SHORT FORM ORDER **INDEX NO. 07495/2007**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

SOMER & HELLER, LLP and
JEFFREY T. HELLER

Plaintiff(s),

-against-

DANIEL GUTTMANN AND
GUTTMANN & KELLNER, P.C.

Defendant(s).

ORIG. RETURN DATE: April 20, 2007
MTN. SEQ. #: 001 - CASEDISP

PLTF'S ATTORNEY:
SOMER & HELLER, LLP
2171 JERICHO TPKE, STE 350
COMMACK, NY 11725

DEFT'S ATTORNEY:
GUTTMANN & KELLNER, P.C.
25 W. MAIN STREET
SMITHTOWN, NY 11787

Upon the following papers numbered 1 to 44 read on this motion to dismiss: Notice of Motion and supporting papers 1 - 17; Affidavit in Opposition and supporting papers 18 - 31; Reply Affirmation and supporting papers 32 - 44; it is,

ORDERED that this motion by the defendants for an order dismissing the complaint pursuant to CPLR 3211(a)(7) is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the court hereby finds the bringing of the action to be frivolous as defined in 22 NYCRR 130-1.1(c) and that part of this motion seeking sanctions and costs is granted pursuant to 22 NYCRR 130-1.1 to that the extent that the plaintiffs are directed to pay to the defendants the sum of $2,500.00 for the reimbursement of actual expenses incurred and reasonable attorney's fees, payable within 30 days of service upon the plaintiffs of a copy of this decision and order as provided herein; and it is further

ORDERED that counsel for the defendants is directed to serve a copy of this decision and order upon counsel for the plaintiffs pursuant to CPLR 2103(b)(1), (2) or (3) within 30 days of the date of this decision and order.

This is an example of litigation run amok. It all stems from the disputed sale of a house and involves three actions among the parties to the sale and their attorneys. In the first action (Index No. 21531/05), the purported seller is suing the purported buyer for liquidated damages ($109,500) of which, it is not contested, the purported sellers' attorneys would be entitled to one-half.

The second action (Index No. 33002/06) is brought by the purported buyer and his wife against the sellers' attorneys for fraud, etc., based upon the purported buyer's contention that the sellers' attorneys altered an incomplete contract of sale to give it the appearance of a completed contract of sale. These same contentions are raised as defenses and a counterclaim in the first action. A motion to dismiss this second action is decided simultaneously herewith.

A motion to consolidate the first two actions is presently pending before an IAS justice.

The third action (Index No. 7495/07) - the underlying action to the instant motion - is brought by the sellers' attorneys against the purported buyers' attorneys for defamation, abuse of process and prima facie tort arising from the bringing of the second action on behalf of the individual plaintiffs therein.

The underlying facts, according to the purported buyer and his attorneys, are that the purported buyer, Alfred DiCanio, accompanied by his attorney, Daniel Guttmann, went to the sellers' attorneys' office on May 27, 2005 (a Friday), and met with the attorney, Jeffrey Heller, to discuss the terms of the contract of sale. According to Mr. DiCanio and Mr. Guttmann, the proposed contract of sale reflected that the buyers were Mr. DiCanio and his wife, Kim - as indicated in numerous places within the contract and an attached rider. In addition, the prepared proposed contract had a date for the signing of the contract for a yet to be determined date in June of 2005. A number of changes were made and, in the ensuing discussions, it was agreed that Mr. DiCanio would sign the agreement now and hand over a check for the down payment with the understanding that the sellers' attorneys would hold the agreement and not deposit the check until sometime the following week when Mr. DiCanio's wife would visit the sellers' attorneys to sign the contract.

On Wednesday, June 1, 2005, of the following week, a phone message (attached to the moving papers) was received from "Patty" of the sellers' attorneys' office asking to "let her know when Kim DiCanio will be coming into their office to sign contract. Please call."

That same day, the sellers' attorneys were informed that the deal was off; Kim DiCanio would not be signing the contract. Two days later, copies of the contract were received in the office of the DiCanios' attorneys which showed that Kim DiCanio's name was crossed out by every signature line that would have corresponded to her signature and that the "June" portion of the date was also crossed out and "May 27, 2005" was handwritten in its place.

The purported buyer and his attorneys claim that the sellers' attorneys unilaterally and fraudulently altered the instrument to give it the appearance of a completed contract when they, in fact, knew it to be otherwise.

According to the sellers' attorneys, Mr. DiCanio merely asked if he could proceed without his wife and simply add her name to the deed at some later point. The sellers' attorneys agreed to this and point out to the court that the agreement is all inclusive and contains no written conditions.

The sellers then brought the first action for the down payment; the purported buyer brought the second action for fraud, etc. against the sellers' attorneys (which is, as a matter of law, conditioned upon the first action being decided in the purported buyer's favor); and, the attorneys for the sellers brought the third action against the purported buyer's attorneys for representing him in bringing the second action.

It is true that in considering a motion to dismiss pursuant to CPLR 3211, the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (***Frank v Daimler Chrysler Corp.,*** 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.,* at 120-121, 12).

But here, the legal arguments put forth by the plaintiff law firm require the court to dismiss all the causes of action for failure to state any viable cause of action under the law.

In the recently decided case of ***Sexter & Warmflash, P.C. v Margrabe*** (38 AD3d 163, 828 NYS2d 315 [1st Dept 2007]), Associate Justice David Friedman went into a lengthy discussion of the law in this very area. The opinion pointed out that there is an absolute privilege for statements made in the course of litigation which affords the "speaker or writer immunity from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive with which the statement was made [citations omitted]" (*Id.,* at __, 322). In order to qualify for the privilege, in addition to the statements being made in the context of the litigation, the statements must also be pertinent to the litigation. In such an event, the personal malice of the writer, if any, does not matter (*Id.,* at __, 323).

The only exception to this privilege is if a statement is "so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame [citing ***Martirano v Frost,*** 25 NY2d 505, 508, 307 NYS2d 425 [1969]" (*Id.,* at __, 324). Moreover, with regard to whether a statement is pertinent or not, the issue is a question of law for the court and "any doubts are to be resolved in favor of pertinence [citations omitted]" (*Id.*). And lastly, in establishing whether a statement is pertinent or not, "the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices" (*Id.*).

The statements at issue here, as well as the bringing of the action itself, are all contained in the verified complaint in the second action brought on behalf of the purported buyer, Mr. DiCanio and are all made with reference to the alleged misconduct of defendants. As such, the statements are clearly pertinent and those statements and the action itself are not of a malicious nature and certainly qualify for the absolute privilege afforded such statements in the context of litigation.[1]

---

[1] The second action is dismissed simultaneously herewith on the technical ground that it was prematurely brought.

Accordingly, the complaint in its entirety is dismissed.

Turning now to the request for sanctions, costs, etc., the court finds that this action is completely without merit in law and cannot be supported by any reasonable argument based upon existing law (22 NYCRR 130-1.1[c][1]); and, is undertaken primarily to harass or maliciously injure the defendants (22 NYCRR 130-1.1[c][2]).

In support of its application for reimbursement of costs and fees, the defendants - who are a law firm and one of its partners individually - provide affirmations supporting the costs incurred, the time spent and their hourly wages. These points are not controverted by the plaintiffs. Accordingly, the court awards costs and fees in the reduced amount of $2,500 taking into consideration that the defendants represented themselves (*see* 22 NYCRR 130-1.2).

This decision constitutes the decision of the court.

Dated: June 28, 2007

PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.