

**Conte v Pondfield Crossing Development Corp.**

2002 NY Slip Op 30099(U)

February 11, 2002

Supreme Court, Suffolk County

Docket Number: 12704/01

Judge: Carol Berkman

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SUPREME COURT - STATE OF NEW YORK  
SPECIAL TERM, PART VI SUFFOLK COUNTY

**COPY**

Present:

Hon HOWARD BERLER

MOTION DATE: 12/27/01; 12/27/01  
12/27/01; 1/17/02  
SUBMITTED: 1/28/02  
MOTION NO.: 002 - MOTD  
003 - MD  
004 - MOTD  
005 - MOTD

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ANTHONY CONTE

Plaintiff,

- against -

PONDFIELD CROSSING DEVELOPMENT  
CORP., AVR HOME BUILDERS, INC., AVR  
REALTY, JENNIFER LOCKE-APPEL, MARS  
SLOANE & CONLON, GLEN B. GRUDER,  
FREDERICK M. MARS, DAVID A.  
SLOANE, MARK ROSENSTOCK,  
CATHERINE ROSENSTOCK, PINE BROOK  
LANDSCAPING, and JOSEPH DE ROSA,  
SR.,

Defendants.

ANTHONY CONTE  
Plaintiff, pro se  
2 Ethan Allan Court  
Centereach, New York 11720

JASPAN SCHLESINGER HOFFMAN LLP  
Attorneys for Pondfield, AVR Home Builders and  
AVR Realty  
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Garden City, New York 11530

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HOBBS & TONETTI, ESQS.  
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Joseph DeRosa  
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Riverhead, New York 11901

AUGELLO, PEZOLD & HIRSCHMANN, P.C.  
Attorneys for defendants Mark Rosenstock and  
Catherine Rosenstock  
120 Main Street  
Huntington, New York 11743

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Upon the following papers numbered 1 to 53 read on these motions for a default judgment etc. (002); to strike the answer (003); for sanctions (005); and this cross motion to vacate a default etc (004): Notice of Motion and supporting papers 1-12; 13-17; Notice of Cross Motion and supporting papers 18-21; 22-25 26-29; 30; 31; Answering Affidavits and supporting papers 32-36; Replying Affidavits and supporting papers 37-50; 51-52; 53 it is,

**ORDERED** that the branch of this motion (002) by the plaintiff for an order directing the entry of a default judgment against the defendant Pondfield Crossing Development Corp. is denied, and it is further

**ORDERED** that the branch of this motion (002) by the plaintiff to impose sanctions on the defendant Pondfield Crossing Development Corp. and the attorney Keith Schutzman for failure to comply with disclosure demands is granted only to the extent that the time for compliance with the plaintiff's disclosure demands is extended until thirty days after service of a copy of this order together with notice of entry upon the attorneys for all the appearing defendants herein. Examinations before trial of all persons previously noticed for such examinations shall commence on April 9, 2002 at 10:00 A.M. at the offices of Certilman, Balin, Adler & Hyman, LLP 1393 Veterans Memorial Highway, Suite 301S, Hauppauge, New York and continue day-to-day unless otherwise agreed to by all parties in writing and it is further

**ORDERED** that the branch of this motion (002) by the plaintiff for an order of attachment against the defendant Pondfield Crossing Development Corp. is denied, and it is further

**ORDERED** that this motion (003) by the plaintiff for an order striking the "purported" answer of the defendants Pondfield Crossing Development Corp., AVR Home Builders, Inc. and AVR Realty based on the failure of their attorney to sign the pleading and failing to promptly correct such omission after it was called to his attention is denied, and it is further

**ORDERED** that the branch of this cross motion (004) by the defendants Pondfield Crossing Development Corp., AVR Home Builders, Inc. and AVR Realty vacating any default by these defendants in answering the amended summons and the amended complaint is granted to the extent that any such default is deemed waived and the answer of the defendants Pondfield Crossing Development Corp., AVR Home Builders, Inc. and AVR Realty to the amended complaint is deemed served as of the date on which it was originally served on the plaintiff, and it is further

**ORDERED** that the branch of this cross motion (004) by the defendants Pondfield Crossing Development Corp., AVR Home Builders, Inc. and AVR Realty extending their time to comply with the Court's discovery schedule is granted to the extent that the time for compliance with the plaintiff's disclosure demands is extended until thirty days after service of a copy of this order together with notice of entry upon the attorneys for all the appearing defendants herein. Examinations before trial of all persons previously noticed for such examinations shall commence on April 9, 2002 at 10:00 A.M. at the offices of Certilman, Balin, Adler & Hyman, LLP 1393 Veterans Memorial Highway, Suite 301S, Hauppauge, New York and continue day-to-day unless otherwise agreed to by all parties in writing, and it is further

**ORDERED** that the branch of this motion (005) by the plaintiff to impose sanctions pursuant to 22 NYCRR 130-1.1(a), (b), (c)(2), (c)(3) and (d) against the defendants Pondfield Crossing Development Corp.,

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AVR Home Builders, Inc. and AVR Realty and their attorneys Stacy Dru Fleisher and Jaspan Schlesinger Hoffman LLP for pleading a denial of the truth of the allegations of paragraph "25" of the amended complaint is denied, and it is further

**ORDERED** that the branch of this motion (005) by the plaintiff to impose sanctions pursuant to 22 NYCRR 130-1.1(a), (b), (c)(2), (c)(3) and (d) against the defendants Pondfield Crossing Development Corp., AVR Home Builders, Inc. and AVR Realty and their attorneys Stacy Dru Fleisher and Jaspan Schlesinger Hoffman LLP for pleading a denial of knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "21" of the amended complaint is denied without prejudice to renewal after the trial of this action.

The plaintiff commenced this action to recover damages arising out of his contract to purchase a new home from the defendants. Among the allegations is the claim that the defendants misrepresented the location of the residence as being Setauket rather than its actual location, Centereach. Pending before the Court are three motions by the plaintiff and a cross motion by the defendants.

By his first motion the plaintiff seeks a default judgment, sanctions and an order of attachment. The second motion seeks an order striking the "purported" answer of the defendants, Pondfield Crossing Development, Inc. (Pondfield), AVR Home Builders, Inc., AVR Realty and (AVR Home) (sometimes hereinafter referred to collectively as the defendants) based on the alleged failure of their attorney to sign such answer "and failing to promptly correct said omission after it being called to his attention." The third motion by the plaintiff is for sanctions against the defendants and their attorneys. The defendants have cross-moved for an order vacating any default by the Defendants in answering the amended Summons and Amended Complaint the court may determine, and extending Defendants' time to comply with this Court's Discovery Schedule."

The plaintiff's first motion and the defendants' cross motion should be considered in conjunction with one another.

An affidavit of service supplied by the plaintiff reflects that the defendant Pondfield was served with a summons and complaint on June 8, 2001. According to the plaintiff, on August 1, 2001, Keith Schutzman, General Counsel to the defendant AVR Realty, represented that he would accept service of the summons and complaint on behalf of AVR Home and AVR Realty. According to the plaintiff, Mr. Schutzman also indicated that he would accept service on behalf of Pondfield, but was informed by the plaintiff that Pondfield had been served previously. The date on which AVR Home and AVR Realty were served (if in fact they were served) is not established, but an answer apparently dated either July 11 or 12, 2001 responding to the original complaint was served on behalf of all three of these defendants with an accompanying cover letter dated August 2, 2001.

In view of the parties failure to memorialize in writing the conversations between the plaintiff and Keith Schutzman, it is difficult to determine what was their precise understanding or agreement. Mr. Schutzman states that the plaintiff has not "properly" served the amended pleadings on Pondfield, an assertion flatly controverted by the plaintiff who claims, supported by an affidavit of service, that the amended complaint was served on Pondfield's Managing Agent, Fred Aker, on August 1, 2001, prior to any appearance by Mr. Schutzman as counsel for Pondfield. Absent from any of the defendants' submissions is

an affidavit from Mr. Aker denying that he was served as asserted by the plaintiff. Mr. Schutzman further states that “[s]ometime after October 9, 2001 and before December 5, 2001 during one of our several telephone conversations, Plaintiff orally extended Defendants time to answer the Amended Complaint to December 20, 2001 if such answer was in fact necessary.”

Mr. Schutzman also states that neither the original nor the amended pleadings were served on AVR Home or AVR Realty.

Despite the current contentions of improper or lack of service on the various defendants neither the answer to the original complaint prepared and served by Mr. Schutzman, which was pleaded on behalf of the defendants Pondfield, AVR Home and AVR Realty, nor the answer to the amended complaint, also pleaded on behalf of these defendants, include a jurisdictional defense. Accordingly, any objection to what might have been a deficiency in the service of the original summons and complaint or the amended complaint has been waived by the defendants and no such jurisdictional objection can be raised in any further amended pleadings (*see*, CPLR 3211(e); *Urena v NYNEX, Inc.*, 223 AD2d 442, 637 NYS2d 49 [1st Dept., 1996]); *Tralongo v State*, 161 AD2d 584, 555 NYS2d 163 [2d Dept., 1990]).

Nevertheless, even having concluded that the defendants waived any objection to what might have been improper service of the plaintiff’s pleadings, the Court further concludes that by his course of conduct of participating in a preliminary conference on October 9, 2001 and, in accordance with a deadline set in the preliminary conference order, serving disclosure demands dated November 9, 2001 directed to the defendants Pondfield, AVR Home and AVR Realty, the plaintiff has waived his right to seek a default judgment against the defendants (*see, Phillips v League For the Hard of Hearing*, 254 AD2d 181, 679 NYS2d 40 [1<sup>st</sup> Dept., 1998]; *Volin v City Beach Catering Corp.*, 166 AD2d 583, 560 NYS2d 869 [2d Dept., 1990], *see also Gilmore v Gilmore*, 286 AD2d 416, 730 NYS2d 239 [2d Dept., 2001]). Accordingly, the branch of the plaintiff’s first motion for a default judgment against the defendant Pondfield is denied. Thus, the Court need not consider the failure of the defendants to submit an affidavit by a party with knowledge of the facts demonstrating a meritorious defense to the action.

The defendants’ cross motion, is granted to the extent that the answer to the amended complaint shall be deemed served as of the date of its initial service upon the plaintiff.

In addition, the Court concludes that the branch of the plaintiff’s first motion seeking an order of attachment must be denied.

CPLR 6201 sets forth the grounds on which an order of attachment may be based. The only ground that is colorably applicable in the present circumstances is set forth in subdivision “3,” which provides:

the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts . . .

Here the plaintiff complains of defense counsel’s delays in complying with disclosure demands and asserts his “firm belief” that “Mr. Schutzman’s stalling and delay is part of a larger effort on his part to buy time for Pondfield. Mr. Schutzman is doing this to allow Pondfield time to build out and transfer the property

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it owns Pondfield Crossing Development) and to receive and transfer the proceeds it receives at closings. He is doing this so that when the present litigation finally does go to trial, any judgment that the Plaintiff receives against Pondfield will be uncollectible, since all that will remain of Pondfield by then will be a worthless shell of a corporation.”

The plaintiff has not presented any evidence that any of the defendants have assigned, disposed of, encumbered or secreted property or removed it from the State. The plaintiff’s “firm belief” that there is a plan to make any judgment he might recover uncollectible is not sufficient to support an order of attachment. In *Rosenthal v Rochester Button Co.*, 148 AD2d 375, 539 NYS2d 11 [1st Dept., 1989] the plaintiff alleged that the defendant’s financial condition had been rapidly deteriorating and that it had disposed of virtually all of its assets located in New York and removed them from this State. The Court, however, found the record devoid of any evidence of fraudulent intent on the part of the defendants and said:

“ ‘Fraud cannot be inferred, it must be proved’ ( *Anderson v. Malley*, 191 App. Div. 573, 575). The fact that the affidavits in support of an attachment contain allegations raising a suspicion of an intent to defraud is not enough (*Mohlman Co. v. Landwehr*, 87 App. Div. 83, 85); it must appear ‘that such fraudulent intent really existed in the mind of the defendants, and not merely in the ingenuity of the plaintiffs’ (*Thompson v. Dater*, 57 Hun 316, 319). Thus, fraud is never presumed by a mere showing of the liquidation or disposal by a debtor of its business assets (*Nolan v. Workman Co.*, 146 Misc. 99, 100 and cases cited). \* \* \* There was here no showing of a secreting or disposal of any particular assets of the appellants with intent to defraud their creditors.” ( *Eaton Factors Co. v Double Eagle Corp.*, 17 AD2d 135, 136.)

(148 AD2d at 376, 539 NYS2d at 12-13; *accord, see, Benedict v Browne*, \_\_AD2d \_\_, 735 NYS2d 404[2d Dept., Dec. 4, 2001]).

The plaintiff’s allegations are similarly insufficient to support an order of attachment in this case.

Further, the fact that the plaintiff predicates his claim for relief on allegedly fraudulent representations by the defendants does not establish a ground for an order of attachment pursuant to CPLR 6201(3).

Accordingly, inasmuch as the plaintiff has not demonstrated that grounds for an order of attachment as set forth in CPLR 6201 exist in this matter, the branch of the plaintiff’s motion seeking an order of attachment is denied.

The Court further concludes that under the circumstances the plaintiff has not demonstrated a basis for imposing sanctions pursuant to 22 NYCRR Part 130 arising out of delays by the defendants in responding to disclosure demands and delaying the prosecution of this action, and that the request for relief pursuant to CPLR 3126 should presently be limited to specifically directing compliance with the plaintiff’s disclosure demands by a firm date. The time for compliance with the plaintiff’s disclosure demands is extended until thirty days after service of a copy of this order together with notice of entry upon the attorneys for all the appearing defendants herein. Examinations before trial of all persons previously noticed for such examinations shall commence on April 9, 2002 at 10:00 A.M. at the offices of Certilman, Balin, Adler & Hyman, LLP 1393 Veterans Memorial Highway, Suite 301S, Hauppauge, New York and continue day-to-day unless otherwise agreed to by all parties in writing.

In his second pending motion the plaintiff seeks an order striking the “purported” answer of the defendants Pondfield, AVR Home and AVR Realty pursuant to 22 NYCRR 130-1.1A on the ground that their attorney did not sign the answer and allegedly failed “to promptly correct said omission after it being called to his attention.”

22 NYCRR 130-1.1A(a) provides:

Signature. Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party.

The plaintiff has submitted a copy of a letter dated August 15, 2001 purported sent to the attorney Keith Schutzman advising of his failure to have signed the answer and expressing the plaintiff’s expectation “that you will correct that omission immediately.” Defense counsel Keith Schutzman asserts in his affirmation in support of the defendants’ cross motion that until he received the plaintiff’s motion papers including the alleged August 15, 2001 letter he never saw it and that he was unaware of his failure to sign prior to the filing of the plaintiff’s motion. Under the circumstances the court concludes that defense counsel has demonstrated sufficient good cause and the motion to strike the answer pursuant to 22 NYCRR 130.1-1A(a) is denied.

The plaintiff’s third motion is for an order pursuant to 22 NYCRR 13-1.1(a),(b),(c)(2),(c)(3) and (d) to impose sanctions against the defendants Pondfield, AVR Home and AVR Realty and their attorneys for engaging in frivolous conduct. This claim for relief is based on the pleaded denials, or denial of sufficient information and belief as to the truth of allegations contained in paragraphs “21” and “25” of the amended complaint.

Addressing first paragraph “25,” the Court concludes that the motion for sanctions must be denied. The plaintiff focuses on the allegation in this pleaded paragraph that the defendants induced the plaintiff and others to purchase homes based on a false representation that the property was situated in Setauket “when in fact the builder and their attorneys knew that the property in question was located in less desirable Centereach.” In their answer to the amended complaint the defendants “denie[d] the truth of the allegations.” In justifying their denial the defendants cite old authority for the proposition that the defendants are justified in wholly denying the paragraph in question because it contains one or more allegations of fact with which the defendants can take issue (*see, Buscelle v Conde Nast Pubs.*, 173 Misc 674, 19 NYS2d 129 [Sup Ct, New York County, 1940]). This is contrary to the more proper procedure of admitting those facts conceded to be true and denying the rest (*see, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3018:8, at 151-152*).

While paragraph “25” of the amended complaint does plead more than one fact, in essence it alleges that the defendants fraudulently misrepresented the location of the property as being in an objectively less desirable area. It is arguable that, Centereach is not necessarily “less desirable.” This is a subjective determination and might not be true, for example, to a person seeking the purchase of a residence in a less

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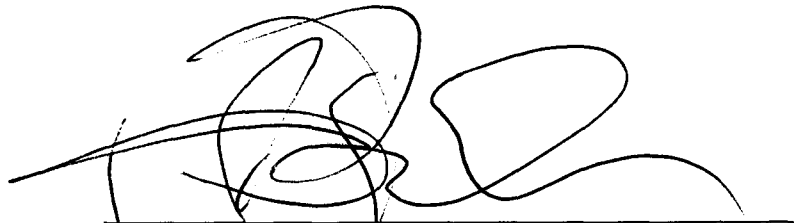
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expensive area. In any event, at this stage of the proceedings it has not been demonstrated that the defendants made the fraudulent representations asserted by the plaintiff and it cannot be concluded that the pleaded denial is frivolous.

Paragraph "21" also pleads more than one fact. Included in paragraph "21," however, is the objective statement that "[e]ach and everyone [sic] of Pondfield's own maps and surveys clearly stated that the Pondfield Crossing development was located in Centereach and indeed, the final survey . . . also states that the lot in question is located in Centereach." The answer to the amended complaint denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "21." Documents submitted by the plaintiff, however, appear to support the above-quoted factual assertion. Even in the January 10, 2002 affirmation of Stacy Dru Fleisher, Esq. in opposition to plaintiff's motion seeking sanctions there is no denial of the truth of this allegation.

Nevertheless, all the facts of this case are yet to be developed. It would be premature for the Court to determine that sanctions are warranted without giving a full opportunity to the parties to be heard, (*see*, 22 NYCRR 130.1-1(d)), and it is not clear at this stage of the proceedings that sanctions pursuant to 22 NYCRR Part 130 would be appropriately imposed (*see*, Siegel, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, CPLR C3018:8, at 151-152, *citing Doyle v Buturlinsky*, 26 AD2d 717, 271 NYS2d 349 [3d Dept., 1966]) and concluding, "[o]ften the courts can do no more than mildly reprimand the defendant's attorney for an unwarranted general denial"). Accordingly, the branch of the plaintiff's motion for an order imposing sanctions based on the denial of knowledge sufficient to form a belief as to the truth of the allegations in paragraph "21" is denied without prejudice to renewal after the trial of this action at which the parties can have a full opportunity to present evidence in support of the issue of whether all of Pondfield's maps and surveys showed the location of the property as being in Centereach, and the materiality of this assertion in conjunction with the plaintiff's allegations of fraudulent misrepresentations. The materiality of this denial in the full context of the action would be relevant to the amount of sanctions, if any, that might be appropriately imposed.

Dated: **FEB 11 2002**



J. S. C.