

MONROE COUNTY CLERK'S OFFICE

THIS IS NOT A BILL. THIS IS YOUR RECEIPT.

Receipt # 3750562

Book Page CIVIL

No. Pages: 15

Instrument: AFFIRMATION IN OPPOSITION

Control #: 202402202684

Index #: E2024000703

Date: 02/20/2024

Time: 5:53:27 PM

Return To:
James R. Caputo
4278 Lafayette Rd
Jamesville, NY 13078

Caputo, James R

Holt, Nathan
Billet, Owen
Premium Mortgage Corporation
Houle, Robert T
Houle Sales Consulting Inc

Total Fees Paid: \$0.00

Employee:

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS
ENDORSEMENT, REQUIRED BY SECTION 317-a(5) &
SECTION 319 OF THE REAL PROPERTY LAW OF THE
STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK



**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE**

James R Caputo

Plaintiff

Index No.: E2024000703

– vs –

Nathan Holt, Owen Billet, Premium Mortgage Corporation, Robert T Houle, Houle Sales Consulting Inc, Donald Cheney Esq, Cheney Law Firm PLLC, ABAR Abstract Corporation, Monroe County Clerk’s Office

VERIFIED RESPONSE TO DEFENDANT’S MOTION TO DISMISS

Defendants

Plaintiff James R. Caputo replies to (both) the Affirmation In Support and the Memorandum Of Law In Support Of Defendant County Clerk’s Motion To Dismiss submitted to the Court in this action by Miguel A. Munoz, Esq., (Deputy County Attorney), on behalf of the Monroe County Clerk’s Office, and asserts the affirmative defenses and relevant claims as follows:

PRELIMINARY STATEMENT

This Plaintiff’s claim for breach of fiduciary duty against Defendant Monroe County Clerk’s Office, which is based on Defendant County Clerk’s alleged failure to properly maintain a record of Plaintiff’s mechanic’s lien, should not be dismissed because: (1) a notice of claim is not required against a county when there is no claim for personal injury, wrongful death or damage to real or personal property is alleged to have been sustained; (2) the statute of limitations has not passed; (3) the Complaint does indeed state a claim for breach of fiduciary duty.

BACKGROUND AND INTRODUCTION

Counsel for the Defendant does an excellent job of delineating the progression of allegations against the various parties (and Defendants) to the action. However, a few points must be made as to his account. First, Defendant Cheney did not engage in any litigation with Plaintiff during the first half of 2022. It was Defendant Houle, (representing himself), who brought the Supreme Court Action against the lien on April 28, 2022, with a Decision by Judge Valleriani on May 2, 2022. Nevertheless, Defendant Cheney, (representing Defendant Robert T. Houle and Houle Sales Consulting, Inc for the property sale), knew full well of this Decision. There were, however, negotiations between all three parties during this first half of 2022, namely during the month of June. A second point that must be made is this. Aside from Mr. Munoz's detailed account of Plaintiff James Caputo's allegations, it must again be asserted to this Court that each allegation in the Complaint is supported by documented material proof, including the deficiencies being claimed against the Monroe County Clerk's Office.

LEGAL STANDARD

Counsel for Defendant County Clerk states the following in his Memorandum:

When determining a motion to dismiss under CPLR 3211(a)(7), a court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, and accord the plaintiff the benefit of every possible favorable inference. *See Leon v. Martinez*, 84 N.Y.2d 83, 87- 88 (1994). "However, while the allegations in the complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dep't 2007) (internal quotation omitted).

However, for Defense Counsel's argument to hold water, it must be demonstrably established that all allegations and factual claims concerning and against the Monroe County Clerk's Office by Plaintiff James Caputo either consisted of "*bare legal conclusions*" or

“factual claims flatly contradicted by documentary evidence”, and therefore *cannot* be accepted as true, despite the court otherwise affording the pleading a liberal construction as that statute calls for. Yet, when this Plaintiff affirmed Mr. Munoz’s account as being quite accurate, (save for the few aforementioned clarifications), I then emphasized to the Court that each factual claim and allegation was substantiated by material proof. Therefore, according to the very legal standard presented by Defense Counsel, and because of the *“documentary evidence”* standard contained therein actually having been met, the Court must *“accord the plaintiff the benefit of every possible favorable inference.”*

DISCUSSION

I. Plaintiff did fail to file a notice of claim.

Plaintiff admits that a notice of claim was not filed in accordance with General Municipal Law § 50-e(1)(a) and County Law § 52(1) against this defendant and therefore, since this stipulation is specific to a *“claim for damages”*, Plaintiff is technically disqualified from seeking damages from Defendant County Clerk. Though named as possibly culpable (to some extent) for Plaintiff’s damages, the Complaint against Defendant County Clerk is more concerned with the issue of improperly filed documents, how this may have interplayed with an illicit property sale at the very same time and whether there is an administrative issue with what has happened.

Therefore, this statutory preclusion from being able to seek damages against Defendant County Clerk does not negate the answerable contentions as part of this Agency’s fiduciary duty to Plaintiff James R. Caputo and to this community as a whole, pursuant to Monroe County Charter. As such, the Complaint should not be dismissed for Plaintiff’s failure to file a notice of claim, since no damages are being sought, just answers that any County Agency would

seemingly be obliged to answer for the sake of clarification to the Court and to the community it serves.

II. Plaintiff's claim is not barred by statute of limitations.

There are two events upon which Plaintiff James R. Caputo's claim is based against Defendant County Clerk. The first event is indeed how Defense Counsel reiterates it being Plaintiff's visit to the Defendant County Clerk to obtain certified copies of "all active filings". And that this visit occurred on August 11, 2022, which is undeniably an interval greater than allowed by statute to bring suit when measured against a Complaint dated January 11, 2024. However, on January 18, 2023, [a date within the statutory requirements to be able to make a claim], Plaintiff James R. Caputo filed a Mechanic's Lien Extension, at which time he was told that the Lien still showed in the system after the attendant had been told it was not showing in the County's online records for the property. The attendant then date stamped the Lien Extension and then issued a receipt for Lien Extended with the new Control/Instrument # on it. (*see Plaintiff Exhibit 50*)

To this day, neither Plaintiff's original mechanic's lien or his lien extension show up on Monroe County online records search for the subject premises. (*see Plaintiff Exhibit 51*) It has, therefore, been alleged in Plaintiff's Complaint that the Monroe County Clerk's Office [*as an administrative agency of Monroe County in the Monroe County Charter and is the official registrar of deeds, mortgages, assignments of mortgages, satisfactions of mortgages, judgments and liens*"] has failed its fiduciary duty to him by the unexplained absence of these two filings on the records for the property at the heart of this matter.

Pursuant to New York Lien Law § 3, an unpaid contractor, laborer, or materialman may file a mechanic's lien *against* privately owned real property. This is why the property ID on the

mechanic's lien is so important, since it is the property, (and not necessarily the owner), that the lien is filed against. The most recent "*happening of the event upon which the claim is based*" was January 18, 2023 (and beyond) by virtue of the lien extension failing (also) to show on the County's online registry for the subject property.

III. The Complaint does not fail to state a cause of action.

Factual Claims and (legally based) Conclusions by Plaintiff.

It was stated earlier that Plaintiff's Complaint should be dismissed because of it being based on "*bare legal conclusions*" or "*factual claims flatly contradicted by documentary evidence*". A closer look at what is stated in the Complaint is essential to refute such a contention.

Plaintiff Factual Claim #1: In ¶ 7 of the Complaint, Plaintiff describes the name, address and nature of business for the Monroe County Clerk's Office as being duly organized and existing under the laws of New York State. In Defense Counsel Munoz's Affirmation in Support of Defense County Clerk's Motion to Dismiss, ¶ 2, he essentially affirms this factual claim rather than contradict it.

Plaintiff Factual Claim #2: In ¶ 28 and 30 of the Complaint, Plaintiff states that on January 21, 2022, he duly filed a Notice of Mechanic's Lien for the sum of \$25,000 on the subject premises, and then properly served upon Defendant Robert T. Houle and Houle Sales Consulting, Inc., all of which is represented in **Plaintiff Exhibits 8, 9 and 10**. This is a factual claim supported, rather than contradicted, by documentary evidence.

Plaintiff Factual Claim #3: In ¶ 49 of the Complaint, Plaintiff James R. Caputo claims to have personally visited the Monroe County Clerk's Office on August 11, 2022 to obtain certified copies of all active filings with the Clerk regarding the subject premises. Plaintiff also

claims that the Mechanic's Lien he filed on January 21, 2022, was nowhere to be found among the certified copies of the financial filings for the subject property. **Plaintiff Exhibits 8, 9, and 14** have been submitted as material evidence proving these claims to be true. Therefore, this is yet another factual claim supported, rather than contradicted, by documentary evidence.

Plaintiff Factual Claim #4: In ¶ 63 of the Complaint, Plaintiff James R. Caputo claims that on January 18, 2023, he filed a mechanic's lien extension and that despite what the attendant told him about the lien still showing in the system that she could see, it was not listed for the subject premises through an online County Clerk property search, as would be expected. **Plaintiff Exhibits 21, 22 and 51** have been submitted as material evidence proving these claims to be true. This is, still, another factual claim supported, rather than contradicted, by documentary evidence.

Plaintiff (legally based) Conclusion #1: In ¶ 109 of the Complaint, Plaintiff alleges that by his duly filed mechanic's lien (from January 21, 2022) being found missing from (both) the Clerk's online records and from the certified records obtained on August 11, 2022 in person from the Clerk's Office (itself) *for* the subject property (4 Chambord Dr. Mendon, NY) at the center of this matter, the Monroe County Clerk's Office failed to properly maintain or properly file the record. **Plaintiff Exhibits 9, 14 and 22** were submitted as material evidence, (along with **Plaintiff Exhibit 51** with this document), demonstrating the absence of the mechanic's liens to be true.

Pursuant to Monroe County Charter § C7-1(B), it states that the County Clerk has the powers and duties to:

- (1) To act as the official registrar of the County.
- (2) To record deeds, mortgages, maps and other actions affecting real property.

The original mechanic's lien filed by Plaintiff is a document that required the Clerk to exercise duties (1) and (2) above. By this lien being absent from the certified records for the subject premises, the registrar, (the record-keeper), who is the Monroe County Clerk's Office, failed to properly attach the lien to the property. Therefore, this legally based conclusion by Plaintiff is supported, rather than contradicted, by documentary evidence.

Plaintiff (legally based) Conclusion #2: In ¶ 110-112 of the Complaint, by discovering the absence of the mechanic's lien being listed for the subject premises in and around the mendacious sale of the property, Plaintiff suggested that there may have been foul play that went on within this official agency, (the Monroe County Clerk's Office), to explain such a finding, and based on the timing. First, the illicit sale of the property (somehow) over and against the lien and then no record of the lien on the property's records? Anyone in the position of lien holder might be suspicious, just on that information alone.

The original mechanic's lien was duly filed on January 21, 2022. At this point, the Monroe County Clerk's Office had a presumed duty, (pursuant to Lien Law § 3 as well as their own Charter), to ensure that this lien was attached and remained attached to the property upon which it was filed. This mechanic's lien was then the subject of a failed challenge in Monroe County Supreme Court in April-May of 2022. The lien thereafter proved effective in prohibiting the sale of the home pending satisfactory payment, as it was designed to do. The subject home was then secretly sold on June 29, 2022, (somehow around the lien), while at the same point in history, (July 11 and August 11, 2022), the mechanic's lien is discovered to be absent from the online and in-person records (respectively) for the subject property at the Monroe County Clerk's Office. Even though the original mechanic's lien was apparently still in the system at the time of the lien extension being filed on January 18, 2023, even *this* entry fails to show up when

searching the records for the subject premises when, again, it is the *property* upon which the mechanic's lien is filed and nothing else.

To know the true significance of these records being absent upon online search for the subject premises would require knowing Defendant County Clerk's operational procedures for how a mechanic's lien is designated and logged into the system pursuant to the Lien Law and in relation to the property upon which it is filed. This is what is being asked of Defendant County Clerk to clarify.

It is true that an official online search of the subject premises did *not* reveal the presence of a duly filed and Supreme Court upheld mechanic's lien in and around the time of the property being sold out from under the lien. Unless the process and procedures of that sale are understood and from the perspective of each party involved, it cannot be fully known what impact the absence of these records at the County Clerk level had on the illicit sale of the home. For instance, the new homeowners are claiming (through their attorney) that they did not have knowledge of a mechanic's lien prior to the sale of the home. Because if they did know, of course they would have resisted proceeding with the sale, by their own defense. Regardless, one would think it customary for any home seeker to do their homework on any new house they might be considering buying, especially one that costs over \$400K and has just seen a complete renovation. And where better to determine if a potential property has any financial encumbrances on it than the Monroe County Clerk's online portal?

When an individual types in either the tax map id or the actual address for the subject premises, you get what has already been introduced as **Exhibits 22** and **51**. No record whatsoever of either lien from as far back as July 11, 2022, just thirteen days after the enigmatic sale of the property. Did this absence of Plaintiff's mechanic's lien within the Monroe County

Clerk's records for this property have any (direct or indirect) bearing on how this home was able to be sold over and against the lien? Maybe, maybe not. But that is one of the many questions to be answered by the parties involved and the basis for which Plaintiff raised his suspicions of impropriety.

It must be said, however, that it has since (the filing of the Complaint) been discovered that the original mechanic's lien and the lien extension can (in fact) be found in a search of the Monroe County Clerk's online records only when the file number (itself) for the lien is searched and not the property against which it is filed. Here is a lien filed directly against the subject property that neither a layperson and a professional person searching the address through the County Clerk website would ever know about or see otherwise. (*see Plaintiff Exhibit 52 and 53*) Note how in Exhibit 52, the Clerk's record for the original mechanic's lien shows the "legal description" as 4 Chambord Dr. Mendon, [which is the subject premises and further argument that this lien record ought to have been attached in the system to the subject premises and then shown up on a search of the property itself]. Yet in Exhibit 53, the Clerk's record for the "Lien Extended" does not list the property at all, which, (again), is the sole object of any mechanic's lien. These are seemingly two separate failures by the Monroe County Clerk's Office to rightfully attach a mechanic's lien to a property which would then go on to be sold out from under that very lien.

While some may debate whether there is such a thing as coincidence or not, such a situational irony would seem somewhat implausible unless there was a purposed action to hide, conceal or disassociate Plaintiff's mechanic's lien from the manifest records for the property, such as has actually happened. Maybe the failure to attach the lien to the property was simple carelessness on part of the County Clerk attendants.....yet, occurring twice...with two separate

lien filings...on a property that was ultimately sold against the lien. Otherwise, is it normal for such filings against a property (as a mechanic's lien) to simply not show up on its record?

When performing the Monroe County Clerk search function for a given property, there are 28 different document types that can be searched for, including four different kinds of liens. This would imply that when a mechanic's lien is filed, it is also attached somehow (through the records system software) to the property against which it filed, else the association would never manifest itself, thus making the search portion for liens, (on any given property), moot. This attachment of the lien to the property did not happen in the matter at hand - twice. Therefore, it is not a bare legal conclusion, [but instead, supported by the documented evidence, the law and reasonable inference, thus meeting CPLR 3016(b)'s requisite specificity requirement], for Plaintiff to suggest that foul play *may* have existed within Defendant County Clerk's office based on the *fact* that they failed to list these two particular liens under the property itself.

The Counsel for Defendant County Clerk asserts that the Court should dismiss Plaintiff's Complaint because the elements of a cause of action for breach of fiduciary duty require there to have been the existence of a fiduciary relationship. He cites various cases to support his point and provides the legal definition as "***A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.***"

There is no argument that a fiduciary relationship is required for there to be a fiduciary failure. But in this case, the Monroe County Clerk's Office does indeed have a ***duty to act for...the benefit of*** (both) this Plaintiff and the County Community (as a whole) ***upon matters*** of record keeping ***within the scope of the relation*** between them. The Community relies upon the

Defendant County Clerk to maintain the official records and filings for the entire county with utmost accuracy. A failure of record keeping can otherwise result in large financial losses to an affected party and thus, a fiduciary relationship is naturally developed between the County Clerk's Office (with their responsibility to maintain records) and those who might be reliant upon such accurate caretaking.

The Monroe County Clerk's Office falls under the auspices and jurisdiction of the Monroe County Charter. Pursuant to § C1-1 of that document, under the heading of "Title and Purpose" it states:

Among the purposes of this Charter are the following:

- A. To maintain a government representative of and responsible to all County residents.
- B. To provide an effective and efficient means for the rendering of County governmental services.
- C. To assure the accountability and responsiveness of County government to the express concerns of its residents.
- D. To provide appropriate mechanisms for citizen participation in the affairs of County government.
- E. To provide the responsibility and authority for County government to function effectively in matters of metropolitan concern and to encourage inter-governmental relationships for such purposes.
- F. To provide a mechanism for a response to new needs of County residents.
- G. To encourage any and all means allowed by law to accomplish these and other purposes for the benefit of the people of Monroe County.

Clearly, by the underlined sections in the County Charter, the Monroe County Clerk's Office not only has a defined duty to the people and residents of the County as a whole, but by their responsibilities also including the custodianship of documents concerned with real estate

transactions and other business dealings involving monetary funds, they most definitely have a fiduciary duty to the Community and individual residents as well. This is due particularly to the potential negative financial impact on any given circumstance that relies upon their Community record-keeping function should they fail to properly execute their obligations.

In this case, plaintiff was damaged by a property being sold over and against an in-force mechanic's lien that was not properly attached to the property itself and therefore did not show up on County Clerk records for the property. Whether it bears out that this failure had any impact on this wrongful sale is yet to be determined. Nevertheless, it stands as absolute proof that should any County Clerk's Office fail to properly file, designate and/or attach a mechanic's lien to a subject property upon which it is filed, it can have dire consequences for the lien instrument itself (and the filer thereof) by not being seen or recognized by any other community party when it is crucial that it does. Therefore, all arguments by Defense Counsel for Defendant County Clerk that his client does not owe the community and (individually) Plaintiff a fiduciary duty is not consistent with the Law and therefore must fail. And if Defendant County Clerk is unable to locate any precedent acknowledging that a fiduciary relationship exists between a county clerk and its patrons, may this case justifiably stand as the first.

Lastly, Defense Counsel for Defendant County Clerk iterates that by Plaintiff contending in his Complaint that each party to the sale had foreknowledge of his mechanic's lien by whatever reason stated, his client's alleged failure to list the lien in the records for the subject premises ***"cannot have directly caused Plaintiff's damages."*** First, Plaintiff did not make any claims that the lien not being listed in the online records was *directly* causative of his damages. The direct causation of Plaintiff's damages were the unlawful actions of Defendant's Cheney and Houle (representing their respective Defendant corporations) to have sold the subject property

over and against a Court Order on an in-force mechanics lien that was supposed to be logged (but wasn't) by the County Clerk's Office in association with the property upon which it was filed. The various party's foreknowledge or not of the mechanic's lien does not erase the filing shortcoming of the County Clerk's Office and their potential culpability, to some degree, in this mechanic's lien violation matter.

CONCLUSION

Plaintiff's Complaint should not be dismissed against Defendant County Clerk, [pursuant to County Law § 52 for failure to file a notice of claim], because Plaintiff is not seeking damages. Further, there is *no* one year and ninety-day Statute of Limitations application to this case either, since Plaintiff established January 18, 2023 as the most recent date that applies to the allegations against Defendant County Clerk. And lastly, the definition of "cause of action" is the following: *a fact or facts that enable a person to bring an action against another*. Plaintiff spelled out the manifest facts surrounding: the filing and hiddenness of his mechanic's lien; the fiduciary duty owed to the Community by the County Clerk's Office; and that the property, [for which the County Clerk failed to properly maintain the record], was sold out from under that very same concealed lien.

Whether or not this Court is the proper venue for an action against the Monroe County Clerk's Office, one would hope and desire to see a County Office, (who is commissioned to serve the interests of the Community), step up and eagerly seek out and provide answers to the questions surrounding the lien records and ensure that any identified shortcoming will be fixed. This case and the truth behind how a mechanic's lien is maintained on property records by the Monroe County Clerk's Office carries a significant potential impact for contractors, homeowners, homebuyers, attorneys, mortgage companies and title insurance companies,

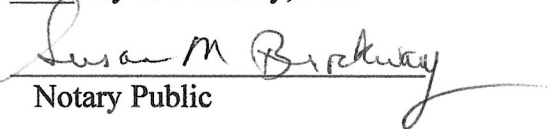
especially if there is a process failure, just as has been demonstrated with this very case. The public wants to know and be confident that not only is their County Clerk's Office operating correctly, but also that no hand of influence (be it good or bad) would have any reach into the otherwise stale and neutral world of municipal document keeping.


WHEREFORE, for the foregoing reasons, Plaintiff James R. Caputo respectfully requests that this Court: (i) deny the motion by Defendant County Clerk to dismiss the Complaint against them; (ii) compel an answer to the lien filing allegations; and that the Court grant such other and further relief as it may deem proper and just.

VERIFICATION

I, James R. Caputo, being duly sworn, say: I am the Plaintiff in the above-named proceeding and that the foregoing Verified Response and submitted evidence were prepared by me, and are true to my own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters, I believe it to be true.

Sworn to before me this
20 day of February, 2024


Notary Public


James R. Caputo, Plaintiff, pro se
6499 East Seneca Turnpike
Box 433
Jamesville, NY 13078
(315) 382-8778

SUSAN M. BROCKWAY
Notary Public, State of New York
Qualified in Onondaga County
Commission Number 4995943
My Commission Expires 5/4/20 26