

Clear Blue Water, LLC v Winston

2009 NY Slip Op 32153(U)

September 11, 2009

Supreme Court, Suffolk County

Docket Number: 18797/2008

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

CLEAR BLUE WATER, LLC,

Plaintiff,

-against-

JOHN WINSTON,

Defendant.

ORDER**PLAINTIFF'S ATTORNEY:**

GEORGE O. GULDI, ESQ.
 100 MILL ROAD
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 631-288-3737

PLAINTIFF'S FORMER ATTORNEY:

DUSTIN J. DENTE, ESQ.
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DEFENDANT'S ATTORNEY:

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Upon the Order of this Court dated March 30, 2009, which, among other things, set down a hearing for May 21, 2009 on the issues of an award to defendant of costs and expenses, pursuant to CPLR 6514 (c), occasioned by the filing and cancellation of the subject notice of pendency, and the imposition of sanctions against plaintiff and plaintiff's counsel, pursuant to 22 NYCRR § 130-1.1, for frivolous conduct in the form of costs, expenses and attorney's fees, and upon the proceedings held on the record on May 21, 2009 and June 25, 2009, and upon the hearing held on July 23, 2009, it is,

ORDERED that defendant's motion for an Order, pursuant to CPLR 6514 (c), awarding defendant costs and expenses occasioned by the filing of the subject notice of pendency, and pursuant to 22 NYCRR § 130-1.1, sanctioning plaintiff and plaintiff's counsel for frivolous conduct in that the instant action is without merit in law or in fact and is undertaken primarily to harass or maliciously injure defendant, is hereby **GRANTED** as set forth hereinafter, without opposition; and it is further

ORDERED that the Court, *sua sponte*, dismisses plaintiff's complaint in its entirety.

As recited in this Court's Order of March 30, 2009, on or about June 28, 2007, Melissa Lanzilotta, as nominee for Ultimate Title and Abstract, LLC ("Ultimate"), plaintiff's predecessor-in-interest, entered into a contract to purchase the real property commonly known as 60 George Street, Babylon, New York ("property") for the purchase price of \$800,000.00. At the time of the execution of the contract, Ultimate tendered a \$30,000.00 down payment. For reasons that were contested, the closing never occurred. Thereafter, on or about November 2, 2007, Ultimate commenced an action against the defendant herein in Supreme Court, Suffolk County, for specific performance of the contract. By Order dated May 13, 2008 (Whelan, J.), the Court dismissed Ultimate's complaint and cancelled a notice of pendency that had been filed against the property by Ultimate. The Court found that Ultimate unilaterally materially breached the contract by failing to appear for the scheduled closing after it had been rescheduled. As such, the Court held that defendant was entitled to retain the contract down payment as liquidated damages. By Order dated August 25, 2008 (Whelan, J.), the Court denied a motion by Ultimate to renew and/or reargue the prior motion to dismiss Ultimate's complaint.

On May 19, 2008, six days after dismissal of the prior action, the plaintiff herein, CLEAR BLUE WATER, LLC ("Clear Blue"), filed another notice of pendency against the property and commenced the instant action against defendant seeking specific performance of the same contract. As such, defendant moved for an Order, pursuant to CPLR 6514 and 6516, vacating and cancelling that notice of pendency; pursuant to CPLR 6514 (c), awarding defendant costs and expenses occasioned by the filing of the notice of pendency; and pursuant to 22 NYCRR § 130-1.1, sanctioning Clear Blue and Clear Blue's counsel for frivolous conduct. Clear Blue had failed to interpose opposition to that application.

By Order dated March 30, 2009, this Court granted defendant's application to the extent that the notice of pendency was vacated and cancelled, pursuant to CPLR 6514 (a), as the Court found that Clear Blue failed to serve a summons within the thirty (30) day time limit set forth in CPLR 6512. That branch of defendant's motion for an Order awarding defendant costs and expenses occasioned by the filing and cancellation of the notice of pendency, and sanctioning Clear Blue and Clear Blue's counsel for frivolous conduct in the form of costs, expenses and attorney's fees, was set down for a hearing on May 21, 2009, at 10:30 a.m., before this Court. Clear Blue's former attorney, DUSTIN J. DENTE, ESQ., was directed to appear at the hearing, as Mr. Dente filed the subject notice of pendency and commenced the instant action on behalf of Clear Blue.

On May 21, 2009, Mr. Dente appeared as directed, but Clear Blue's current attorney, GEORGE O. GULDI, ESQ., failed to appear. MIKEL J. HOFFMAN, ESQ. appeared on behalf of the defendant, JOHN WINSTON. On that date, the Court noted on the record that a consent to change attorney form was filed, dated December 16, 2008, substituting Mr. Guldi as attorney of record for Clear Blue herein, and that Mr. Guldi had made a personal appearance in court in this matter on December 18, 2008. Mr. Hoffman indicated on the record that he served Mr. Guldi with the Order of March 30, 2009 with notice of entry on April 20, 2009. In view of Mr. Guldi's non-appearance, the Court adjourned the hearing to June 25, 2009, and directed Mr. Hoffman to correspond with Mr. Guldi to inform him that his presence would be required on June 25, 2009. The Court also indicated that it would notify Mr. Guldi directly as to the June 25, 2009 hearing date.

On May 21, 2009, Mr. Hoffman sent a letter to Mr. Guldi, by facsimile and first class mail, noting his failure to appear, informing him of the June 25, 2009 hearing date, and indicating that his presence would be required on that date. On June 1, 2009, the Court sent a letter to all counsel notifying them of the new hearing date, and directing that all parties, counsel of record, and former counsel of record were to appear on June 25, 2009.

On June 25, 2009, Mr. Guldi appeared, as did Mr. Hoffman, but Mr. Dente failed to appear. The Court noted on the record that Mr. Dente had contacted the Court that morning to indicate he had "car troubles" and was unable to appear in court. Under the circumstances, the Court adjourned the hearing to July 23, 2009 to give all parties concerned an opportunity to appear. By Order dated July 7, 2009, the Court directed all parties, counsel of record, and former counsel of record to appear for hearing on July 23, 2009.

On July 23, 2009, Mr. Guldi and Mr. Hoffman appeared, but Mr. Dente again failed to appear. The Court conducted the hearing in Mr. Dente's absence, as Mr. Dente was twice afforded the opportunity to appear, but failed to do so, and had not provided the Court with an affirmation of actual engagement or any other reason or excuse for his non-appearance.

Initially at the hearing, Mr. Hoffman discontinued any and all claims for costs and/or sanctions asserted against Mr. Guldi, acknowledging that Mr. Guldi's involvement herein was subsequent to the filing of the successive notice of pendency and the instant action. As such, the Court excused Mr. Guldi from the hearing.

Mr. Hoffman then proceeded to recite the factual and procedural history of this matter on the record, including the prior action, the dismissal of that action, the vacatur of the first notice of pendency, and the filing of the second notice of pendency and the instant action by Mr. Dente six days later. Mr. Hoffman indicated that after he learned of the second notice of pendency and action, he contacted Mr. Dente by letter, dated July 3, 2008, advising him that his actions were improper and demanding that he voluntarily discontinue the action and vacate the notice of pendency. Mr. Hoffman alleged that in response, Mr. Dente sent a letter to Mr. Hoffman, dated July 22, 2008, advising that Mr. Hoffman's request for a voluntary discontinuance of this action was "wholly and entirely rejected and refused." In addition, Mr. Hoffman informed the Court that after Ultimate filed a Notice of Appeal of the Order of August 25, 2008 (Whelan, J.), Mr. Hoffman and Mr. Dente attended CAMP conferences before Justice Santagata of the Appellate Division, Second Department, who "repeatedly" advised Mr. Dente to voluntarily discontinue this action and remove the notice of pendency. Mr. Hoffman further stated on the record that Mr. Dente's justification for the second action was that Ultimate had a right to assign the contract to a third-party, i.e. Clear Blue, and that Mr. Dente claimed that the assignment "gave the contract and their remedies a new life." The Court accepted these statements as relevant to the issues of Mr. Dente's knowledge and state of mind at that time.

The Court elicited from Mr. Hoffman that an actual assignment was never produced by Ultimate or Clear Blue to Mr. Hoffman or to the Court. Moreover, the Court noted on the record that a handwritten amendment to the contract provided that the contract was "freely assignable by the purchaser to a corporation or entity in which the purchaser has an interest or ownership and no consent from the seller is required." There is no indication that any assignment had ever taken place.

Mr. Hoffman alleged on the record that the instant action was filed in bad faith; that there was no reasonable basis in law or fact to commence and maintain this action and file the second notice of pendency; that the action was unsupported by a good faith argument to extend, modify, or reverse existing law; and that the action and notice of pendency were filed solely for the purpose of delaying or prolonging the litigation and as a coercive tactic to influence the defendant. Further, the Court noted that Mr. Dente failed to inform the Court that the relief sought by Ultimate/Clear Blue had been previously denied.

With respect to the relief sought by defendant, the moving papers indicate that defendant sought an award of costs in the amount of \$210.00, and counsel fees in the amount of \$4,800.00, representing legal services rendered in

this matter through the submission of defendant's motion. At the hearing, Mr. Hoffman submitted an Affidavit of Legal Services Rendered (Deft.'s Exh. "B"), detailing the legal services rendered and seeking a fee of \$4,800.00, but now seeking disbursements in the amount of \$273.50. In addition, Mr. Hoffman indicated on the record that since the submission of defendant's motion, he performed an additional ten (10) hours of legal services, including his appearances in court on the two prior hearing dates. At \$300.00 per hour charged, Mr. Hoffman therefore seeks an additional legal fee award in the amount of \$3,000.00.

As discussed, defendant seeks an award of costs and expenses pursuant to CPLR 6514 (c), and an award of sanctions against Clear Blue and Clear Blue's counsel, pursuant to 22 NYCRR § 130-1.1, for frivolous conduct in commencing and maintaining the instant action. CPLR 6514 (c) provides that "[t]he court, in an order cancelling a notice of pendency under [CPLR 6514], may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action" (CPLR 6514 [c]; see generally *Congel v Malfitano*, 61 AD3d 807 [2009]). The purpose of CPLR 6514 (c) is to reimburse a party for costs and expenses incurred as a result of a wrongful filing of a notice of pendency, and such costs and expenses are "in addition to" and separate and distinct from, any damages sustained by a party arising from the underlying claims in the action (CPLR 6514 [c]; see *No.1 Funding Ctr., Inc. v H & G Operating Corp.*, 48 AD3d 908 [2008]).

Further, section 130-1.1 of the Rules of the Chief Administrator of the Courts provides in pertinent part:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either

an attorney or a party to the litigation or against both.
(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

(22 NYCRR § 130-1.1).

Rule 130-1 authorizes sanctions for frivolous conduct in civil litigation, as such conduct is defined therein, to wit: if the conduct is completely without merit in law, is undertaken primarily to delay or prolong the resolution of the litigation, is undertaken to harass or maliciously injure another, or asserts material factual statements that are false (see 22 NYCRR § 130-1.1 [c]). In making a determination, the court must consider the circumstances under which the conduct took place, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party (see *Matter of Ernestine R. v John R.*, 61 AD3d 874 [2009]). Awards of sanctions should not be disturbed absent an abuse of discretion (*Navin v Mosquera*, 30 AD3d 883 [2006]).

In New York, *res judicata*, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if (i) there is a judgment on the merits rendered by a court of competent jurisdiction; and (ii) the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was (*Matter of People of the State of New York, by Eliot Spitzer, as Attorney Gen. v Applied Card Sys., Inc.*, 11 NY3d 105 [2008]; *Sainval v City of New York*, 57 AD3d 508 [2008]). Generally, to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding (*Matter of People of the State of New York, by Eliot Spitzer, as Attorney Gen. v Applied Card Sys., Inc.*, 11 NY3d 105, *supra*).

The Court finds that both actions concern the same contract for the sale of real property, and that a determination on the merits was made by a court of competent jurisdiction that Ultimate materially breached the contract, that defendant was entitled to retain the contract down payment, and that the notice of

pendency should be cancelled. The Court finds that Clear Blue, as the purported assignee of the subject contract, is clearly in privity with Ultimate for *res judicata* purposes, especially as the contract could only be assigned by the purchaser to a corporation or entity in which the purchaser has an interest or ownership.

The Court has reviewed both complaints and find that they asserted the same four causes of action, and that the allegations therein are virtually identical except that Clear Blue was substituted as plaintiff for Ultimate. Although the instant complaint alleges that Clear Blue is the assignee of Ultimate, it fails to allege any specifics with respect thereto, such as the date of the assignment or the parties involved in the transaction. Notably, Mr. Hoffman had requested that Clear Blue voluntarily discontinue this action, but by correspondence dated July 22, 2008, Clear Blue's former counsel flatly refused. The Court finds unavailing Clear Blue's argument that the purported assignment of the contract revives the rights and remedies of the purchaser thereunder notwithstanding the fact that the Order of May 13, 2008 (Whelan, J.) dismissed Ultimate's complaint on the merits and cancelled the notice of pendency. In any event, an assignment, if one occurred, would be a nullity in light of Justice Whelan's Orders, as a party cannot assign more rights than he possesses. As such, the Court finds that the instant action is barred by the doctrine of *res judicata* following the dismissal of Ultimate's complaint in the prior action, the cancellation of the notice of pendency, and the determination on the merits that Ultimate materially breached the contract (*see generally Matter of Josey v Goord*, 9 NY3d 386 [2007]).

Based upon the foregoing and on the record presented herein, the Court finds that the instant action was filed in bad faith; that there was no reasonable basis in law or fact to commence and maintain this action and to file the second notice of pendency; that the action was unsupportable by a good faith argument to extend, modify, or reverse existing law; and that the action and notice of pendency were filed solely for the purpose of delaying or prolonging the litigation and as a coercive tactic to influence the defendant to sell the property to Clear Blue.

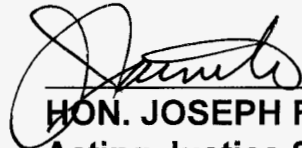
Accordingly, defendant's application for costs, expenses, and financial sanctions is hereby **GRANTED** to the extent that the Court awards defendant costs in the amount of \$273.50, pursuant to CPLR 6514 (c), representing costs incurred by defendant as a result of the filing and cancellation of the second notice of pendency, to be paid by plaintiff CLEAR BLUE WATER, LLC directly to "Mikel J. Hoffman, P.C., as attorney for John Winston." In addition, the Court awards defendant reasonable attorney's fees in the amount of \$7,800.00, pursuant to 22 NYCRR § 130-1.1, incurred as a result of the filing of

the instant frivolous action, as a financial sanction against plaintiff CLEAR BLUE WATER, LLC and its former attorney DUSTIN J. DENTE, ESQ., jointly and severally, to be paid directly to "Mikel J. Hoffman, P.C., as attorney for John Winston" (see e.g. *Danica Group LLC v Atl. Ct. LLC*, 2009 NY Slip Op 50708[U] [Sup Ct, Kings County 2009]). The aforementioned sums shall be paid within thirty (30) days of the date of service of the within Order upon plaintiff with notice of entry. If plaintiff and/or plaintiff's former counsel fails to pay as so directed, defendant may submit to this Court a proposed judgment against plaintiff and/or plaintiff's former counsel along with a supporting affidavit of non-compliance.

Finally, the Court, *sua sponte*, dismisses plaintiff's complaint in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: September 11, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court