
Commonwealth of Massachusetts
Appeals Court
Middlesex County

2012-P-0524

JESSE E. TORRES, III and
JENNIFER J. ADAMS,

Plaintiffs-Appellants,

vs.

SOPHIE J. TORRES, JESSE TORRES, IV
and DEBTMERICA, LLC,

Defendants-Appellees,

and

DONALD F. TORRES,

Defendant.

*Appeal from the Order from the Barnstable Superior Court,
Civil Docket No. BACV2011-00433*

BRIEF FOR DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
COUNTER-STATEMENT OF THE ISSUES.....	1
COUNTER-STATEMENT OF THE CASE.....	2
ARGUMENT.....	8
I. THE BARNSTABLE SUPERIOR COURT TRIAL JUDGE CORRECTLY DETERMINED THAT PLAINTIFFS' CLAIMS FOR BREACH OF CONTRACT AGAINST DEFENDANT, SOPHIE J. TORRES, FAILED AS THE TIME FOR PERFORMANCE HAD NOT YET ARRIVED.....	8
II. THE BARNSTABLE SUPERIOR COURT TRIAL JUDGE APPROPRIATELY TREATED DEFENDANT, JESSE E. TORRES, IV'S MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT.....	13
III. THE TRIAL JUDGES AT THE BARNSTABLE SUPERIOR COURT ACTED IN MATTERS RELATED TO PLAINTIFFS AND DEFENDANTS PROPERLY AND WITHOUT BIAS.....	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

Page

Cases

<u>Daniels v. Newton,</u> 114 Mass. 530 (1874).....	9, 11, 12, 13
<u>Johnson v. Starr,</u> 321 Mass. 566 (1947).....	<i>passim</i>
<u>The Stop & Shop Companies, Inc. v. Bruce B. Fisher,</u> <u>et al.,</u> 387 Mass. 889 (1983).....	14

Rules of Procedure

M.R.C.P. 12(b)(6).....	5, 13, 14, 15
M.R.C.P. 56.....	13, 16

COUNTER-STATEMENT OF THE ISSUES

- I. Did the Barnstable Superior Court trial judge correctly determine that Plaintiffs' claims for breach of contract against Defendant, Sophie J. Torres, failed as the time for performance had not yet arrived.
- II. Did the Barnstable Superior Court trial judge appropriately treat Defendant, Jesse E. Torres, IV's Motion to Dismiss as a Motion for Summary Judgment.
- III. Did the trial judges at the Barnstable Superior Court who acted in matters related to Plaintiffs and Defendants act with bias.

COUNTER-STATEMENT OF THE CASE

Plaintiff, Jesse E. Torres, III, drafted a Will for his mother, the Defendant, Sophie J. Torres, on or about April 24, 2009, of which its terms basically transferred the majority of her estate to the Plaintiff, Jesse E. Torres, III. (Appendix Vol. 1, pgs. A42-46). In addition to the Will, the Plaintiff, Jesse E. Torres, III, drafted a document entitled Addendum to the Will of Sophie June Torres, Addendum I, Permanent Transfer of Property Rights and he had the Defendant, Sophie J. Torres, sign that document, which Plaintiffs have alleged is a contract. (Appendix Vol. 1, pgs. A36-39). This Addendum purports to have the Defendant, Sophie J. Torres, transfer all of her rights in real property to the Plaintiff, Jesse E. Torres, III, and that said transfer is to occur upon the death of Sophie J. Torres by way of the dispositive language in her April 24, 2009 Will. The Plaintiffs further allege that, at some point after this Will and Addendum was signed, Defendant, Sophie J. Torres, changed her Will and as a result breached a contract that the Plaintiffs allege existed.

There was, and has been, no actual transfer or conveyance of the properties from Defendant, Sophie J. Torres, to Plaintiff, Jesse E. Torres, III.

The Plaintiffs filed a nineteen (19) count complaint against Defendants, Sophie J. Torres, Jesse E. Torres, IV (the son of Plaintiff Jesse E. Torres, III), Debtmerica, LLC and Donald F. Torres (uncle of the Plaintiff, Jesse E. Torres, III). (Appendix Vol. 1, pgs. A2-36). However, at the heart of the dispute between the parties is Defendant, Sophie J. Torres' action to execute a new Will, thereby terminating her earlier Will of April 24, 2009.

As Plaintiffs' Complaint is voluminous and contains extraneous claims not pertinent to this appeal, the following is a delineation of the pertinent portions of Plaintiffs' Complaint:

Counts I through IV of Plaintiffs' Complaint are under the same cause of action, to wit a breach of contract. Count I alleges the Defendant, Sophie J. Torres, transferred certain properties to her son, Plaintiff, Jesse Torres, III, through her execution of a Will with an addendum to the Will (dated April 24, 2009). The transfer, according to Count I, consisted of property rights to land known as "Grandma's house",

"Horse property" and "Uncle Fred's house". The allegation is that the Defendant, Sophie J. Torres, breached the alleged contract by executing a new Will, thus invalidating her prior Will. (Appendix Vol. 1, pg. A24).

Count II is a breach of contract under the same theory as Count I, except that Count II involves property known as the "Farmhouse". (Appendix Vol. 1, pgs. A24-25).

Count III is essentially the same as the first two counts, except that it involves real property known as the "Waquoit" home, which is located at 562 Waquoit Highway, East Falmouth, MA. (Appendix Vol. 1, pg. A25).

Count IV is the same as the previous counts, except that it involves real property, which consists of approximately six (6) acres, located directly across the street from the "Farmhouse" with an address of 345 Carriage Shop Road, East Falmouth, MA. (Appendix Vol. 1, pgs. A25-26).

Counts V through XIX are against Defendants, Debtmerica, LLC, Jesse E. Torres, IV, and Donald F. Torres alleging tortious interference, deliberate interference, malicious intent, conspiracy to commit

fraud, slander, defamation of character, coercion, extortion and intentional infliction of emotional distress. (Appendix Vol. 1, pgs. A26-31).

During the pendency of this matter, a myriad of motions were filed by the Plaintiffs prior to Defendants' Motions to Dismiss for Failure to State a Claim, which were addressed by the Barnstable Superior Court in a manner befitting the same. These motions shall not be further discussed as they are not pertinent to this appeal.

Defendants, Sophie J. Torres, Jesse E. Torres, IV, and Debtmerica, LLC, through their respective counsel, each filed a Motion to Dismiss on or about August 2011 and all requested a dismissal of Plaintiffs' claims against them with prejudice, as permitted under Mass. R. Civ. P. 12(b)(6). All Defendants argued that Plaintiffs' Complaint failed to state any legally cognizable claim against them upon which relief may be granted. (Appendix Vol. 1, pgs. A75-79, Vol. 2, pgs. A126-134, A173-179, respectively). However, in an effort to address the pertinent matters to this appeal, only the Motions to Dismiss for Failure to State a Claim under Rule 12(b)(6) of the Massachusetts Rules of Civil

Procedure, which were filed by counsel for Defendants, Sophie J. Torres and Jesse E. Torres, IV, shall be discussed (hereinafter called "Motions to Dismiss"). (Appendix Vol. 1, pgs. A75-80 and Vol. 2, pgs. 126-134, respectively).

Defendant, Jesse E. Torres, IV, through counsel, argued that all of Plaintiffs' claims against all of the Defendants stemmed from Defendant, Sophie J. Torres' alleged breach of contract and that if the court determined that there is no breach of contract or that the cause of action cannot be prosecuted at this time, then the remaining claims against the other Defendants must fail. (Appendix Vol. 2, pgs. A126-134).

Defendant, Sophie J. Torres, through counsel, argued that Counts I through IV of Plaintiffs' Complaint alleged breach of contract by her when she changed her Will and that such allegations for breach of contract are simply not a cause of action that can be prosecuted at this time. (Appendix Vol. 1, pgs. 75-79).

Plaintiffs filed their lengthy oppositions to Defendants' Motions to Dismiss requesting a denial of Defendants' motions. Additionally, Plaintiffs' sought

a leave of court to amend their Complaint if the Defendants' Motions to Dismiss were allowed. (Appendix Vol. 1, pgs. A80-97 and Vol. 2, pgs. A135-154).

Arguments on Defendants' Motions to Dismiss were heard by the Honorable Christopher J. Muse at the Barnstable Superior Court on November 17, 2011. Present at that hearing were the Plaintiffs (*Pro Se*), Cindy A. Nuzzolo, as co-counsel for Defendant, Sophie J. Torres, and Jeremy M. Carter, as co-counsel for Defendant, Sophie J. Torres, and as sole counsel for Defendants, Jesse Torres, IV and Debtmerica, LLC. After a full hearing on the Defendants' Motions to Dismiss, Judge Muse took matters under advisement and later issued a Memorandum of Decision and Order granting Summary Judgment in favor of the Defendant, Jesse E. Torres, IV, with respect to Count I of Plaintiffs' Complaint. (Appendix Vol. 2, pgs. A201-202). The Honorable Christopher J. Muse ruled that said determination would impact all remaining claims. As such, he ruled that all defendants were entitled to a judgment as a matter of law and Plaintiffs' Complaint was dismissed against all Defendants. (Appendix Vol. 2, pg. 204).

Plaintiffs now appeal the trial court's summary judgment in favor of the Defendants and the dismissal of Plaintiffs' Complaint against all defendants.

ARGUMENT

Defendants, Jesse E. Torres, IV, Debtmerica, LLC, and Sophie J. Torres, submit joint arguments against Plaintiffs' appeal of the allowance of summary judgment in favor of Defendant, Jesse E. Torres, IV, and the dismissal of Plaintiffs' Complaint against them.

I. THE BARNSTABLE SUPERIOR COURT TRIAL JUDGE CORRECTLY DETERMINED THAT PLAINTIFFS' CLAIMS FOR BREACH OF CONTRACT AGAINST DEFENDANT, SOPHIE J. TORRES, FAILED AS THE TIME FOR PERFORMANCE HAD NOT YET ARRIVED.

The Plaintiffs' Complaint concerns a Will and Addendum that Plaintiff, Jesse E. Torres, III, drafted and had the Defendant, Sophie J. Torres, sign on or about April 24, 2009 (Appendix Vol. 1, pgs. A42-46 and A36-39). Disregarding the suspected circumstances under which this Will was executed and the motives of the Defendant, Sophie J. Torres, at the time of its execution, the Plaintiffs' claims are simply not a cause of action that can be prosecuted at this time.

Massachusetts case law is clear that, even in the case of an enforceable contract to make a Will, a plaintiff cannot recover from a defendant for breach of contract in such a matter until such time for performance has arrived, which is at the time of death. See Johnson v. Starr, 321 Mass. 566, 569 (1947), citing *Daniels v. Newton*, 114 Mass. 530. It is clear from Johnson v. Starr, that a claim for an anticipated breach of contract is not legally valid until the death of the promissor/declarant; and therefore, the Plaintiffs' claims against Defendant, Sophie J. Torres, for breach of contract must fail since those claims cannot be prosecuted, nor can the Plaintiffs recover on their claims, at this time.

The underlying facts in Johnson v. Starr are analogous to the facts involved in this matter, excepting that Johnson involves an oral contract where the present matter involves a purported written contract.

The plaintiff in Johnson alleges that she entered into a contract with the defendant and that the defendant promised that in her Will she would devise certain real property to the plaintiff (and plaintiff's husband), and that in reliance of that

promise the plaintiff rendered services to the defendant. The defendant apparently executed a Will in accordance with the agreement involving the plaintiff and then subsequently took actions in contravention of the agreement by transferring the subject real property to another individual by deed, destroyed the Will purported to devise the real property to the plaintiff, and informed the plaintiff that she would not make any provision for the plaintiff.

The defendant in Johnson argued that the plaintiff's action against the defendant was,

"... brought prematurely since it was begun before the time for performance of the defendant had arrived, and that there could be no breach of the contract by the defendant until her death, that there can be no recovery for anticipatory breach of contract, and that therefore the plaintiff could not recover... for the breach of oral contract."

Johnson v. Starr, at 569.

In that case, the court found that the plaintiff could not recover for breach of contract on the express contract, since the time for performance on the part of the defendant had not arrived. Id.

Additionally, the trial judge in Johnson cites to Daniels v. Newton, which addressed a similar factual situation. Daniels v. Newton, 114 Mass. 530 (1874). In this case, there was a written agreement between the parties regarding the purchase of real property that was to occur within thirty (30) days from a certain date and included an automatic extension of an additional thirty (30) days for performance of the sale. While these facts are not identical to the present matter, they are certainly analogous as the defendants in Daniels similarly refused to comport with the terms of a written agreement sometime during the period allowed for performance of the contract and the plaintiff then sued the defendants for breach of contract. Id. at 530-531. Specifically, the court in Daniels stated that,

"The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration, whether promise or denial, could give him any cause of action in respect of that agreement...."

Id. at 541

Further, under Daniels, the doctrine of anticipated breach of contract is expressly rejected. Id. at 532. In contravention of anticipatory breach, the court

further states that the "true rule" is that to claim a breach of a contract, the other party must show a refusal or neglect to perform at a time when, and under conditions, that one is, or might be, entitled to require performance. Id. at 533. As clearly stated in Daniels, one cannot suffer an injury or deprivation to form grounds for damages until the time arrives, by the terms of the agreement, for performance or the entitlement to performance of that agreement, and without performance (or the entitlement to performance), there can be no violation of right or a loss to support an action. Id. at 533.

As in Johnson and Daniels, the present matter includes an alleged contract for the Defendant, Sophie J. Torres, to transfer properties to the Plaintiff, Jesse E. Torres, III, by way of a provision in her April 24, 2009 Will and Addendum (in the present case, the alleged contract is in writing). (See Appendix Vol. 1, pgs. A36-39 and A 42-46). As in Johnson and Daniels, Plaintiffs' claims for breach of contract against Defendant, Sophie J. Torres, occur prior to the time of performance under said alleged contract. (See Appendix 36). Analogous to Johnson, Plaintiffs' claims for breach of contract against Defendant,

Sophie J. Torres, are triggered by her execution of a subsequent Will. Therefore, as determined in Johnson and Daniels, Plaintiffs have no present right to performance of the alleged contract by the Defendant, Sophie J. Torres, nor are Plaintiffs entitled to performance of the alleged contract by Sophie J. Torres, as the time of performance does not arise until the death of Defendant, Sophie J. Torres.

II. THE BARNSTABLE SUPERIOR COURT TRIAL JUDGE APPROPRIATELY TREATED DEFENDANT, JESSE E. TORRES, IV'S MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT.

In accordance with Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure, the trial judge must treat a Rule 12(b)(6) motion as one of summary judgment and must dispose of it as provided under Rule 56 of the Massachusetts Rules of Civil Procedure if: (1) matters outside of the pleadings are presented to, and are not excluded by, the court; and (2) all parties are given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. M.R.C.P. 12(b)(6). The courts generally construe "outside matters" broadly; however those "outside matters" must contain relevant, factual

information. The Stop & Shop Companies, Inc. v. Bruce B. Fisher, et al. 387 Mass. 889, 892 (1983). An uncontroverted admission of a relevant fact at the hearing has been held as sufficient to trigger a conversion of a Rule 12(b)(6) motion to one of summary judgment. Id. Further, a party may be held to have constructive notice of the motion's conversion by the court to one of summary judgment when that party has submitted additional materials. Id. at 892, citing *White v. Peabody Constr. Co., supra* at 127-128 (1975).

As evidenced by the transcript of the hearing held on November 17, 2011, Plaintiffs' made significant arguments with respect to their opposition to the Defendants' Motions to Dismiss; and those arguments included uncontroverted facts presented by the Plaintiff, Jesse E. Torres, III, that were not included in the pleadings, such as: (1) a more in-depth description of the lots in Florida (Transcript C, pg. II-5); (2) the fact that Plaintiff, Jesse E. Torres, III, and his neighbors have used Quicken Willmaker (Transcript C, pg. II-7); (3) facts related to the actual drafting of the Will via Quicken Willmaker (Transcript C, pgs. II-16-17); and (4) opinion of fact regarding Defendant, Sophie J. Torres'

mental status with respect to her capacity to execute a subsequent Will and/or breach the alleged contract (Transcript C, pg. II-22).

The Plaintiffs had constructive notice from the court regarding the conversion of the hearing from a Rule 12(b)(6) motion to one of summary judgment as evidenced by the November 17, 2011 transcript wherein Judge Muse states,

"What I'm saying is that if they're [Defendants] successful...that as a matter of law, she [Sophie J. Torres] could not be found to have breached her own will."

(Transcript C, pg. II-23).

Additionally, it is clear from the transcript of the November 17, 2011 hearing that Judge Muse was questioning the Plaintiffs in regard to their claims in an effort to obtain as much relevant information on the matters pertinent to the Plaintiffs claims, as well as offering vague suggestions as to possible appropriate claims against Defendant, Sophie J. Torres. (Transcript C). Further, at the end of the hearing, Judge Muse stated, "If [Count] one stands.... If it doesn't, that's the end of the case so far as I'm concerned." (Transcript C, pg. II-35-36). During the hearing, it was clear that the Plaintiffs

understood the nature of the hearing and its ramifications since Plaintiff, Jesse E. Torres, III, argued his request to amend his Complaint. (Transcript C, pg.II-33-34).

As there was no genuine issue as to any material fact, Judge Muse made a judgment of law, as permitted under Rule 56. M.R.C.P. 56.

**III. THE TRIAL JUDGES AT THE BARNSTABLE SUPERIOR COURT
ACTED IN MATTERS RELATED TO PLAINTIFFS AND
DEFENDANTS PROPERLY AND WITHOUT BIAS.**

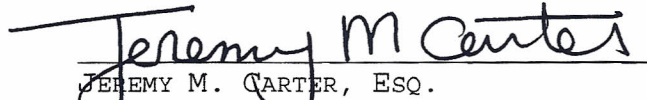
Counsel for Defendants, Jesse E. Torres, IV, Debtmerica, LLC, and Sophie J. Torres, did not perceive any bias or unfairness toward the Plaintiffs by the trial court judges, Honorable Christopher J. Muse and Honorable Regina L. Quinlan; but rather, counsel would state that they perceived the trial judges as offering judicious assistance and guidance to the Plaintiffs (because of their *Pro Se* status) in a manner befitting a Superior Court Justice. A review of the hearing transcripts shall provide sufficient evidence of the same. (Transcripts A, B, and C). No further argument with respect to the alleged bias will be addressed by the Defendants, and the Defendants

leave the issue of bias to this Honorable Appellate Court for its determination.

CONCLUSION

All parties present at the November 17, 2011 hearing had a full and fair opportunity to be heard. There was no genuine issue as to any material fact presented at that hearing; and as such, Defendant, Jesse E. Torres, IV's Motion to Dismiss for Failure to State a Claim was appropriately adjudicated and Plaintiffs' Complaint was dismissed, as a matter of law, against all defendants under the Honorable Christopher J. Muse's Memorandum of Decision and Order (dated November 23, 2011). (Appendix Vol. 2, pgs. A201-202). Defendants, Jesse E. Torres, IV, Debtmerica, LLC, and Sophie J. Torres, pray that this Honorable Appellate Court will uphold the decision of the Honorable Christopher J. Muse for a summary judgment in favor of the Defendants and a dismissal of the Complaint against all defendants with prejudice.

Respectfully submitted,

A handwritten signature in black ink that reads "Jeremy M. Carter". The signature is written in a cursive style with a horizontal line drawn through the middle of the name.

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CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass.R.A.P. 16(b); Mass.R.A.P. 16(d); Mass.R.A.P. 16(e); Mass. R.A.P. 16(f); Mass. R.A.P. 16(g); Mass. R.A.P. 16(h); and Mass. R.A.P. 20.


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