

Tully v Coughlin

2007 NY Slip Op 30776(U)

April 5, 2007

Supreme Court, Suffolk County

Docket Number: 0011770/2006

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

COPY

SHAWN TULLY and ARIES ESTATES, LLC, <div style="text-align: right;">Plaintiffs,</div> <p style="text-align: center;">- against -</p> SCOT BRIAN COUGHLIN a/k/a SCOT COUGHLIN, S B COUGHLIN, INC, SCOT BRIAN COUGHLIN, INC, and RONALD PALTROWITZ, <div style="text-align: right;">Defendants.</div>	
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INDEX NO.:	2006-11770
MOTION SEQ. NO.:	001 - MD
ORIG. MOTION DATE:	08/30/06
MOTION SEQ. NO.:	002 - MG
ORIG. MOTION DATE:	08/24/06
FINAL SUBMIT DATE:	01/24/07

UPON the following papers numbered 1 to 108 read on these Motions:

- Defendant PALTROWITZ’s Motion (001) & Supporting Papers (Pages 1-10 & Exhibits A-E);
- Plaintiffs’ Opposition (Pages 11-30 & Exhibits A-D);
- Defendants COUGHLINs’ Support (Pages 31-35);
- Defendant PALTROWITZ’s Reply (Pages 36-42)
- Plaintiffs’ Motion (002) & Supporting Papers (Pages 43-65 & Exhibits A-F);
- Defendant PALTROWITZ’s Opposition (Pages 66-76 & Exhibits A-D);
- Defendants COUGHLINs’ Support (Pages 77-86);
- Plaintiffs’ Reply (Pages 87-108);

it is,

ORDERED, that the application of Defendant PALTROWITZ (001) is hereby denied in all respects; and the application of Plaintiffs (002) is hereby granted in all respects.

Defendant PALTROWITZ moves this Court (001) for an Order staying this action, pursuant to CPLR 2201, pending the conclusion of the appeal in the underlying action entitled *Coughlin v Tully*, Index No. 18504/03.

Plaintiffs move this Court (002) for an Order:

1. Dismissing 3 Affirmative Defenses alleged by Defendants SCOT BRIAN COUGHLIN and S B COUGHLIN, INC; and
2. Dismissing the 7 Affirmative Defenses and 2 Counterclaims alleged by Defendant PALTROWITZ.

As to the Motion of Defendant PALTROWITZ, as properly proffered by Counsel for Plaintiffs:

1. As stated in McKinney’s Practice Commentary at CPLR 2201, C2207:7, by David D Siegel:
“‘A stay of an action can easily be a drastic remedy, on the simple basis that justice delayed is justice denied. It should therefore be refused unless the proponent shows good cause for

granting it. Nothing but good cause would make for a 'proper case'. Some excellent reason would have to be demonstrated before a judge is asked to bring a halt to a litigant's quest for a day in court."

2. Where there is no identity of issues or of parties in a related action which would warrant the granting of such a stay, denial of such a motion is proper (*See, Bennell Hanover Associates v Neilson*, 215 AD2d 710, 627 NYS2d 439 [2 Dept 1995]).

This Court finds that Defendant PALTROWITZ failed to demonstrate that either the issues or the parties in this action or *Coughlin v Tully*, Index No. 18504-2003, were identical, and further finds, upon the Court's own knowledge of said other matter, that these actions are sufficiently unrelated as to create no potential for conflicting determinations that would disrupt the interests of justice.

Turning to Plaintiffs' Motion to dismiss various Affirmative Defenses and Counterclaims separately alleged by Defendants in the action, the Court notes the following, as adeptly and convincingly pointed out by Counsel for Plaintiffs:

Defendants SCOT BRIAN COUGHLIN and S B COUGHLIN, INCs' Answer alleges three Affirmative Defenses which are all set forth in conclusory language, without facts supporting said claims, rendering them insufficient as a matter of law (*See, Glenesk v Guidance Realty Corp*, 36 AD2d 852, 321 NYS2d 685 [2 Dept 1971]; *Bentivegna v Meenan Oil Co, Inc*, 126 AD2d 506, 510 NYS2d 626 [2 Dept 1987]).

As to said Defendants' First Affirmative Defense, alleging the Complaint fails to state a cause of action, same cannot be pleaded as an affirmative defense in the Second Department (*See, Glenesk v Guidance Realty Corp, supra; Bentivegna v Meenan Oil Co, Inc, , supra*), and therefore said Affirmative Defense is dismissed.

As to their Second Affirmative Defense, alleging this action constitutes an abuse of process, same is insufficient as a matter of law, as a summons is not process that can be abused, and commencement of an action cannot be the basis for such a claim (*See, 86 NY Jur2d, Process and Papers, Section 155, page 502*), and therefore said Affirmative Defense is dismissed.

As to their Third Affirmative Defense, alleging this action constitutes malicious prosecution, same is also insufficient, as said Defendants have not set forth two necessary elements of a civil malicious prosecution claim: (1) that a prior action commenced by Plaintiffs against them terminated in their favor, and (2) that in said prior action Plaintiffs employed a provisional remedy or otherwise interfered in any way with Defendants' person or property (*See, 59 NY Jur2d, False Imprisonment, Section 52, pages 307-308*), and therefore said Affirmative Defense is dismissed.

Defendants PALTROWITZ's Answer alleges seven Affirmative Defenses and two Counterclaims, all of which are insufficient as a matter of law, as they are set forth in conclusory language, without facts supporting said claims, similar to the Affirmative Defenses of the prior Defendants (*See, Glenesk v Guidance Realty Corp, supra; Bentivegna v Meenan Oil Co, Inc, , supra*).

As to said Defendants' First Affirmative Defense, alleging the Complaint fails to state a cause of action, as stated previously, this is not the proper subject of an affirmative defense in the Second Department, (*See,*

Glenesk v Guidance Realty Corp, supra; Bentivegna v Meenan Oil Co, Inc, , supra), and therefore said Affirmative Defense is dismissed.

As to his Second Affirmative Defense, alleging Plaintiffs' claims are barred by statutes of limitations, said Defendant fails to identify such statutes, and the Court notes that this action was commenced within the three year statutes of limitations applicable for actions claiming abuse of process (*See, CPLR 214; Levine v Sherman*, 86 Misc2d 997, 384 NYS2d 685 (SupCt, Nassau Co, 1976), and the one year statute of limitations applicable for actions claiming malicious prosecution (*See, CPLR 215.3*), and therefore said Affirmative Defense is dismissed.

As to his Third Affirmative Defense, alleging Plaintiffs' claims are barred by the doctrine of *res judicata*, said Defendant fails to identify any prior determination which would constitute the basis for applying the doctrine of collateral estoppel to Plaintiffs' claims in this action , and therefore said Affirmative Defense is dismissed.

As to his Fourth Affirmative Defense, alleging Plaintiffs' claims are barred by provisions of the Lien Law of the State of New York, said Defendant fails to identify any applicable provision of Lien Law , and therefore said Affirmative Defense is dismissed.

As to his Fifth Affirmative Defense, alleging Plaintiffs' claims are barred by an absolute or qualified privilege said Defendant possesses, as a licensed Attorney-at-Law in the State of New York, the Court notes that Plaintiff claims said Defendant signed the a false notice of lien as agent for the lienors, and as agent is liable for his own tortuous act (*See, Parr Meadows Racingt Association, Inc v White*, 76 AD2d 858, 428 NYS2d 509 [2 Dept 1980]), and therefore said Affirmative Defense is dismissed.

As to his Sixth Affirmative Defense, alleging Plaintiffs lack standing to assert the claims stated in the Complaint, the Court notes that Plaintiff SHAWN TULLY is the sole member of Plaintiff ARIES ESTATES, LLC, and that Plaintiff ARIES ESTATES, LLC is the owner of the premises against which the lien was filed, and that therefore both Plaintiffs possess proper standing to institute, maintain and pursue the claims set forth in the Complaint against said Defendant, and therefore said Affirmative Defense is dismissed.

As to his First Counterclaim, alleging this action constitutes abuse of process, as noted herein above, a summons is not process that can be abused, and commencement of an action cannot be the basis for an abuse of process claim (*See, 86 NY Jur2d, Process and Papers, Section 155, page 502*), and therefore said Counterclaim is dismissed.

As to his Second Counterclaim, alleging this action constitutes malicious prosecution, as noted herein above, same is insufficient as a matter of law, as said Defendant has not allege the two necessary elements of a civil malicious prosecution cause of action (*See, 59 NY Jur2d, False Imprisonment, Section 52, pages 307-308*), and therefore said Counterclaim is dismissed.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Defendant PALTROWITZ (001) for an Order staying this action,

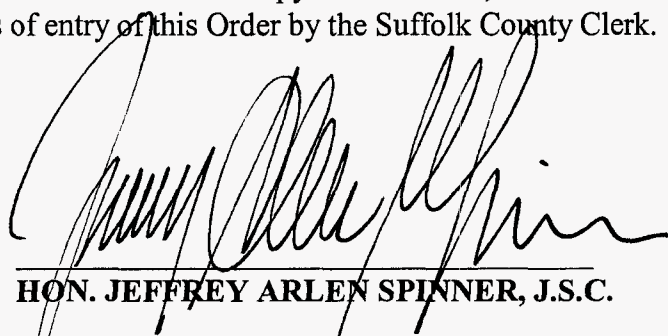
pursuant to CPLR 2201, pending the conclusion of the appeal in the underlying action entitled *Coughlin v Tully*, Index No. 18504-2003, is hereby denied in all respects; and it is further

ORDERED, that the application of Plaintiffs for an Order:

1. Dismissing 3 Affirmative Defenses alleged by Defendants SCOT BRIAN COUGHLIN and S B COUGHLIN, INC; and
2. Dismissing the 7 Affirmative Defenses and 2 Counterclaims alleged by Defendant PALTROWITZ; is hereby granted in all respects; and it is further

ORDERED, that Counsel for Plaintiffs is hereby directed to serve a copy of this Order, with Notice of Entry, upon Counsel for Defendants within 20 days of entry of this Order by the Suffolk County Clerk.

**Dated: Riverhead, New York
April 5, 2007**



HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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