Lastly, plaintiff seeks punitive damages.

The complaint alleges, in sum and substance, that the parties conspired in some fashion to remove plaintiff as the deeded owner of real property located at 144 Fort Pond Boulevard, East Hampton, New York. Non-parties Michael and Tara Ceslow were the prior owners of the subject property which was subject to a mortgage held by Bank of New York Mellon. On or about December 8, 2012, the Ceslows transferred the subject property to defendant O'Sullivan who placed title ownership in defendant Hampton.

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[1]In the columns above, South Fork is identified as the movant, although the notice of motion states that Christopher Thompson was initiating the motion. A reading of the affirmation of support establishes that defendant South Fork is the party making the motion. (*See* NYSCEF DOC. 142).

Plaintiff avers that he does not properly understand the English language. On January 20, 2014, he purchased the subject property from Hampton for $250,000.00. Plaintiff gave a down payment of $60,000.00 and entered into a mortgage loan agreement with Hampton for the balance of the purchase price. The mortgage secured plaintiff's indebtedness to Hampton in the amount of $250,000.00 and was payable for eight years in monthly installments of $2,000.00. Michael O'Sullivan signed the deed to the subject property as president of Hampton. On the above closing date, the parties to the real estate transaction signed a document bearing the letterhead, William Grasso Attorney At Law, which stated in part:

> "You are purchasing the property listed above subject to all liens, mortgages and judgments. Though it is the responsibility of Hampton Dream Properties, LLC to deliver to you title free and clear within a timely manner there is no way to accurately predict or guarantee when that will happen."

NYSCEF DOC. 120

Plaintiff alleges he moved into the home with his spouse and made significant renovations to the property.

In 2016 Bank of New York Mellon commenced a foreclosure action against the property, presumably for the outstanding loan taken by former owners Michael and Tara Ceslow when they had purchased the subject property. Mr. Ocampo was not named in the foreclosure complaint and was never served with it. Plaintiff avers that he asked defendants O'Sullivan and Grausso about the Bank of New York mortgage and was advised it was not a concern.

Beginning about August 2022, plaintiff claims that defendants O'Sullivan, Grausso and Young advised him that he needed to provide them with hundreds of thousands of dollars to resolve the Bank of New York foreclosure action and he provided the funds. Plaintiff alleges that later, defendants O'Sullivan and Grausso coerced him into signing a deed transferring the subject property back to Hampton for no consideration. He was advised that to negotiate with the bank and resolve the foreclosure, defendant Hampton had to become the owner again.

Plaintiff further alleges that defendants O'Sullivan and Grausso removed the Bank of New York Mellon mortgage and thereafter, Hampton as owner of the subject property and took out a mortgage against the property from defendant Wisdom. That mortgage was purportedly assigned to defendant Bankwell. According to the complaint, O'Sullivan demanded plaintiff pay an additional $500,000.00 to repurchase the property. On June 27, 2023 plaintiff received notice that defendant South Fork was the new owner of the subject premises and it was seeking to evict him. It is alleged that Christopher Thompson, Esq. was the legal representative for defendants O'Sullivan, Hampton and South Fork.

As against defendant South Fork, plaintiff has alleged causes of action for (First Cause of

Action) Fraud; (Third Cause of Action) Conversion; (Fourth Cause of Action) Unjust Enrichment; (Fifth Cause of Action) Quiet Title and Declaratory Judgment; and (Sixth Cause of Action) Constructive Trust.

As against defendant Grausso and Grausso and Foy LLP, plaintiff has alleged causes of action for (First Cause of Action) Fraud; (Fifth Cause of Action) Quiet Title and Declaratory Judgment; and (Sixth Cause of Action) Constructive Trust.

A. Defendants South Fork (008) and Grausso's (011) Motion to Dismiss for Failure to State A Claim Pursuant to CPLR § 3211(a)(7)

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must determine, accepting as true the factual averments of the complaint and affording the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated (***Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization,*** 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting ***Schneider v Hand,*** 296 AD2d 454, 744 NYS2d 899 [2002]). Although the facts pleaded are presumed to be true and are to be afforded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible (***Nasca v Sgro,*** 101 AD3d 963, 964, 957 NYS2d 246 [2d Dept 2012]).

1. First cause of action against defendants O'Sullivan, Hampton, Grausso, Grausso & Foy, Thompson, Young, Young Law P.C. and South Fork for Fraud

The elements of a cause of action for fraud are a misrepresentation or a material omission of fact which was false and known by the defendant(s) to be false, made to induce the plaintiff to rely on it, plaintiff's reliance is justifiable and damages. ***Lama Holding Co. v Smith Barney Inc.***, 88 NY2d 413 [1996].

After incorporating the prior 114 paragraphs of the complaint in to his first cause of action, plaintiff claims that the defendants, all acting in concert, made material representations to the plaintiff, the representations were false and known by the defendants to be false and plaintiff relied on these representations and was damaged. Plaintiff summarizes the false representations as follows:

> (a) Falsely representing Hampton as a legitimate company despite its long history of fraud and its history of judgments;
>
> (b) Falsely representing the status of the property;
>
> (c) Falsely representing the status of the Bank of New York Mellon foreclosure;
>
> (d) Falsely representing what documents were and the effect the

documents would have on Mr. Ocampo and the property;

(e) Falsely representing that once Mr. Ocampo paid the down payment and all the payments due under the mortgage and note that he would be the sole owner of the property free and clear of all liens;

(f) Falsely demanding additional moneys from Mr. Ocampo following his acquiring the property in 2014;

(g) Falsey "*sic"* causing him to transfer his property to Hampton in 2022;

(h) Falsey "*sic*" transferring the property from Hampton to South Fork;

(I) Falsely attempting to evict Mr. Ocampo from his property;

(j) Falsely telling Mr. Ocampo that he had lost his right to the property due to his failure to make demanded payments;

(k) Falsely telling him he was no longer the owner of the property.

Defendant Grausso acknowledges that he represented O'Sullivan and Hampton in 2014, when the subject property was sold to the plaintiff. It is clear that Grausso was aware of plaintiff's difficulty with English and notes that Ocampo was represented by an attorney who was "bilingual and explained the transaction."[2] He offers that after the sale to plaintiff in September 2022 the first mortgage holder (Bank of New York) approved a short sale of the subject property in the amount of $750,000.00. What was said to the plaintiff is difficult to discern, but plaintiff Ocampo ultimately gave O'Sullivan money and a deed to the property presumably in hopes of protecting his interest in his home. Clearly, defendant Grausso was involved in the 2022 transaction(s).

Defendant Grausso asserts that there were no misrepresentations and that the plaintiff entered into the transaction to purchase the property with full knowledge of the outstanding liens and that O'Sullivan and Hampton were obligated to clear these liens. Of course, this does not explain why plaintiff was ever re-engaged in 2022 by the same defendants to pay for, and clear, these liens. Grausso blends arguments of documentary evidence, which was never properly noticed, in an attempt to show that no fraud was or could have been committed by him. He does not clearly point to failures in plaintiff's fraud pleading.

Plaintiff notes that a fraud claim is established when plaintiff alleges that he was induced to

[2]There is nothing in this record that suggests any of the defendants understood what was being said to the plaintiff in Spanish.

enter into a transaction because a defendant misrepresented material facts. The same circumstances may also give rise to a breach of contract claim. Plaintiff, relying on his pleading, claims that he was given false assurances that the existing liens were a mere technicality, the house was his and would be free and clear of all liens in short order. Plaintiff continues and notes other misrepresentation made to the plaintiff in 2022 to induce him to pay over money and sign over his deed to the defendant Hampton.

Defendant South Fork alleges that plaintiff's first cause of action must be dismissed because he has failed to meet the pleading requirements under New York Law. CPLR 3016(b) requires that when pleading fraud the circumstances constituting the wrong must be stated in detail. South Fork claims that plaintiff has failed to allege that it made any statements or omissions that were relied upon by the plaintiff. Defendant South Fork also claims that any claim that it concealed its purchase of the subject property is not actionable because it had no duty to disclose such information.

Plaintiff asserts that South Fork is not a good faith purchaser for value but instead was a shell or shill for Hampton. South Fork is claimed to have acted in concert with Hampton in an effort to remove the property from plaintiff's reach. Plaintiff further admits that at this early stage of the litigation is not fully aware of the extent of Hampton and South Fork's interrelationship, but verily believes that each defendant was part of fraud perpetuated against him which has resulted in his loss of ownership of the subject property with South Fork's alleged purchase of the property another attenuation to his rightful claim. Plaintiff offers Christopher Thompson, Esq. as a nexus between the defendant entities and to which knowledge was imparted.

The fraud being alleged by plaintiff in his amended complaint spans many transactions over many years. It gives fair and reasonable notice to the defendants of the facts and circumstances upon which a fraud was allegedly perpetrated against the plaintiff by the defendants individually and in concert with one and other. The Court finds that the plaintiff has a claim for fraud which exists separate and apart from any breach of contract claim. Furthermore the Court finds that plaintiff has stated a claim for fraud against these defendants.

The plaintiff avers, and the moving defendants seemingly agree, that plaintiff purchased the subject property and paid Hampton pursuant to a note and mortgage. O'Sullivan and Hampton were obligated to clear the lien(s) and failed to do so by 2022. The fundamental question — how, absent a fraud, was plaintiff Ocampo induced to pay more for his home, deed it back to Hampton and finally learn that he was being evicted by a new owner of the property and home? — is clearly central to this litigation. Defendants have no obligation to answer the question at this time, but these peculiar circumstances beg for answers that full discovery may provide. Defendants' motion to dismiss the first cause of action is denied.

2. Third Cause of Action against Defendants O'Sullivan, Hampton and South Fork for Conversion

A conversion is when a person intentionally and without authority exercises control over personal property belonging to someone else. ***Sneider v Great S. Bay Surgical Assoc.***, 235 AD3d 685, 687 [2d Dept 2025].

Defendant South Fork claims that plaintiff has failed to set forth a cause of action for conversion because real property cannot be the subject of a conversion. (*See* ***C & B Enterprises USA, LLC v Koegel***, 136 AD3d 957 [2d Dept 2016]). Plaintiff has acknowledged this point of law and withdraws its cause of action for conversion against South Fork only.

3. Fourth Cause of Action against Defendants O'Sullivan, Hampton and South Fork for Moneys had and Received and Unjust Enrichment

In pleading a cause of action for unjust enrichment plaintiff must allege that the defendant was enriched at plaintiff's expense and it is against equity and good conscience to allow the defendant to keep what is sought to be recovered. ***GFRE, Inc. v U.S. Bank, N.A.***, 130 AD3d 569 [2d Dept 2015].

Defendant South Fork claims that a claim of unjust enrichment requires some connection between the parties although not necessarily privity, so that one party can be enriched to the detriment of another. Defendant claims that plaintiff has failed to allege any relationship between him and South Fork sufficient to form a requisite reliance of inducement between the parties. (*See* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173 [2011]). It is argued that the relationship between the plaintiff and South Fork is too attenuated.

Plaintiff seemingly acknowledges that there is no direct privity between the parties, but contends there is an intersection between the parties sufficient to support an unjust enrichment claim. Plaintiff alleges that South Fork acquired ownership of the subject property from Hampton which defrauded him of his title and interest in same. While South Fork argues its innocence from co-defendants' alleged fraud, as it is a bonafide purchaser for value, there is no determination as of yet of South Fork's status when it obtained the deed to the subject premises.

The Court finds that plaintiff has alleged a nexus between himself and South Fork. Admittedly, that intersection between the parties is surmised based on the South Fork's quick formation, legal representation and an underdisclosed real estate transaction. Any relationship between O'Sullivan, Hampton, South Fork and plaintiff is uniquely within their own knowledge and upon discovery may be more fully understood. While the Court denies defendant South Fork's motion to dismiss this cause of action, it does so without prejudice to renew after full discovery.

4. Fifth Cause of Action against All Defendants: Quiet Title and Declaratory Judgment

Defendant seeks that this claim as well as plaintiff's Sixth (Constructive Trust) and Seventh (Permanent Injunction) causes of action be dismissed because plaintiff has failed to plead its claim in accordance with RPAPL §1501 and it is a bona fide purchaser for value. This Court is unable to discern opposition to defendant South Fork's motion to dismiss the fifth cause of action, and therefore, it is granted as to South Fork only.

5. Sixth Cause of Action against All Defendants: Constructive Trust

The imposition of a constructive trust is an equitable remedy and its purpose is to prevent unjust enrichment. Plaintiff generally set forth the four elements for this remedy: a confidential or fiduciary relationship, a promise, a transfer in reliance thereon and an unjust enrichment from the breached promise. ***Sanxhaku v Margetis***, 151 AD3d 778, 779 [2d Dept 2017]. In ***Sanxhaku***, the Appellate Division underscores the flexibility of this remedy:

> "[T]hese factors, or elements, serve only as a guideline, and a constructive trust may still be imposed even if all four elements are not established" (Tyree v. Henn, 109 A.D.3d at 907–908, 971 N.Y.S.2d 319, citing, inter alia, Simonds v. Simonds, 45 N.Y.2d 233, 241, 408 N.Y.S.2d 359, 380 N.E.2d 189; see Henning v. Henning, 103 A.D.3d at 780, 962 N.Y.S.2d 189), because "the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice" (Ning Xiang Liu v. Al Ming Chen, 133 A.D.3d 644, 645, 19 N.Y.S.3d 565; see Kaprov v. Stalinsky, 145 A.D.3d at 870, 44 N.Y.S.3d 123)."

While the special relationship between the plaintiff and South Fork appears to be nonexistent, this Court will honor the remedy's flexible nature given the unique allegations in the complaint and the paucity of facts known to the plaintiff as to the relationship as and between all parties. In ***Morales v Orlon***, 226 AD3d 765 [2d Dept 2024], the Appellate Court noted:

> ". . . [T]hus, a constructive trust may be imposed [w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest' " (id. at 737-738 [internal quotation marks omitted], quoting ***Cruz v McAneney***, 31 AD3d 54, 58-59 [2006])."

This Court denies defendant South Fork's motion to dismiss the Sixth cause of action.

B. Defendant South Fork's Motion to Dismiss (008) and Defendant Grausso's Motion to Dismiss (011) Pursuant to CPLR 3211(a)(1) — Documentary evidence

Both defendants South Fork and Grausso ask this Court to dismiss plaintiff's complaint based on documentary evidence.[3] In dismissing a complaint pursuant to CPLR §3211(a)(1), the documentary evidence must resolve all factual issues as a matter of law. ***Fontanetta v Doe***, 73 AD3d 78, 83 [2d Dept 2010]. While part of defendants' submissions, such as deeds and mortgages, are of the kind and nature of documents that are considered in motions to dismiss, the case itself is posited on the alleged fraud that procured the documents. As such, proof of transfers, proof of ownership, and contracts in this case fail to resolve factual issues. In fact, there seems little contest as to their authenticity, but significant contentions as to how they were obtained or entered into. While South Fork's documents related to it obtaining the subject property are relevant, they by themselves fail to establish a defense of bona fide purchaser of value as a matter of law. Based on its independent review of the documentary evidence, the Court recognizes that the plaintiff signed a deed transferring his property to Hampton for no consideration, but that fact alone does little to determine as a matter of law his fraudulent inducement claims. Defendants have failed to conclusively dispose of plaintiff's claims through their documentary evidence, and therefore, their motion pursuant to CPLR §3211(a)(1) is denied.

C. Defendant South Fork's Motion to Dismiss (008) pursuant to CPLR §3211(a)(8)

Defendant South Fork's Notice of Motion includes CPLR §3211(a)(8) that the Court lacks jurisdiction over the defendant. This Court was unable to discern within defendant's moving papers support for this claim to dismiss plaintiff's amended complaint. Therefore, defendant's motion pursuant to CPLR 3211(a)(8) is denied.

D. Plaintiff's Motion to Dismiss (009) on Defendant Grausso & Foy's Counterclaim and First Affirmative Defense

Defendants Grausso and Grausso & Foy filed their answers with Counterclaims to the Amended Complaint. Defendants' counterclaims are both for defamation and slander. In both of their second counterclaims, the defendant lawyer and law firm allege multiple misrepresentations in the Amended Complaint claiming these statements are false or not true. In addition, in the defendants' opposition papers, defendants claim plaintiff made false statements to the East Hampton police, who then referred a complaint to the Suffolk County District Attorney. Grausso also states that plaintiff's attorney attempted to disparage defendant's character during on oral argument held by this Court. Defendants conclude that these actions were interposed with malice and not made in good faith. As a result, the defendants aver that they have suffered damages to their names and reputation.

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[3]Defendant Grausso in his notice of motion failed to note he was moving upon CPLR 3211(a)(1).

Plaintiff underscores the fact that the alleged defamatory statements are contained in the Amended Complaint, a pleading in a judicial proceeding. In addition, plaintiff's attorney states that he, not the plaintiff, verified the Amended Complaint. As these statements were made within a judicial proceeding plaintiff asserts that they are privileged and protected from a claim of defamation.

An allegedly defamatory statement made in the course of a judicial proceeding and pertinent to it is absolutely privileged. ***Goldfeder v Weiss***, 250 AD2d 731 [2d Dept 1998]. In ***Goldfeder*,** the Appellate Court reversed the trial court and granted the motion to dismiss. Here, defendants' counterclaim for defamation and slander, as pled in the answer with counterclaims, focuses solely on the statements made in the Amended Complaint and does not mention any conversations outside the pleadings as a source of the cause of action. The challenged statements are absolutely privileged as a matter of law and cannot be a basis for a defamation cause of action. (*See* ***Yuk Ping Ifantides v Wisniewski***, 181 AD3d 575 [2d Dept 2020]). Plaintiff's motion to dismiss defendants' counterclaim for defamation is granted.

The second prong of plaintiff's motion is to dismiss defendant Grausso & Foy's first affirmative defense. Defendant Law Firm asserts in its first affirmative defense that the plaintiff cannot claim fraud when the same allegations support his breach of contract cause of action. (*See* ***Guerrero v Valiando***, 197 AD2d 667 [2d Dept 1993]). Grausso opines that the claimed misrepresentations in plaintiff's fraud claim are the same allegations in his breach of contract claim and the two claims cannot coexist.

Plaintiff urges that his fraud claim is distinct from the breach of contract claim. Plaintiff states that the fraud claim goes beyond the reach of the breach of contract cause of action. Specifically, he claims that in 2022 defendants used false pretenses to remove him as title owner, requested of him funds for a home he already purchased and paid for, encumbering his property with other loans and placing South Fork as title owner of the property.

Here, plaintiff has alleged misrepresentations of present facts that are collateral to the contract which served as an inducement to enter into the contract. These representations span a time period both before and after the 2014 alleged contract. From the pleadings there appears to be no contract which required plaintiff to pay either O'Sullivan or Hampton hundreds of thousands of dollars to protect his home from foreclosure. When plaintiff is induced to enter into a transaction be it a purchase, transfer of title, or transfer of money based on misrepresentations of material facts a fraud claim can be maintained along with a breach of contract claim. ***First Bank of Americas v Motor Car Funding, Inc.***, 257 AD2d 287 [1st Dept 1999].

Due to the expanse of time (2014 -2022), the multiple transactions and many alleged misrepresentations, it is difficult to determine if defendants' affirmative defense has no application in this case. Plaintiff's application is to dismiss for failing to state an affirmative defense. Plaintiff has failed to establish with complete clarity and particularity that there could be no application of this defense. Plaintiff's motion to dismiss this affirmative defense is denied without prejudice to renew after discovery is complete.

E. Plaintiff's Motion (010) to Dismiss Defendant Grausso's counterclaims and first affirmative defense

For the reasons set forth above plaintiff's motion pursuant to CPLR §3211(a)(7) is granted to the extent that defendant Grausso's second counterclaim for defamation and slander is dismissed and the dismissal of his affirmative defense that the fraud claim cannot stand, as it arises from the same facts and allegations as the contract claim, is denied without prejudice. This leaves defendant's first cause of action for use and occupancy.

An extensive review of the NYSCEF Docket fails to reveal any opposition to this motion. The Court has deemed defendant's opposition to motion sequence 009 as also opposition to motion 010. In any case, there is no opposition to the dismissal of defendant Grausso's use and occupancy counterclaim, and therefore, plaintiff's motion is granted in that respect.

F. Defendant Grausso's Motion to Dismiss (011) Pursuant to CPLR §3211(a)(7)

The Court has previously denied defendant Grausso's motion to dismiss pursuant to CPLR §3211(a)(7), *supra*.

G. Defendant Grausso's Motion for Summary Judgment (012) on his Counterclaims

The Court has previously dismissed the defendant's counterclaims, *supra*. Therefore, this motion is deemed moot.

H. Plaintiff's Application for Temporary and Preliminary Relief (001)

Plaintiff moved by Order to Show Cause pursuant to CPLR §§ 6311 (Preliminary Injunction) and 6313 (Temporary Restraining Order) to prevent defendants from taking any action to evict or remove plaintiff from the subject premises and to prevent it from being further encumbered or transferred. The Court granted the temporary restraining order pending its determination of the request for preliminary relief.

In its application, the plaintiff outlines the transactional history of him gaining ownership of the subject premises and transferring the property back to Hampton in 2022. While he claims to have received no consideration for this deed, the recording documents state a purchase price of $750,000.00. (See NYSCEF Doc. 6). Plaintiff avers that in August 2023, Hampton mortgaged the property for $900,000.00 and interestingly, in June 2023, plaintiff received a notice from South Fork claiming it was the owner of the property. (*See* NYSCEF Doc. 11). Plaintiff avers that he gave up ownership of the premises so that defendant Hampton could eliminate the extant liens as was agreed in 2014.

To obtain a preliminary injunction the plaintiff must demonstrate a probability of success on the merits, irreparable injuring in the absence of the injunction and a balance of equities in his favor. ***Masjid Usman, Inc. v Beech 140, LLC***, 68 AD3d 942 [2d Dept 2009]. The Appellate Court in ***Masjid Usman, Inc.*** (*supra*, at 942) notes that the purpose of the injunction is to maintain the status quo, not to determine the rights of the parties. This case presents issues of ownership to real property which could be lost if this Court does not exercise its discretion.

Defendant O'Sullivan opposes plaintiff's application for injunctive relief. He acknowledges Hampton selling the subject property to plaintiff in 2014 subject to the liens against the premises. O'Sullivan claims that Hampton agreed to assist plaintiff in negotiating a short sale or short payoff of the mortgage to settle the foreclosure proceeding. While defendant refers this Court to NYSCEF Doc. 4 in support of this claim, the one page "agreement" only speaks to the existence of the liens and Hampton's obligation to remove them. O'Sullivan acknowledges risks in this transaction and claims the plaintiff was aware of them. Approximately seven (7) years later the threat of foreclosure materialized and transactional steps were undertaken which resulted in plaintiff being removed from title ownership of the premises and his eviction from his home initiated.

The Court has not considered attorney Thompson's papers in opposition to this application. Since filing his papers plaintiff has discontinued his action against Thompson.

The Court has considered the divergent claims made by the parties as to the nature of these real estate transactions. The documentation submitted to date does not give any clarity to the enterprises. Plaintiff was title owner of the subject premises subject to the liens against the property. Defendant Hampton was obligated to clear title and failed to do so before acquiring the property back from the plaintiff. Liens were substituted but not removed and now Plaintiff is being evicted from his home. The Court based on the pleadings and averments before it finds that the plaintiff has shown a likelihood of success on the merits. No one has challenged that plaintiff has over the course of time paid valuable consideration for the premise. He is presently in danger of losing his home. The status quo should be maintained so that full discovery may ensue and the matter determined on its merits. The Court grants plaintiff's preliminary injunction.

The Court orders that before making any further motions a party shall first seek a pre-motion conference. In addition, this matter is set down for a preliminary conference and settlement conference on July 22, 2025 at 2:30 PM. Please have your clients present in the Courthouse.

This constitutes the decision and order of this Court.

Dated: **June 18, 2025**
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

____ FINAL DISPOSITION **X NON-FINAL DISPOSITION**