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| Makan Land Dev.-Three, LLC v Prokopov |
| 2006 NY Slip Op 30794(U) |
| July 10, 2006 |
| Supreme Court, Orange County |
| Docket Number: 556/06 |
| Judge: Lewis J. Lubell |
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. LEWIS J. LUBELL, J.S.C.

SUPREME COURT : ORANGE COUNTY

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MAKAN LAND DEVELOPMENT-THREE, LLC,

Plaintiff,

-against-

GEORGINE O. PROKOPOV, as Trustee of
PROKOPOV FAMILY TRUST,

Defendant.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. 556/06
Motion Date: June 23, 2006

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The following papers numbered 1 to 7 were read on the submissions of the parties with
respect to the issue of costs and attorneys' fees due and owing defendant after the waiver of a
hearing by the parties:

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| Affirmation of Legal Services, Cost and Disbursements of Burt J. Blustein, Esq.-Exhibits . . . | 1-2 |
| Affirmation Relative to Request for Costs of Joseph Haspel, Esq.-Exhibit | 3-4 |
| Affirmation of Kushpal Viridi, Esq. | 5 |
| Reply Affirmation of Burt J. Blustein, Esq.-Exhibit | 6-7 |

Upon the foregoing papers and after a waiver of a formal hearing by the parties it is
ORDERED that the matter of attorneys' fees and costs relative to the above entitled matter is
disposed of as follows:

Defendant previously moved to dismiss plaintiff's complaint pursuant to CPLR
3211(a)(1) claiming that documentary evidence demonstrated that plaintiff's complaint was

meritless, and alternatively moved for summary judgment. Plaintiff cross-moved to amend its complaint and opposed defendant's motion for summary judgment.

In an order dated April 19, 2006, this Court made a determination that from the submissions on the aforesaid motions, plaintiff's undertaking of the filing of a lis pendens without first ascertaining whether that remedy was appropriate was improper. Furthermore, after being informed of the impropriety of the remedy, plaintiff did nothing to cancel the lis pendens. In his unsigned opposition affirmation on the original motions, plaintiff's counsel admitted that based upon the complaint which was filed, the lis pendens was improper. Moreover, plaintiff's counsel opposed the motion to dismiss and a motion for summary judgment with an unsigned affirmation of an attorney lacking personal knowledge of the facts and cross-moves to amend plaintiff's complaint. The Court previously determined in its decision of April 19, 2006 that plaintiff's conduct in this matter demonstrated a repeated disregard for proper procedure and the law, and as such, made a finding that plaintiff's conduct was frivolous, setting the matter down for a formal hearing on the issue of costs and attorneys fees for May 9, 2006. At the May 9th hearing, plaintiff's counsel requested time to submit opposition to the defendant's affirmation of attorneys' fees which application was granted. Counsel for all sides agreed to waive the formal hearing of the matter and agreed to submit all matters on this issue on papers to this Court. Final submission was scheduled for June 23, 2006.

At the May 9th hearing date, plaintiff's counsel, Joseph Haspel, Esq., admitted on the record, that defendant's motion was made prior to his retention, and in fact, the complaint was drawn by Mr. Viridi. Mr. Haspel stated that after reading defendant's motion, he essentially agreed with it. He further stated: "I called Mr. Blustein and I said there is a problem here. I spoke

with my client and I realized that what we have here is really the – the correct church but the wrong pew. Meaning what was set for in the complaint was for lack of better words garbage. At that point in time I indicated to Mr. Blustein that I agree that based upon the complaint that’s filed, there should be no lis pendens.”

As expressed in *Park Health Center v Country Wide Ins. Co.*, 2 Misc3d 737, 740 (N.Y.City Civ.Ct.,2003):

“In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal and factual basis for the conduct, and 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.” (*Id.*) [22 NYCRR 130-1.1[c]]

While the factors listed above are precatory in determining sanctionable conduct, “what remedy [to impose] is dictated by considerations of fairness and equity.” (*Levy v. Carol Management Corp.*, 260 A.D.2d 27, 34, 698 N.Y.S.2d 226 [1st Dept. 1999]). Moreover, “[s]anctions are retributive in that they punish past conduct. They are also goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics. citation omitted”(*Levy*, 260 A.D.2d at 34, 698 N.Y.S.2d 226). The measure of sanctions should be proportionate to the amount sought in the lawsuit, the culpability of the party’s conduct and prejudice to the adversary. (*See Vicom v. Silverwood*, 188 A.D.2d 1057, 591 N.Y.S.2d 919 [4th Dept. 1992]).

By Mr. Haspel’s own admission the originally filed complaint and lis pendens were “garbage”. Mr. Haspel did nothing to remedy the situation, but instead proceeded with the litigation, filing wholly inadequate papers in an effort to revive what was an action that was “dead on arrival.”

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.

In *Levy v. Carol Management Corp.*, 260 A.D.2d 27, 698 N.Y.S.2d 226 [1st Dept.1999], the Appellate Division held that “(s)anctions are retributive, in that they punish past conduct. They are also goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the Bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics (cf., *Matter of Kernisan v. Taylor*, 171 A.D.2d 869, 567 N.Y.S.2d 794.)”

In re Edward Shapiro, P.C., 9 Misc.3d 369, 378 (N.Y.City Civ.Ct.,2005). “Costs, in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, may be awarded to an attorney (See 22 NYCRR 130-1.1[a]). In addition, financial sanctions may be imposed, payable by an attorney to the Lawyers’ Fund for Client Protection (See 22 NYCRR 130-1.3). An award of costs or the imposition of sanctions may be made upon the court’s own initiative, after a reasonable opportunity to be heard (22 NYCRR 130-1.1[d]). *Klein ex rel. Klein v. Seenaath*, 180 Misc2d 213, 220 (N.Y.City Civ.Ct.,1999).

Plaintiff’s counsel acknowledged that his predecessor counsel filed an inappropriate *lis pendens* based upon a complaint that he, himself, termed “garbage.” Mr. Blustein attempted to get Mr. Haspel’s predecessor to remove the *lis pendens* and drop the lawsuit. Such overtures were ignored. Mr. Haspel then took over prosecuting the case for Mr. Viridi. Instead of discontinuing the action and pursuing any claims under new theories, Mr. Haspel instead chose to continue with the perilous course of pursuing improper litigation, this time attempting to amend a complaint by essentially remaking it. Such efforts were in vain since Mr. Haspel himself failed to follow proper procedure.

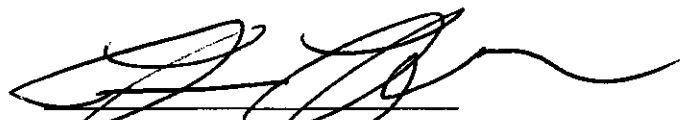
Based upon the foregoing and the findings of the Court that the conduct in this action was

frivolous, the Court is obligated to award costs and sanctions to defendant. The only question here is how much. Mr. Blustein's affirmation documents a long list of time and effort placed into defending this action totaling more than 50 hours of attorney time alone totaling \$11,628.75 plus \$403.73 in disbursements. Mr. Blustein further alleges an additional \$2,215.00 in attorney time in preparing for the hearing on costs and sanctions.

Mr. Haspel's opposition mostly deals with the issue of his subsequent motion to renew and reargue his underlying motion to amend plaintiff's complaint. That issue is being dealt with in a separate decision. Mr. Haspel argues that since the majority of the objectionable conduct focused on the filing of the improper lis pendens, attorneys' fees should be based solely upon that issue. Mr. Haspel noted that the original complaint itself was "garbage." Mr. Haspel attempted to file an amended complaint which sought to effectively replead a wholly new case within the confines of the original action, but did so improperly. The Court previously found plaintiff's conduct with respect to the entire litigation up to date to be frivolous, the filing of the lis pendens being only one component of a larger picture of improper conduct from the outset of the litigation. Based upon the documented frivolous conduct, the Court's April 19, 2006 order, the submissions of the parties and the entire record of this case, the Court hereby awards defendant attorneys's fees for the having to defend the underlying action in th amount of \$11,628.75 plus \$403.73 in disbursements, for a total of \$12,302.48. The Court denies defendant's request for attorneys' fees for the hearing for \$2,215.00.

Dated: July 10, 2006
Goshen, New York

ENTER



HON. LEWIS J. LUBELL, J.S.C.