

<b>Bodden v Victory Realty Mgt. LLC</b>
2007 NY Slip Op 33263(U)
October 10, 2007
Supreme Court, Richmond County
Docket Number: 0102061/2007
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

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**Index No.: 102061/2007  
Motion No.: 1 & 2**

**CARLOS BODDEN and LORRAINE BODDEN,**

*Plaintiffs*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**VICTORY REALTY MANAGEMENT LLC,  
STEVEN MASSERIA, HOWARD M. FILE, P.C. and  
HOWARD M. FILE, ESQ.**

*Defendants*

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The following items were considered in the review of these motions to dismiss and strike answer

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 4
Answering Affidavits	2, 5
Replying Papers	3, 6
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 1, the defendants, Howard M. File, P.C. and Howard M. File, Esq., individually, move this court for an order pursuant to CPLR § 3211 dismissing the plaintiffs complaint against them, together with sanctions, costs, and allowances pursuant to CPLR § 8393(a) and NYCRR § 130-1. The plaintiffs oppose this motion.

The plaintiffs' complaint alleges six separate causes of action, the first seeking adverse possession against the defendants, Victory Realty Management LLC and Steven Masseria. The second alleging trespass against the same defendants. The third cause of action alleges that the defendants, Howard M. File, P.C. and Howard M. File, Esq., "participated in such trespass by actively advising, discussing, agreeing with, and directing defendants to so trespass." Additionally, the plaintiff alleges that the File defendants' "participation in the alleged trespass" was in the form

of two letters sent to the plaintiffs on March 20 and March 26, 2007 respectively, informing plaintiffs that they had mis-located their fence within the co-defendants' property lines, and that legal actions would follow if not removed.

The fourth cause of action claims that the File defendants "acted in concert" with the co-defendants to cause physical damage to the plaintiffs' property. The fifth and sixth causes of action allege that the File defendants "acted in concert" with the co-defendants to either intentionally or negligently inflict emotional distress upon the plaintiffs.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleadings a liberal construction, accept all facts as alleged in the pleadings to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.<sup>1</sup> Applying this standard here, the complaint does state a cause of action, in effect, to hold the File defendants liable on any of the alleged causes of action.

It is well settled that an attorney is only an agent for his or her client and thus is not responsible for the client's actions.<sup>2</sup> To hold otherwise would place an attorney in a precarious situation should a plaintiff assert claims against the attorney for the sole purpose of forcing counsel to divulge confidential material in order to defend themselves.<sup>3</sup> Moreover, none of the four causes of action alleged against the File defendants are legally sufficient. The third and fourth causes of action alleged that the File defendants conspired and acted in concert with the co-defendants to cause damage to the plaintiffs' property. However, New York does not recognize an independent cause

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<sup>1</sup> *Holmes v. Gary Goldberg & Co., Inc.* 40 A.D.3d 1033 [2d Dept 2007].

<sup>2</sup> *Sullivan v. Greene & Zinner, P.C.* 283 A.D.2d 420 [2d Dept 2001]; citing to *Bonyng v. Field* 36 Sickels 159 [1880].

<sup>3</sup> *First Federal Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co.* 110 F.R.D. 557 [S.D.N.Y.,1986].

of action founded in civil conspiracy.<sup>4</sup> Therefore, the third and fourth causes of action must be dismissed against the File defendants as a matter of law.

The fifth cause of action must likewise be dismissed. Specifically, the fifth cause of action alleges that the File defendants “acted in concert” with the co-defendants to intentionally inflict emotional distress upon the plaintiffs. Once again sounding in civil conspiracy, this cause of action fails as a matter of law. Moreover, a claim for the intentional infliction of emotional distress must be conduct that goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in civilized society.<sup>5</sup> As a matter of law, this cause of action must be dismissed.

Likewise, the sixth cause of action is dismissed as a matter of law. The File defendants cannot be liable under a conspiracy claim by having allegedly acted in concert with co-defendants to negligently inflict emotional distress upon the plaintiffs. Furthermore, New York does not extend liability to attorneys where an act of misfeasance or nonfeasance causes injury to a third party with whom there is no privity.<sup>6</sup> Accordingly, the File defendants’ motion to dismiss is granted, and the complaint is dismissed as against Howard M. File, P.C. and Howard M. File, Esq. The court is not imposing sanctions for this motion, but awards costs and disbursements to Howard M. File, P.C. and Howard M. File, Esq. for this motion only. Mr. File is to file a bill of costs directly with this court and with plaintiffs’ counsel by November 1, 2007. Therefore, that part of the File defendants’ motion is denied.

In motion number 2, the plaintiff seeks an order pursuant to CPLR § 3024 striking the joint answer of the defendants and directing the defendants to file separate answers, as well as striking the defendants’ counterclaim. Since the File defendants are dismissed, the plaintiffs’ motion is granted to the extent that the remaining defendants, Victory Realty Management L.L.C. and Steven Masseria,

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<sup>4</sup> *Plymouth Drug Wholesalers, Inc. v. Kirschner* 239 A.D.2d 479 [2d Dept 1997].

<sup>5</sup> *Ruggiero v. Contemporary Shells, Inc.* 160 AD2d 986 [2d Dept 1990].

<sup>6</sup> *Mars v. Grant* 36 A.D.3d 561 [1<sup>ST</sup> Dept 2007].

are to serve an answer within 30 days of this order. All other prayers for relief in the plaintiffs' application, to wit: striking the defendants' counterclaim, are denied.

Accordingly, it is hereby:

ORDERED, that motion number 1 to dismiss is granted to the extent that the complaint is dismissed against Howard M. File, P.C. and Howard M. File, Esq., individually; and it is further

ORDERED, that costs and disbursements for this motion are awarded to Howard M. File, P.C. and Howard M. File, Esq. Mr. File is to serve and file a bill of costs to the plaintiffs' counsel by **November 1, 2007**; and it is further

ORDERED, that motion number 2 to strike the answer is granted to the extent that the remaining defendants, Victory Realty Management L.L.C. and Steven Masseria, are to serve an answer within 30 days of this order; and it is further

ORDERED, that all parties return to DCM 3 at 9:30AM on **November 20, 2007** to enter into a preliminary conference order.

ENTER,

DATED: October 10, 2007

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Joseph J. Maltese  
Justice of the Supreme Court