

Pioneer Parking, LLC v 2386 Creston Ave. Realty, LLC
2009 NY Slip Op 30272(U)
February 5, 2009
Supreme Court, New York County
Docket Number: 108942/08
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART _____

Justice

Index Number : 108942/2008
PIONEER PARKING LLC
vs.
2388 CRESTON AVENUE REALTY LLC
SEQUENCE NUMBER : # 001
DISMISS

INDEX NO. 108942-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

FEB 09 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/8/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
PIONEER PARKING, LLC,

Plaintiff,

-against-

2386 CRESTON AVENUE REALTY, LLC

Defendant.
-----x

Index No.108942/08
Mtn Seq. 001

FILED
FEB 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----x
WALTER B. TOLUB, J.:

This is Defendant's motion to dismiss Plaintiff's action for malicious prosecution pursuant to CPLR §§3211(a)(5) and (a)(4).

Facts

Pioneer Parking, LLC (Pioneer) commenced the underlying action for malicious prosecution claiming that on or about February 24, 2005, Pioneer purchased certain real property located at 2386 Creston Avenue, Bronx, New York (Creston Property) from M-P-M Management Corp (MPM). Pioneer further claims that unbeknownst to it, Defendant 2386 Creston Avenue realty (Defendant) had previously contracted with MPM for the same property. After Pioneer closed on the Creston Property, Defendant commenced an action in Bronx County Supreme Court (Index 8083/2005) (Prior Action). In addition, Defendant filed a Notice of Pendency on the Creston Property.

In the Prior Action, Defendant (then Plaintiff) alleged that Pioneer intentionally interfered with its contract with MPM and

that it conspired with MPM to defraud the Defendant and cause the breach of the sales contract MPM had with Defendant. Pioneer denied the allegations against it and asserted cross claims against MPM but did not assert any counterclaims against Defendant.

After depositions were complete in the Prior Action, Pioneer moved for summary judgment against the Defendant and for sanctions pursuant to 22 NYCRR 130-1.1[c][1] and costs and expenses pursuant to CPLR 6514[b]. Pioneer's summary judgment motion was granted by Hon. Yvonne Gonzales on February 13, 2008 (Defendant Ex. D). The Court stated that in the absence of any evidence in admissible form to suggest Pioneer had been aware of MPM's contract with Plaintiff, Pioneer's motion for summary judgment was granted and the Notice of Pendency was vacated. Pioneer's motion for sanctions and costs was denied (Id.). With respect to the motion for costs and sanctions, the Court stated that ". . .that branch of Pioneer's motion that seeks sanctions is denied as unwarranted" (Defendant Ex. D).

Defendant appealed Justice Gonzalez' decision and argued on appeal that filing a Notice of Pendency was the proper vehicle to protect its interests pending the outcome of litigation. The First Department disagreed and held that the filing of the Notice of Pendency was not a substitute for the recording of the contract of sale, that the now Defendant, had no enforceable

interest and that bald assertions alone were insufficient to warrant reversal (Defendant Ex. F). As such, Justice Gonzalez' decision was affirmed by decision dated November 18, 2008.

Pioneer then commenced this action for malicious prosecution claiming that Defendant wrongfully commenced and continued the Prior Action and maliciously filed and refuses to vacate the Notice of Pendency. Defendant now brings this motion to dismiss Plaintiff's action for malicious prosecution based on collateral estoppel, issue preclusion and res judicata.

Discussion

The requisite elements of malicious prosecution are (1) the commencement or continuation of a civil or criminal proceeding, where the court granted a provisional remedy or there occurred other interference with the Defendant's person or property; (2) termination of the proceeding in Defendant's favor; and (3) actual malice (Manti v. New York City Transit Authority, 165 AD2d 373 [1st Dept 1991]).

Defendant argues that the Complaint must be dismissed as a matter of law because an action for malicious prosecution is barred under the doctrine of res judicata. The doctrine of res judicata bars future litigation of a claim between the same parties that has already been litigated to a final determination (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §36:350 citing Matter of Hodes v.

Axelrod, 70 NY2d 364 [1987]). For a matter to be barred by res judicata; (1) the parties must be identical to those in the previous action; (2) the cause of action must be the same in the previous action; and (3) there must have been a full and fair opportunity to litigate the cause of action in the previous proceeding (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §36:350 [internal citations omitted]).

The Court of Appeals has adopted a "transaction" test to determine whether a previous litigation bars the present action under the doctrine of res judicata. Under the test, if it is determined that the present action arises out of the same transaction as a prior action, and there was a judgment in the prior action, then res judicata bars all causes of actions arising out of those transactions regardless of whether or not the specific causes of action were raised in the first action (Outerial v. Otis Elevator, Inc., 220 AD2d 255 [1st dept 1995]; also Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §36:351).

Pioneers concedes that it did not raise the claim of malicious prosecution in the Prior Action. However, Defendant's argument is misguided because a claim for malicious prosecution in the Prior Action would be impossible to determine since the cause of action requires the termination of the prior action in

favor of the party later seeking damages.

Defendant also argues that the action should be dismissed based on claim preclusion and collateral estoppel. Defendant argues that the issues of its bad faith, malice and lack of probable cause in instituting and continuing the Prior Action were decided by Justice Gonzalez in the Prior Action based on the denial of sanctions and costs. However the elements of malicious prosecution were not litigated and fully determined in the Prior Action. Justice Gonzalez' decision denied Pioneer's motion for costs and expenses based on CPLR 6514[b]. CPLR 6514[b] provides that it is within the Court's discretion to decide whether to award costs and expenses incurred on account of the filing and cancellation of a Notice of Pendency. This section does not require the element of malice. Similarly, sanctions were denied pursuant to 22 NYCRR 130-1.1 which is also discretionary and not conclusive of Pioneer's claim for malicious prosecution. The denial of sanctions for frivolous conduct does not render the issue of bad faith fully litigated.

It follows that Defendant's motion for summary judgment must be and is denied.

Accordingly, it is

ORDERED that Defendant's motion for summary judgment is denied.


Counsel for the parties are directed to appear for a

[* 7]
preliminary conference on March 20, 2009 at 11:00AM in room 335
at 60 Centre Street.

This memorandum opinion constitutes the decision and order
of the Court.

Dated:

2/19



HON. WALTER B. TOLUB, J.S.C.

FILED
FEB 09 2009
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NEW YORK