

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD KEENEY : CIVIL ACTION
 :
v. : No. 06-5403
 :
ROBERT E. DONATELLI, et al. :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

February 9, 2007

Donald Keeney asks this Court¹ to dismiss his civil rights complaint without prejudice to re-filing against Robert Donatelli, a court-appointed estate administrator for an intestate, and Conestoga Title Co., the title insurance company involved in the sale of real estate from the estate. Donatelli and Conestoga Title make a compelling argument neither is a state actor for purposes of recovery under section 1983.² Ordinarily, I would grant Donatelli's and Conestoga Title's motions to dismiss with prejudice. Because Keeney asked for an opportunity to re-file his Complaint based on after-

¹In a motion filed with this Court on February 1, 2007, Keeney states he never consented to a hearing before a Magistrate Judge. I note for Keeney's edification on June 24, 2004, President George W. Bush appointed me to the U.S. District Court for the Eastern District Court of Pennsylvania as an Article III Judge.

²Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983.

discovered evidence, I will grant the motions without prejudice.

FACTS³

Keeney feels aggrieved because he alleges he was never paid for building materials delivered to 617 Washington Street, Allentown, the home of Louis M. Polak. Louis Polak died intestate and the Lehigh County Court of Common Pleas appointed Robert Donatelli, Esq., administrator of the estate. George Polak, an heir to the estate, had filed three UCC financing statements in the Recorder of Deeds Office for Lehigh County. Keeney was the secured party under one of the financing statements; George Polak the secured party under the other two.

Donatelli sought termination of the financing statements to be able to convey good title. George Polak terminated one, leaving the other two. Donatelli petitioned Lehigh County Court, and Judge Brenner directed the Recorder to mark the remaining two financing statements terminated. A year after Polak died, Donatelli sold the property to Alain Aoun and Scott Solazzo, also named as defendants, who insured their title through Conestoga Title.

Keeney alleges he was deprived of a property right without notice and under color of state law. Keeney believes terminating his financing statement deprived him of property and has sued Donatelli, the two buyers of the property, the title insurance company that insured the buyers and 12 unnamed persons. The counts are undifferentiated as to each party and in Count I allege fraud by Donatelli in petitioning for and receiving a termination of the security statements without notice to Keeney and in collusion with George Polak. Count II alleges the unencumbered sale without notice to Keeney unjustly enriched Alain Aoun and Scott Solazzo. Count III alleges Donatelli presented

³When I consider a Motion to Dismiss, I accept all allegations in, and reasonable inferences from, the Complaint as true and view them in the light most favorable to Keeney. *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989).

false claims under 18 U.S.C. § 35(a). In Count IV, Keeney alleges a conspiracy under section 1985 among Donatelli, Auon and Solazzo.

During oral argument on Donatelli's and Conestoga Title's motions to dismiss, Keeney asked to have his Complaint dismissed without prejudice to refile. This I will do, but write to give Keeney guidance on the law.

DISCUSSION

This Court may grant a Rule 12(b)(6) motion only "if it appears to a certainty that no relief could be granted under any set of facts which could be proved." *D.P. Enter. Inc. v. Bucks County Cmty. Coll.*, 725 F.2d 943, 944 (3d Cir. 1984). This Court holds the allegations of a *pro se* litigant to a "less stringent standard" than formal pleadings prepared by a lawyer. *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir.2003) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

Keeney brings his complaints under sections 1983 and 1985,⁴ alleging a conspiracy to deprive him of property. Keeney's causes of action fail on two grounds. First, none of the Defendants is a state actor and, second, none deprived him of a constitutional right under color of state law. An attorney does not become a state actor when he files a court pleading. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1266 (3d Cir. 1994).

Property interests are created by state law. In Pennsylvania a UCC1 financing statement does

⁴Section 1985 provides in relevant part:

(3)If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

not create a security interest. *Equibank v. H.L. Clement Co.*, 112 B.R. 165, 168 (Bankr. W.D. Pa. 1981). A security interest may only be created when the debtor signs a security agreement, value has been given, and the debtor has rights in the collateral. *Reuter v. Citizens & Northern Bank*, 599 A.2d 673, 677 (Pa. Super. 1991).

A security interest is not an interest in real estate. A security interest, evidenced by a UCC1, is an interest in goods, chattels, or accounts. 13 Pa.C.S. § 1201.⁵ The Statute of Frauds invalidates any interest in real estate not signed by the grantor.⁶ Certain liens, created by statute, may be imposed on real estate after notice, such as the repair person's lien, 6 P.S. § 11;⁷ a mechanic's lien,

⁵ Section 1201 defines security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation." 13 Pa.C.S. §1201.

⁶The Statute of Frauds provides:

From and after April 10, 1772, all leases, estates, interests of freehold or term of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding; except, nevertheless, all leases not exceeding the term of three years from the making thereof; and moreover, that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall, at any time after the said April 10, 1772, be assigned, granted or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, or by act and operation of law.

Act of March 21, 1772, Sm.L. 389, § 1, codified at 33 P.S. § 1.

⁷Section 11 states:

Hereafter where any person, corporation, firm, or copartnership may have what is known as a "common law lien" for work done or material furnished about the repair of any personal property belonging to another person, corporation, firm, or copartnership, it shall be lawful for such person, corporation, firm, or copartnership

which fixes on real estate and arises from repairs or improvement to that real estate, 49 P.S. § 1101 *et seq.*;⁸ or, a lien for unpaid taxes, 53 P.S. § 7102.⁹ Keeney might have had a repair person's or a

having said common law lien, while such property is in the hands of the said person, corporation, firm, or copartnership contriving such work and material, to give notice in writing to the owner of the amounts of indebtedness for which said common law lien is claimed for the labor and material that has entered into the repair, alteration, improvement, or otherwise, done upon the said property. If the said claim for said work or material is not paid within thirty days the said person, corporation, firm, or copartnership to which said money is due, may proceed to sell the said property, as hereinafter provided. Provided, however, that the owner of said property, if he disputes said bill, may issue a writ of replevin, as provided by law, within the said thirty days, and the said dispute shall be settled in said action of replevin.

Act of May 7, 1925, P.L. 557, § 1, codified at 6 P.S. § 1.

⁸Notice is required before the imposition of mechanic's lien:

(b.1) Time Period of Formal Notice. No claim by a subcontractor, whether for erection or construction or for alterations or repairs, shall be valid unless, at least thirty (30) days before the same is filed, he shall have given to the owner a formal written notice of his intention to file a claim, except that such notice shall not be required where the claim is filed pursuant to a rule to do so as provided by section 506.

Act of Aug. 24, 1963, P.L. 1175, No. 497, art. I, § 501, codified at 49 P.S. § 1501.

⁹Tax liens are automatically imposed:

All taxes which may hereafter be lawfully imposed and assessed by counties, institution districts, cities, boroughs, towns, townships, and school districts on real property, are hereby declared to be a first lien on such real property (but subordinate to the lien of taxes imposed by the Commonwealth), and every such lien shall date from the day on which the millage or tax rate is fixed by the proper authority of any such political subdivision, except where such taxes are imposed and assessed prior to the commencement of the fiscal year for which the same are imposed or assessed, in which case the lien of such taxes shall date from the first day of the fiscal year for which such taxes are imposed or assessed.

Act 1945, March 21, P.L. 47, § 1, codified at 53 P.S. § 7102 .

mechanic's lien, but he failed to perfect them during Loius Polak's lifetime.¹⁰ Without a writing signed by the debtor, the UCC1 does not create a property interest for Keeney.

Keeney also argues, in Count II, the sale of the property unjustly enriched Aoun and Solazzo by giving them the property without paying the debt averred in the UCC1. Aoun and Solazzo are bona fide innocent purchasers for value. *Janus Management Services, Inc. v. Schlessinger*, 810 A.2d 637, 638 (Pa. Super. 2002) (holding "it is not enough to know that there is a claim against a property to disqualify one from being a bona fide purchaser for value."). Keeney frames the Count as one against Donatelli; on that ground, it will be dismissed even though Aoun and Solazzo have not filed a motion to dismiss.

In Count III, Keeney makes largely unintelligible allegations premised on 18 U.S.C. § 35(a), forbidding imparting or conveying false information. Keeney has alleged no set of facts under which Donatelli could be seen to have conveyed "false information, knowing the information to be false, concerning an attempt or an alleged attempt . . . to do any act which would be a crime . . ." 18 U.S.C. § 35(a).

In Count IV, Keeney alleges Donatelli, Aoun and Solazzo conspired to create the HUD-1 closing document to deprive him of his right to collect on his financing statement. Because Keeney had no property right in the financing statement, there could have been no conspiracy to deprive him of that right.

To recapitulate, Keeney cannot find relief under section 1983 because no state actor deprived

¹⁰The Dead Man's Rule prevents Keeney from arguing Louis Polak agreed to a lien. 42 Pa.C.S. § 5930 (providing "where any party to a thing or contract . . . is dead . . . neither any surviving or remaining party . . . nor any other person whose interest shall be adverse to the said right of such deceased . . . shall be a competent witness to any matter occurring before the death of said party.")

him of any property right, the innocent buyers were not unjustly enriched, no false information was conveyed, and no one conspired with anyone else to deprive Keeney of any right. Keeney would do well to consider the foregoing if he intends to re-file his complaint. Keeney may re-file, but Defendants need not answer until or unless such time as this Court directs. This Court will entertain a motion to dismiss from Aoun and Solazzo when it is filed.

An appropriate order follows.

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ORDER

AND NOW, this 9th day of February, 2007, the Defendants' Motion to Dismiss (Document 5) is GRANTED and the Complaint is DISMISSED without prejudice. Plaintiff's Motion for Appointment of a Federal Judge (Document 16) is DENIED as moot. Plaintiff's Motion for Reconsideration (Document 17) is DENIED. Plaintiff's Motion to Amend Complaint (Document 18) is GRANTED. It is further ORDERED Defendants need not answer any such amended complaint unless or until so directed by this Court.

BY THE COURT:

 /s\ Juan R. Sánchez
J. Juan R. Sánchez