

Xiao Mei Teng v Mintz

2008 NY Slip Op 31262(U)

April 23, 2008

Supreme Court, Nassau County

Docket Number: 6266-07/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
XIAO MEI TENG,

Plaintiff,

-against-

ELLEN H. MINTZ,

Defendant.

-----x
ELLEN H. MINTZ,

Third-Party Plaintiff,

-against-

**GREGORY CARMAN and CARMAN,
CALLAHAN & INGHAM, LLP,**

Third-Party Defendant.

-----x
The following papers have been read on this motion:

Notice of Motion, dated 2-29-08.....	1
Affirmation in Opposition, dated 3-13-08.....	2
Affidavit, dated 3-24-08.....	3
Reply Affirmation in Support, dated 3-24-08.....	4
Notice of Cross Motion, dated 3-27-08.....	5
Affirmation in Opposition, dated 4-8-08.....	6

TRIAL TERM PART 48

INDEX NO. 016266/07

MOTION DATE: 3-25-08

SUBMIT DATE: 4-15-08

SEQ. NUMBER: 003

MOTION DATE: 4-15-08

SUBMIT DATE: 4-15-08

SEQ. NUMBER: 004

The motion by the third-party defendants (hereinafter Carman and CCI) to dismiss the third-party action pursuant to CPLR §3211(a)7 and for costs pursuant to 22 NYCRR 130-1.1, is granted. The motion, incorrectly denominated as a cross motion (see CPLR §2215) of the third party plaintiff (Mintz) is denied.

This action is by a buyer (Teng) of a house against the seller (Mintz) to recover the down payment on the contract on the grounds that the property was damaged by flood and the contract was cancelled pursuant to GOL 5-1311. 1.a.

Alternatively, the complaint seeks specific performance with an abatement of purchase price pursuant to GOL §5-1311a(2). The compliant also seeks an injunction against a nonparty, defendant's former attorney for return of the contract downpayment.

In conjunction with the action, Teng, through her attorneys, filed a Notice of Pendency (the Notice) against the property in the office of the Clerk of Nassau County giving notice of this action CPLR §6501 *et seq.*

Mintz counterclaimed against Teng for slander of title, based on the Notice, breach of contract and punitive damages. In addition, Mintz instituted a third-party action against plaintiff's attorney and her law firm Carman and CCI for slander of title in connection with the Notice, to disqualify Carman and CCI, and for punitive damages.

Counsel for third-party defendants Carman and CCI, thereafter, on February 20, 2008, wrote to counsel for Mintz to request a discontinuance of the third-party action as lacking in merit. When no discontinuance was forthcoming, this motion ensued. Mintz included a

procedurally improper cross motion to vacate the Notice in her opposition papers and two weeks later cross moved by proper notice of motion to vacate the Notice.

Before this motion was submitted third-party plaintiff moved to disqualify third-party defendants from representing plaintiff in the main action and plaintiff cross moved for summary judgment. Both of those motions were denied before the submission of these motions (Decisions of this Court dated March 17, 2008). These motions were submitted on April 15, 2008.

As to the causes of action that seek to disqualify Teng's counsel and law firm, Carman and CCI, the motion is granted pursuant to CPLR §3211(a) 5 and 7. This Court's determination on Mintz's motion to disqualify constitutes the law of the case and is binding on Mintz. *AIG Trading Corp., v. Valero Gas Marketing L.P.*, 254 AD2d 117 (1st Dept. 1998).

Further, the issue raised by the complaint is identical to the issue raised by Mintz' previous motion, thus invoking the doctrine of collateral estoppel. *City of New York v. Welsbach Electric Corp*, 9 NY3d 124 (2007), *Brownrigg v. New York City, Housing Authority*, 29 AD3d 721 (2d Dept. 2006). Hence the causes of action to disqualify Carman and CCI are dismissed.

As this motion is made pursuant to CPLR 3211(a)(7) prior to answer, the Court must look within the four corners of the third-party complaint, and if any cause of action is discernable therefrom the motion should fail. *See, e.g., Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the

pleading are to be accepted as true, and the third-party plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Leon v Martinez*, 84 NY2d 83 (1994); *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 (2d Dept. 2004).

A court may consider evidence outside a pleading to test if a plaintiff has a cause of action including affidavits received for the limited purpose of remedying defects. *Morris v. Morris*, 306 AD2d 449 (2d Dept. 2003); *Davis v. CCF Capital Corp.*, 277 AD2d 342 (2d Dept. 2000).

The purpose of a Notice of Pendency is to give constructive notice to a prospective purchaser or incumbrancer of real property that an action is pending that would affect title to such property. CPLR §6501.

Since Teng's action for specific performance with an abatement affects title to the property it was appropriate to file the Notice. *Nastasi v. Nastasi*, 26 AD3d 32 (2d Dept. 2005); *see also 5303 Realty Corp. v. O & Y Equity Corp.*, 64 NY2d 313 (1984).

Although CPLR §6514(a) and (b) provides a mechanism to invoke cancellation of the Notice, to the extent that Mintz's cross motion relies upon those sections, Mintz has not sustained her burden in demonstrating entitlement to relief. Mandatory cancellation pursuant to CPLR §6514(a) is not applicable because Mintz has failed to bring forth any facts tending to show the presence of any basis for dismissal under this section. Mintz has also failed to meet her burden for relief pursuant to CPLR §6514(b) discretionary cancellation. Except for arguing the merits or lack of merits of her counterclaim, Mintz has not shown how she is aggrieved by the Notice and has made no attempt to address the requirements of CPLR

§6515 with respect to an undertaking or the requirements of paragraphs 1 and 2 of said section. *Matter of Tschernia*, 18 Misc. 3d 1129A (Surr. Ct. Nassau Cty, 2008, Riordan J.).

Although Mintz argues that plaintiff and her attorneys have acted in bad faith by filing the Notice, it is well settled that bad faith may not be found when a party utilizes a Notice of Pendency in a manner such as here, which is consonant with the purpose for which it was designed. *Andesco v. Page*, 137 AD2d 349 (1st Dept. 1988). Here, there are conflicting factual accounts of the events surrounding the respective claims of the parties, there has been no showing of dilatory tactics and no showing of bad faith in connection with the commencement of the action. *551 West Chelsea Partners LLC v. 556 Holding LLC*, 40 AD3d 546 (1st Dept. 2007). In sum, the Notice was properly filed based on plaintiff's action for specific performance with an abatement and it should not be vacated. *RKO Properties, Ltd. v. Boymelgreen*, 37 AD3d 580 (2d Dept. 2007), *Nastasi v. Nastasi*, *supra*.

Since there is no basis for finding that the Notice was improper or improperly filed, the cause of action in the third-party complaint, slander of title against Carman pursuant to the First Cause of Action, must also be dismissed.

The elements of a cause of action for slander of title are (i) communication falsely casting doubt on the validity of title (ii) reasonably calculated to cause harm and (iii) resulting in special damages. *39 College Point Corp., v. Transpac Capital Corp.*, 27 AD3d 454, 455 (2d Dept. 2006); *see also Vollbrecht v. Jacobson*, 40 AD3d 1243, 1247 (3d Dept. 2007) and it is well settled that the filing of a Notice of Pendency does not give rise to a cause of action sounding in slander of title. *Alexander v. Scott*, 286 AD2d 692 (2d Dept. 2001).

Here, the allegations are patently without merit but if the complaint did express the proper elements of the cause of action for slander of title, it would not apply to the attorneys for the plaintiff because their conduct in filing the Notice on behalf of their client is privileged. *East Patchogue Contracting Co. v. Magesty Securities Corp.*, 266 AD2d 257 (2d Dept. 1999). Judicial proceedings are among the settings in which an absolute privilege is recognized. The rule is that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation. This privilege includes attorneys because as a matter of public policy, the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to a litigation. *Sexter & Warmflash P.C. v. Margrabe*, 38 AD3d 163, 171 (1st Dept. 2007), *Sinrod v. Stone*, 20 AD3d 560 (2d Dept. 2005). There can be no doubt that the filing of the Notice was an integral part of Teng's action against Mintz for specific performance with an abatement as the statutory scheme requires that an action be commenced within 30 days thereafter. CPLR §6512. Thus, filing of the Notice by third-party defendants was absolutely privileged. *Rosenberg v. MetLife, Inc.*, 8 NY3d 359 (2007), but were it to be contended that absolute privilege does not apply, the conduct was nevertheless entitled to a qualified privilege. Conduct protected by a qualified privilege is not actionable unless malice can be shown. *Rosenberg v. MetLife Inc.*, *Supra* at 365. Here, the statements made in the Notice and its filing were made by the third-party defendant's in the discharge of their legal duties as counsel to Teng and the conclusory allegations of the third-party complaint lack any factual support for a claim of malice. Thus, the qualified privilege afforded to an attorney in these circumstances bars the claims against the third-party defendants. *Blackman v. Stagno*, 35 AD3d 776 (2d Dept. 2006).

The Fourth Cause of Action for punitive damages is not a cognizable cause of action, but is instead a remedy to be applied in certain cases, *Rocanova v. Equitable Life*, 83 NY2d 603, 615 (1994), *see also Rose Lee Mtg, Inc., v. Chemical Bank*, 186 AD2d 548 551 (2d Dept. 1992). However, since it is premised entirely upon the “act of placing” the Notice, it too in view of the foregoing, is dismissed. *Pier 59 Studios L.P. v. Chelsea Piers L.P.*, 27 AD3d 217 (1st Dept. 2006).

In sum, the motion of the third-party defendants to dismiss the amended third-party complaint of defendant Mintz and for costs is granted and the third-party complaint is dismissed. The cross motion of Mintz, although incorrectly denominated as such (CPLR §2215), is treated as a motion to vacate the Notice and as such is denied.

As more fully described above, there was no basis to the claims made by Mintz against Carman and CCI and there are no facts to support any argument that Carman and CCI are liable in any way for any wrongful or unethical conduct.

CPLR §8303-a provides in substance that if a claim such as this see General Construction Law §37-a, is commenced or continued and is found to be frivolous, the Court shall award costs and reasonable attorneys fees up to \$10,000 to the successful party. In order to find the action to be frivolous the court must find that there was no reasonable basis in law or fact for the action or its continuance that it could not be supported by a good faith argument for a change of existing law CPLR §8303-a (c) (ii).

The rules of the Chief Administrator, 22 NYCRR 130-1.1 provide that an award of costs maybe made for frivolous conduct §130-1.1(c) (1), lack of merit in law or facts. *Yan*

v. Klein, 35 AD3d 729 (2d Dept. 2006) and there is a duty upon the attorney to make an analysis of the case in the context of the entire record and make a determination of merit independent of the wishes of the client, *Heilbut v. Heilbut*, 18 AD3d 1 (1st Dept. 2005).

Although at times an evidentiary hearing is required to make a determination of whether costs should be imposed, *Walker v. Weinstock*, 213 AD2d 631 (2d Dept. 1995), that requirement is not necessary here because the request for costs was a separate and distinct prayer for relief on this motion, Mintz has been afforded the opportunity to respond with reasons for her conduct, the parties have submitted documentary evidence, there are no factual disputes and Mintz has not requested a hearing. Hence, in this instance it is not necessary to hold an evidentiary hearing on the issue of whether the conduct of Mintz was frivolous, *Gordon v. Marrone*, 202 AD2d 104 (2d Dept. 1994).

After the third-party action was commenced, counsel for Carman and CCI made written and telephonic requests to counsel for Mintz seeking a dismissal. The Court has not been directed to any written response to these requests, however, the claim has been made that Mintz offered to discontinue as to Carman and CCI if the Notice was cancelled.

The Court finds that there came a time during this litigation, prior to the making of this motion when a cursory analysis of the well settled legal principles and rudimentary facts should have made apparent to Mintz's counsel that there was no merit to the claims against third-party defendants and thus the action should not have been continued as to them. *Mitchell v. Herald Company*, 137 AD2d 213 (4th Dept. 1988). To continue this action and

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to require third-party defendants to make this motion was thus frivolous, within the meaning of the above statutes and regulations, thereby entitling the latter to recover costs from counsel to Mintz.

Giving third-party plaintiff every benefit of the doubt the Court finds that by February 20, 2008, after counsel had made a request for a dismissal, third-party plaintiff should have discontinued the third-party action and thus third-party defendants are entitled to recover from the attorneys for third-party plaintiff, statutory costs, CPLR 8301(a), the reasonable and necessary expenses and legal fees of this motion CPLR §8301(b) and all costs, expenses and reasonable attorneys fees (such fee not to exceed \$10,000) incurred by third-party defendants since the above mentioned date, CPLR §8303-a, 22NYCRR §130-1 *et seq.*

A hearing is necessary to assess the quantum of costs to be awarded to the moving third-party defendants in accordance with this decision and order.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for a hearing on May 27, 2008, at 9:30 A.M., to assess damages in accordance with this decision.

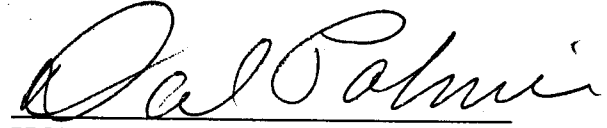
A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect the hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 23, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

APR 25 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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