MEMORANDUM

Supreme Court of the State of New York,
County of Suffolk

Index No. 30336-2001

ESTHER GLASS, RALPH GRASSO, IRENE GRASSO, ICILIO W. BIANCHI, ARLINE FASSMAN and CHARLES PETIGROW, as taxpayers, citizens and residents of Suffolk County,

Plaintiffs,

-against-

ALLAN GRECCO, PEERLESS ABSTRACT CORP., ROBERT GAFFNEY, as Suffolk County Executive, COUNTY OF SUFFOLK, TOWN OF BROOKHAVEN, CHANDLER PROPERTY INC., (formerly known as TOUSSIE FAMILY ENTERPRISES, LTD.), ROBERT I. TOUSSIE, FRANK CAMPO, MICHAEL CAMPO and EDWARD CAMPO,

Defendants.

MOT D; SETT O
(O)5/22/03
(S) 6/12/03
Motion Nos. 12 & 13

By: Hon. Robert A. Lifson

Dated: September 26,2003

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In a taxpayer's action, the defendant Peerless moves for an order pursuant to 22 NYCRR §§ 130-1.1 and 130-2.1 imposing sanctions against the plaintiffs' counsel on two bases. In response, the plaintiffs cross-move asserting that the sanctions application itself is frivolous and seek an order directing that the defendant Peerless and/or its attorney pay the legal fees, costs and expenses of

plaintiffs in the defense of defendant Peerless' motion and that the attorney for defendant Peerless be sanctioned pursuant to § 130-1.2 of the Rules of the Chief Administrator for bringing the instant motion.

The moving defendant asserts that multiple proceedings were brought by the plaintiff against it for malicious purposes. Indicative of that alleged motivation the movant claims is the fact neither the original complaint nor the amended complaint stated a viable claim against Peerless nor was any relief requested against the defendant Peerless. As a separate and distinct basis for sanctions the movant indicates that plaintiffs' counsel failed to appear at a court conference without so advising her adversaries.

The factual pattem pertaining to this litigation has been the subject of many decisions by the undersigned in this litigation (as well as related litigation brought by others). In brief, the plaintiff taxpayers brought the subject action seeking recoupment of what they alleged to be a gross misuse of public funds in the purchase of certain parcels of land by the County of Suffolk pursuant to one of its land preservation programs. The plaintiffs allege that the sums expended were far in excess of the appraised values of the properties in question. Critical to the allegations of the subject complaint was that the defendant Peerless Abstract was a company owned by the defendant Grecco, allegedly the public official responsible for effecting the public purchases in question. The complaint, based on media "revelations'', claims that an excessive price was paid for the purchases in question and that such outcome was influenced by the business relationships between Peerless and the vendors of the various properties.

The litigation in question took a somewhat tortured course through the courts. The matter was originally assigned to another IAS Justice. A motion was made to dismiss the claims interposed against the defendant Peerless (as well as other defendants). The motion was denied. Thereafter, the various moving defendants sough reargument and renewal of the initial application asserting, *inter alia*, that the court had failed to fix adequate security established by statute for the various municipal defendants and that the court had otherwise erred in its rulings in failing to dismiss the claims against Peerless.

At that juncture a motion seeking recusal of that IAS justice was made. While those motions were sub judice the assigned IAS Justice *sua* ***sponte*** recused himself from further judicial activity on the case.

The action then was referred to the undersigned. Reargument and renewal were granted and the court then proceeded to grant each branch of the various applications that had previously been denied. In pertinent part, the court found that the allegations of the complaint were lacking in specificity and dismissed the complaint without prejudice to the plaintiffs' right to replead within a specified time. Moreover, the court concluded that the security did not comport with the clear mandates established by the Legislature in General Municipal Law §51. The decision of the court

as it pertained to Peerless expressly noted that the pleadings before the court contained no allegations relating to any possible liability to be imposed against Peerless and even intimated the type of allegations that might be actionable against such defendant. In accordance with that decision, the plaintiffs amended their complaint and apparently sought to rectify the very deficiencies indicated by the court as to the defendants other than Peerless. The plaintiffs also filed a notice of appeal of the court's decision. In the amended complaint the plaintiffs again named Peerless as party defendant and asserted the same or similar allegations against said defendant previously dismissed by this court. Moreover, in response to the amended complaint, the attorney for Peerless sent a letter requesting that the claim against Peerless be withdrawn in view of proof which he enclosed with his correspondence which demonstrated that Peerless was not involved in any of the transactions in question, the proof clearly indicating that another abstract company did the work in question. Notwithstanding the forgoing, the plaintiffs' attorney refused to discontinue against Peerless. It is conceded that none of the pleadings at issue ever sought affirmative relief against the defendant Peerless. The repetitive imposition of legal proceedings against an entity without any request for legal redress against such entity is one of the bases for the request by the defendant Peerless for sanctions.

Since the court's decision precluded any further legal proceeding absent the posting of the required security, the plaintiffs' counsel requested a special conference with the court and the other parties in part to determine the manner in which the security would be fixed to comply within the parameters set by the court. The request for a conference was granted and a conference was scheduled for May 1,2003. On the conference date, all of the parties and their attorney were present in court except the plaintiffs and their attorney. After some two hours an application was made in court to dismiss the amended complaint with prejudice due to the failure to appear. The failure to attend the conference requested by plaintiffs counsel forms the second and separate part for an additional sanctions request. At the conclusion of the conference, the court granted the request for sanctions for the nonappearance of plaintiffs to the sole extent of directing that formal written application be made to afford the plaintiffs and their counsel the requisite notice required by the applicable court rules.

Subsequent to that conference date, the plaintiffs discontinued the present action with prejudice and withdrew their appeal with prejudice. Despite that fact, the defendant Peerless insisted on pursuing the instant application for sanctions on both of the indicated grounds. To properly put the issue in context, the court notes that while this action was pending a similar suit was instituted by the Attorney General of the State of New York against the same parties casting similar allegations as a violation of various provisions of the Executive Law. Thus, the underlying allegations of the claims of the plaintiffs were being advanced and considered within the context of the allegations of that lawsuit. The Attorney General suit was ultimately dismissed with prejudice. That determination is presently on appeal.

The pertinent portions of the Rules of the Chief Administrator of the Courts are set forth as

follows:

§ 130-1.1 Costs; Sanctions

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defmed in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part....

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and **cannot be supported by a reasonable argument** for an extension, modification or reversal of existing law;

(2) it is **undertaken primarily to delay** or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) **it asserts material factual statements that are false.** Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues,

(1) the circumstances under which the conduct took place, including the time available for investigating **the legal or factual basis** of the conduct; and

(2) **whether or not the conduct was continued** when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

§ 130-2.1 Costs; Sanctions

(a) Notwithstanding and in addition to the provisions of subpart 130-1 of this Part, the court, in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, upon any attomey who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court. This Part shall not apply to town or village courts or to proceedings in a small claims part of any court.

(b) In determining whether an attomey's failure to appear at a scheduled court appearance was without good cause and in determining the measure of sanctions or costs to be imposed, the court shall consider all of the attendant circumstances, including but not limited to:

(1) the explanation, if any, offered by the attorney for his or her nonappearance;

(2) the adequacy of the notice to the attorney of the time and date of the scheduled appearance;

(3) whether *the* attorney notified the court and opposing counsel in advance that he or she would be unable to appear;

(4) whether substitute counsel appeared in court at the time previously scheduled to proffer an explanation of the attorney's nonappearance and whether such substitute counsel was prepared to go forward with the case;

(5) whether an affidavit or affirmation of actual engagement was filed in the manner prescribed in Part 125 of the Uniform Rules for the Trial Courts of the Unified Court System;

(6) whether the attorney on prior occasions in the same action or proceeding failed

> to appear at a scheduled court action or proceeding;
> (7) whether financial sanctions or costs have been imposed upon the attorney pursuant to this section in some other action or proceeding; and
> (8) the extent and nature of the harm caused by the attorney's failure to appear. (emphasis added).

At the hearing, the defendant Peerless called the plaintiffs' counsel as a witness. The questioning sought to establish that the plaintiffs' attorney did not take proper steps to research the factual allegations of the complaint before the action was instituted. In pertinent part, the questioner elicited that the attorney read about the facts constituting the case from various newspaper accounts in Newsday. Minimal and certainly not thorough steps were taken to verify the pertinent allegations of the complaint prepared by the attorney. Significant in this regard is the fact that the attorney concedes that she knew that Peerless was not the abstract company involved on any of the subject transactions but that she just "assumed" such was the case from the prior relationship of the parties. This assumption was based in part on the pleadings contained in other legal proceeding where it was alleged that Peerless performed title work and had other relationships with the owners of the parcels in question.

The plaintiffs' counsel also conceded that when the complaint was finished she forwarded it to Newsday. No satisfactory explanation was suggested for those actions and the inference is that such actions were an indicia of bad faith and malicious intent of the plaintiffs and their attorney. The plaintiffs' attorney also indicated that she coordinated her activities with the Attorney General's office and sent that office a company of the amended complaint.

With respect to the missed court appearance, the plaintiffs' counsel explains that one of the plaintiffs to the action has a medical condition that required a visit to a hospital. The attorney volunteered to assist her friend and client by accompanying him and his spouse to the hospital. Unexpectedly this medical intervention allegedly necessitated eight hours in the intensive care unit of the medical center. Although a telephone was present at the medical facility (although not in the intensive care unit) and the plaintiffs' attorney had a cell phone, she concedes that she made no effort to contact her waiting adversaries or the court. Her explanation for this omission is that she did not expect to be in the medical center for that length of time and she did not have the phone numbers of the court or that of any her adversaries.

On cross examination, the plaintiffs' attorney was given an opportunity to express her views in narrative form. She indicated that her failure to attend the conference was due to the medical emergency of her client and friend and she apologized for those circumstances. She further believed and still believes that, notwithstanding the fact that no affirmative relief was ever sought against Peerless in any of the proceedings that Peerless was a necessary party to the litigation. She asserts that her position was fortified by the fact that the initial IAS Justice declined to dismiss the complaint against Peerless.

The movant called Alan Grecco as a witness. Mr. Grecco is the principal of Peerless. He testified that there was no relationship between Peerless and any of the subject real estate

transactions. On cross examination, he forcefully denied every assertion of the allegations of the amended complaint. Upon questioning by the court, however, he conceded that Peerless did receive a $15.00 fee no more than ten times for recording various documents incidental to title closings.

Finally, the attorney for Peerless testified as to the hours expended, his fees charged and his expertise and reputation in the legal community in Suffolk County. He stated that he is owed $14,202.05 as a result of his representation of Peerless. On cross examination, he insisted it was not his obligation to do legal research to satisfy plaintiffs' counsel that Peerless was not a necessary party to the litigation. Upon questioning from the court, he stated that $5,000.00 was attributable to the work done while the case was pending before the first IAS justice. An additional $5,000.00 of said sum was attributable to the reargument and dismissal motion addressed to the undersigned and the remainder, to wit, the sum of $4,202.05 was due to all the subsequent legal services. Excluded from said sum was $750.00, which sum is attributed to the three hours wasted attending the court conference which plaintiffs' counsel failed to attend.

As to the failure to attend the court conference arranged at her bequest, the court has examined the factors to be considered set forth in 22NYCRR130-2. However commendable the efforts of the plaintiffs' counsel in assisting a friend and client in need of emergency medical treatment were, the facts as set forth by such counsel are insufficient to constitute a defense to the instant application. There was no explanation why an altemative emergency transportation was not undertaken, why the services of the plaintiffs' counsel were essential since she was not a family member, or why during the course of an eight hour period she could not leave a situation usually reserved for close family members only to excuse herself to discharge her superior obligations to the legal system. In other words, the other parties should not be required to subsidize the good Samaritan instincts of plaintiffs' counsel. Accordingly, said counsel shall reimburse the defendant Peerless for the $750.00 in legal fees associated with the aborted court conference of May 1,2003. The court notes that although the other defendants who were similarly aggrieved had sought sanctions subsequently they waived such application. The court is inclined to conclude that the circumstances should not warrant any further judicial sanction beyond the reimbursement of legal fees incurred by the defendant (Peerless).

With respect to the alleged frivolous action, the court notes that an imposition of sanctions has a potentially chilling effect on future lawsuits to vindicate the public interest and should not be considered if any colorable claim can be discerned or a good faith argument for the extension of existing legal principles is presented. See: *Parks v. Leahv*, 81 N. Y.2d 161, 597 N.Y.S.2d 278 (1993). *Constanza v. Seinfeld*, 279 A.D.2d 255,719 N.Y.S.2d 29 (First Dept., 2001). In this case, however, the court notes to date the plaintiffs counsel is unable to refer the court to any cognizable legal theory or holding upon which one might conclude that the defendant Peerless was a necessary party, nor is she able to articulate an intelligent rationale upon which such a legal argument could be advanced. In such instances, our courts have provided relief to the party aggrieved by such conduct. See: *Nuchbaur v. American Transit Ins. Co.*, 300 A.D.2d 74, 752 N.Y.S.2d 605 (First Dept., 2002); *Citv of New Rochelle v. O.Mueller. Inc.*, 193 A.D.2d 677,598 N.Y.S.2d 970 (Second Dept., 1993). Although the proof is equivocal whether the action was undertaken with a malevolent

intent' directed to Mr. Grecco and his business enterprise, the reality is that such action unduly prolonged the litigation and caused the defendant to defend a baseless lawsuit. Moreover, the overall thrust of the assertions of the amended complaint as it pertains to Peerless were false in the sense that the complaint fails to allege a nexus between the activities of Peerless to the allegedly inflated price of the underlying real estate transactions.

The plaintiffs' counsel asserts that she believed that Peerless was a necessary party. Such an assertion is somewhat validated by the initial IAS Justice's determination to deny that branch of the motion which sought dismissal against Peerless. However, once the undersigned came to the opposite conclusion and dismissed the amended complaint against Peerless, the plaintiffs and their counsel were obligated to have the order reconsidered or reversed. Ignoring the plain and unmistakable language of the determination of the decision was not an option. Our courts have consistently provided a mechanism to compensate litigants who have been subjected to misuses of the courts in direct contravention of explicit judicial instructions or against those that have failed to abide by judicial wamings not take certain proscribed actions. See: *Lightron Corporation v. J.S.M. Holding Inc.*, 188 A.D.2d 641, 591 N.Y.S.2d 853 (Second Dept., 1992); *In Re Babigian*, 247 A.D.2d 817, 669 N.Y.S.2d 686 (Third Dept., 1998), *Khazadian v. Ganek*, 257 A.D.2d 607, 684 N.Y.S.2d 261 (Second Dept., 1999); *Fowler v. Conforti*, 194 A.D.2d 394, 598 N.Y.S.2d 782 (First Dept., 1993).

In the proper exercise of its discretion, the court would normally be loathe to stigmatize a lawyer or to penalize litigants seeking to vindicate the public rights in a matter of such great importance to the residents of Suffolk County. In the present case, however, other circumstances exist that greatly disturb the court. The damages to defendants Grecco and Peerless (the only technical movant herein) far exceed any award of costs, legal fees or penal sanctions that can be imposed by the court. The ability of Peerless to continue in business is in great doubt. Moreover, it and its principal, Mr. Grecco, have been falsely cast by the plaintiffs, other allied litigants, and the the local media as modern day incarnations of Boss Tweed bilking the public of thousands of dollars in inflated payments for land acquisitions. Although the factual allegations have been a matter of public record for more than two years and are the subject of investigations by the Federal, State and local prosecutors, to date, no formalized charges[2] have been tendered against either the defendants Grecco or Peerless. Indeed to the limited extent the allegations have been aired in two civil suits to date, each proceeding has been dismissed. Nonetheless, both defendants have suffered grievously and perhaps irreparably- akin to an Alice in Wonderland experience where the red queen calls for execution first and trial later. Faced with such circumstances, one might expect the plaintiffs and their counsel to express some remorse or contrition. On the contrary, the plaintiffs' counsel, even

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[1] The court questions the efforts made by the plaintiffs to ascertain the accuracy of the allegations forming the substance of the amended complaint.

[2] The court notes that the time to bring such charges has not yet expired. The optimum utility for the airing of such charges may span the next 90 days.

during the pendency of this proceeding, threatened yet two other suits[3] against the defendants and their counsel.

The court is unaware of any defense to the imposition of sanctions based on the ideological purity of the intentions of the party bringing a false and meritless suit. However laudable, the goal of maximizing scarce public funds for additional acquisition of environmentally sensitive properties may be, it cannot excuse ill founded accusations against one who bears no legal liability for the facts at issue especially where, as here, the action is brought after a judicial indication that it is lacking in merit and the opposing counsel has presented the plaintiffs with proof of the erroneous assumptions and afforded them an opportunity to withdraw the claim prior to seeking an award from the court.

In view of the foregoing, the court determines defendant Peerless' motion as follows: the court hereby awards the defendant Peerless the sum of $4,202.75 as and for the sum attributable to the legal fees incurred after the rendering of this court decision of December 20,2002. Said sum shall be the joint responsibility of the plaintiffs and their counsel and, unless satisfied within 90 days, may be docketed as a judgment accordingly. In addition, the plaintiffs' counsel and each individual plaintiff are sanctioned in the sum of $250.00, which sums shall be paid to the Lawyer's Fund For Client Protection[4]. In addition, the plaintiffs' counsel shall be responsible for an additional $750.00 to be paid to the defendant Peerless, which sum shall compensate said litigant for the needless, aborted court appearance of May 1,2003. No other sanction shall be imposed for such discourtesy. All other relief requested by either party including the plaintiffs' request for sanctions is denied.

Settle order.

Robert A Lif

J.S.C.

[3] In addition to a cross-motion for sanctions, during her examination the plaintiffs' attorney threatened to bring an action pursuant to Civil Rights Law $70-a - a cause of action of dubious viability since Peerless was not an applicant or permittee as defined by Civil Rights Law $76-a.

[4] Although the court is loathe to impose sanctions against individual litigants for the improper actions of their attorneys, the court notes that such penalty in warranted in this instance because such individuals had commenced a law suit without posting security for costs as required by General Municipal law. Had security for such costs been posted, the amount of the prospective bond would likely exceed the amount of sanctions herein imposed.