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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

The Dermot Company, Inc.

-v-

200 Haven Company + 200 Haven LLC

INDEX NO. 105566/05

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for Vacate Notice of Pendency

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4
Replying Affidavits	5-9

Memos of Law M1-M4
Supp. Memos Supp1 – Supp3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is

FILED
SEP 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

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

Dated: 9-11-09

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

THE DERMOT COMPANY, INC.,

Plaintiff,

Index No.: 105566/2005

- against -

DECISION/ORDER

200 HAVEN COMPANY and 200 HAVEN LLC,

Defendants.

This is an action for specific performance on a contract to purchase residential real estate. Plaintiff The Dermot Company, Inc. ("Dermot") moved to discontinue the action, vacate the notice of pendency, and discharge the posted bond. Defendants 200 Haven Company ("Haven Co.") and 200 Haven LLC ("Haven LLC") cross-moved, pursuant to CPLR 3217 and 6514, for costs and fees incurred in defending the action and for other damages allegedly resulting from Dermot's filing and continuation of the notice of pendency. By order dated April 2, 2009, this court granted the branch of Dermot's motion for leave to discontinue the action with prejudice, and reserved decision on the issue of the damages, if any, to which defendants are entitled.[1]

The underlying facts of this action have been recited in prior orders and will not be repeated at length here. In brief, the underlying dispute was whether Haven LLC, as a general partner of Haven Co., was entitled, under the Haven Co. partnership agreement, to match

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[1]Pursuant to CPLR 6514(a), and as noted in the April 2 order, the notice of pendency was cancelled upon the discontinuance.

Dermot's bid and thereby to purchase the property. Haven Co. had terminated the contract of sale with Dermot based on Haven LLC's matching bid. Dermot claimed that Haven LLC did not validly exercise its option to match and sought specific performance.

The relevant procedural history of this case is as follows: Dermot commenced this action by filing a summons and complaint and notice of pendency on April 21, 2005. All parties moved for summary judgment on their respective claims. By decision on the record on December 14, 2005, and order and judgment entered on January 24, 2006, this court granted Dermot's motion and denied the cross-motions of defendants. On or about January 25, 2006, Dermot sent a demand for specific performance to Haven Co. Haven LLC subsequently filed a notice of appeal and moved for reargument. In a decision dated February 24, 2006, this court granted Haven LLC's motion for reargument and, upon reargument, adhered to its original determination. Haven LLC appealed this order as well.

On March 20, 2006, Haven Co. sent Dermot a "time of the essence" demand that Dermot close on the property by April 25, 2006. On March 29, 2006, Dermot commenced a second action against Haven Co. seeking an injunction to restrain Haven Co. from enforcing the demand to close and also seeking a declaratory judgment finding that Haven Co. was unable convey marketable and insurable title to the property to Dermot. Dermot also filed a second notice of pendency on this date. By order dated August 7, 2006, this court granted an injunction staying the time to close pending Haven LLC's appeal, and ordered Dermot to post an undertaking in the amount of two million dollars. By order dated June 14, 2007 (Dermot Co., Inc. v 200 Haven Co., 41 AD3d 188, 189 [1st Dept 2007]), the Appellate Division of this Department modified this court's orders of January 24 and February 24, 2006 by denying summary judgment to Dermot.

The Court affirmed this court's denial of summary judgment to defendants, finding triable issues of fact as to the proper interpretation of both the contract of sale between Haven Co. and Dermot and the Haven Co. partnership agreement, and thus as to whether Dermot or Haven LLC was entitled to purchase the property.

By motion returnable on November 30, 2007, Dermot sought to consolidate both actions, extend and continue the injunction in the second action, and extend the notices of pendency in both actions pending a determination on the merits. Haven Co. made a cross-motion to convert the preliminary injunction undertaking into a notice of pendency bond, and Haven LLC moved to amend its answer to allege as a defense that Dermot lacked standing and to add a counterclaim for tortious interference with contract. By decision on the record on January 10, 2008, this court granted Dermot's motion to the extent of joining the two actions, adjourned Haven Co.'s motion for supplemental briefing, and denied Haven LLC's motion. The denial of Haven LLC's motion was affirmed by order of the Appellate Division dated January 15, 2009. (Dermot Co., Inc. v 200 Haven Co., 58 AD3d 497 [1st Dept 2009].) By decision on the record on January 24, 2008, this court granted Haven Co.'s cross-motion to the extent of deeming the motion one to cancel the notice of pendency unless an undertaking was posted, and setting the undertaking in the amount of two million dollars, the amount at which the preliminary injunction bond had previously been set.

As a threshold matter, Dermot argues that Haven LLC does not have standing to pursue a claim for damages against Dermot under CPLR 6514 as a "person aggrieved" because Haven LLC is not a record owner of the property. However, Haven LLC entered into a contract of sale with Haven Co. before Dermot commenced this action and before Dermot filed the original

notice of pendency. Thus, Haven LLC qualifies as a person aggrieved under CPLR 6514. (See e.g. Skoler v Rimberg, 20 AD2d 580 [2nd Dept 1963].)

CPLR 6514(b) provides that the "court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith." Upon cancelling the notice of pendency, the court "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].) While a party may be held liable for the continuation of the notice of pendency, where that party is "found to have improperly or maliciously filed the notice of pendency, they would be liable for damages for the entire period the lis pendens was in effect." (Tucker v Mashomack Fish and Game Preserve Club, Inc., 199 AD2d 957, 959 [3rd Dept 1993]. See generally No. 1 Funding Ctr., Inc. v H & G Operating Corp., 48 AD3d 908 [3rd Dept 2008]; Chain Locations of Am., Inc. v T.I.M.E.-DC, Inc., 99 AD2d 111, 113 [3rd Dept 1984].)

Here, there is no evidence that Dermot improperly or maliciously filed the notice of pendency. On the contrary, the record demonstrates that Dermot's claims were based on bona fide factual issues that could not be resolved by the parties' summary judgment motions but rather were appropriate for trial. The Appellate Division thus held in its June 14, 2007 decision that "issues of fact exist arising from the reasonable competing interpretations" of Dermot's contract of sale, and denied the motions of both defendants and Dermot. (Dermot Co., Inc., 41 AD3d at 189.) In its subsequent decision denying Haven LLC's motion to amend its answer, the Appellate Division held that Dermot has standing to maintain this action because it has "a bona fide economic interest in seeking specific performance." (Dermot Co., Inc., 58 AD3d at 497.) In

upholding this court's denial of Haven LLC's request to add a counterclaim against Dermot for tortious interference with contract, the Court reasoned that Haven LLC "has not alleged any facts indicating that plaintiff commenced this action without justification." (Id. at 497.) On this record, there is no basis for a finding that Dermot's filing of the notice of pendency was improper or malicious, and that defendants are therefore entitled to damages as a result of the filing.

Defendants also do not submit evidence showing that Dermot prosecuted this action in bad faith. Contrary to Haven LLC's contention, Dermot's discontinuance of the action is not evidence that it litigated in bad faith. Even if the case had proceeded and Dermot had lost on the merits, this would not necessarily be a basis for a finding that Dermot prosecuted the action in bad faith. (See e.g. Jonestown Place Corp. v 153 W. 33rd St. Corp., 74 AD2d 525, 526 [1st Dept 1980], lv denied 50 NY2d 841 [holding "[t]he fact that we think the contract is void under the Statute of Frauds does not mean that the 'plaintiff has not commenced or prosecuted the action in good faith'"].) This is also not a case in which Dermot engaged in dilatory tactics or unjustifiably refused to comply with discovery orders or deadlines, thus evidencing a failure to prosecute the action in good faith. (See 551 W. Chelsea Partners LLC v 556 Holding LLC, 40 AD3d 546, 548 [1st Dept 2007]; Williams v Harrington, 216 AD2d 761, 765 [3rd Dept 1995], lv dismissed and denied 87 NY2d 967 [1996].)

Although Dermot has prosecuted the action in good faith, it is nevertheless liable for its continuation of the notice of pendency. It is settled that liability for the continuation of the notice of pendency is absolute where "the plaintiff was not entitled to [the notice of pendency] or where the defendant is successful in the action." (Chain Locations of Am., Inc., 99 AD2d at 113. See also Greenberg v Tamir, 178 AD2d 184, 185 [1st Dept 1991].) In determining whether a

defendant is entitled to damages because the plaintiff was "not entitled" to the notice of pendency, the courts may look to cases interpreting the analogous language of CPLR 6312(b), which provides that a plaintiff shall be liable to a defendant for the damages sustained by reason of an injunction "if it is finally determined that [the plaintiff] was not entitled to an injunction." (See Chain Locations of Am., Inc., 99 AD2d at 113 [citing authority on provisional remedies in interpreting CPLR 6514].) As noted by the Court of Appeals in J.A. Preston Corp. v Fabrication Enters., Inc. (68 NY2d 397 [1986]), there is authority, in the preliminary injunction context, that "when [a] defendant consents to the discontinuance of the action without reserving his rights on the undertaking, there can be no recovery on the bond because there can be no such final determination, but when without defendant's consent, plaintiff discontinues the action his doing so is equivalent to a determination that he was not entitled to the injunction and permits defendant to recover on the bond." (Id. at 404 [Internal citations omitted]. See also Margolies v Encounter, Inc., 42 NY2d 475 [1977]; Pacific Mail S.S. Co. v Toel, 85 NY 646 [1881]; Straisa Realty Corp. v Woodbury Assocs., 185 AD2d 96 [2nd Dept 1993].) Moreover, a "defendant's right to recover on the undertaking [is] not . . . defeated by its consent to discontinuance in view of the reservation of its right to recover on the bond." (J.A. Preston Corp., 68 NY2d at 407.)

Here, similarly, Dermot discontinued the action with prejudice and defendants reserved their right to seek damages on the undertaking. Although there were triable issues of fact, specifically with respect to the interpretation of the contract of sale and the provision of the partnership agreement authorizing Haven LLC to purchase the property if it matched Dermot's bid, Dermot made the decision to prosecute the action well into discovery, aware that it was at risk of not succeeding on the merits. After almost two years of litigation, however, Dermot

decided to discontinue the action based on the "drastic change in market conditions." (See Aff. of William Dickey [Dermot's President], ¶ 27.) The discontinuance terminated any right Dermot had to purchase the property under the contract of sale. On the other hand, both Haven Co. and Haven LLC litigated throughout a protracted discovery process and have continued to defend their respective positions although subject to the same deleterious market conditions as Dermot. Defendants not only incurred substantial litigation costs, but also were delayed in closing on their contract of sale because of Dermot's continuation of the notices of pendency. On this record, and on the above authority, Dermot's discontinuance of the action is tantamount to a determination that Dermot was not entitled to the notice of pendency.[2] The court accordingly holds that Dermot is liable to defendants for damages sustained as a result of Dermot's continuation of the notice of pendency from the date of the Appellate Division decision finding triable issues of fact as to the parties' entitlement to purchase the property until the date of Dermot's discontinuance of the action ("damage period").

The first category of damages that defendants seek is attorney's fees and costs incurred in litigating the action. In support of this branch of their cross-motions, defendants submit affidavits and invoices detailing their litigation expenses. (See Aff. of Maks Etingin in Sup. of Haven Co.'s Cross-Motion, ¶¶ 12-14; Haven LLC's Cross-Motion, Ex. C.) As Dermot is liable

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[2]As stated above, this court granted Dermot's motion to discontinue the action with prejudice. The parties vigorously dispute whether the discontinuance was an adjudication on the merits. Defendants cite authority that a discontinuance with prejudice has the effect of a judgment on the merits. (See Schwartzreich v E.P.C. Carting Co., Inc., 246 AD2d 439, 441 [1st Dept 1998].) However, there is other authority holding that where a discontinuance with prejudice merely serves to preclude the plaintiff from asserting the claims in a new action, it does not constitute a determination on the merits. (See Color by Pergament, Inc. v O'Henry's Film Works, 278 AD2d 92, 94 [1st Dept 2000].) That is precisely the case here. In any event, as already discussed, the issue here is not whether defendants were successful in the action as a result of the discontinuance, but rather whether Dermot was "entitled to" the notice of pendency.

for the continuation of the notice of pendency, defendants are entitled to an award of reasonable attorney's fees and costs for the above-specified damage period.

The second category of damages that defendants seek is comprised of expenses and lost income or profits allegedly sustained as a result of their inability to close on the original contract of sale between Haven Co. and Haven LLC because of Dermot's continuation of the notice of pendency. As to expenses, Haven Co. argues that it was required to keep seven apartments vacant until closing pursuant to paragraph 42 of its contract with Dermot, and that it has done so throughout the litigation. The court finds that Haven Co. is not entitled to these damages. First, as there has never been a determination on the merits, there has never been a showing that the contract of sale with Dermot was valid and that Haven Co. was obligated on the contract to keep the apartments vacant. In any event, Haven Co.'s position throughout this litigation has been that its contract with Dermot was cancelled by its subsequent contract with Haven LLC, the validity of which it has still not denied. Maks Etingin, one of Haven Co.'s general partners, also states in his affidavit that a contractual provision requiring apartments to be kept vacant was included not only in Dermot's contract of sale but also in the Haven LLC contract. (See Etingin Aff., ¶ 15.) Thus, Haven Co. cannot seek damages from Dermot for the apartments which it chose to keep vacant in order to comply with its agreement with Haven LLC.

In addition to the above expenses, Haven Co. claims that it is entitled to the loss in profits it sustained from not being able to sell the property in 2005 and instead having to sell it in the current market at a reduced priced. Haven Co. further seeks the interest it would allegedly have gained on the sale proceeds. It is well settled that damages for lost profits are not recoverable "unless they were within the contemplation of the parties at the time the contract was entered into

and are capable of measurement with reasonable certainty." (Ashland Mgt. Inc. v Janien, 82 NY2d 395, 403 [1993].) While damages need not be proved with either absolute certainty or mathematical precision, damages must be "capable of measurement based upon known reliable factors without undue speculation." (Id.) A "stricter standard" is required in the case of a new business seeking to recover loss of future profits. (Id. at 404 [citing Kenford Co. v County of Erie, 67 NY2d 257].) Further, where a party is seeking damages on a contract of sale for lost profits, "courts have appropriately valued property by utilizing the comparable sales method, the capitalization of income method or the reproduction cost less depreciation method." (Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack, 92 NY2d 179, 189 [1998].)

Here, the contract of sale between Haven Co. and Dermot provides that in the event of Dermot's default in performance, Haven Co.'s sole remedy shall be the retention of Dermot's down payment as liquidated damages. (Contract of Sale, ¶ 54.) This is therefore not a case in which damages resulting from a downturn in the real estate market were within the parties' contemplation. Even if such damages were recoverable, Haven Co. does not submit any evidence that supports a reasonable inference of damages based on the claimed losses. Haven Co. does not put forth evidence to support the valuation of the property, such as an appraisal of the specific property or evidence of recent sales of comparable buildings in the same or similar neighborhoods. (See generally St. Lawrence Factory Stores v Ogdensburg Bridge & Port Auth., 49 AD3d 1069 [3rd Dept 2008], lv granted 11 NY3d 712. See also Matter of John P. Burke Apts., Inc. v Swan, 137 AD2d 321, 325 [3rd Dept 1988] [holding that appraiser's supporting testimony was insufficient where "he failed to set forth the location of the comparable sales, the names of other apartments in the same area of the project which could be used as comparables

for market value, any dollar and cents adjustments to the subject sale and any factor he considered relevant to such necessary adjustments"].) Nor does Haven Co. make any showing in support of its bare assertion that it would have invested the sale proceeds in an interest bearing account and could have earned five percent interest. (See Etingin Aff., ¶ 8.) The wholly conclusory affidavits on which Haven Co. relies do not show with reasonable certainty that Haven Co. sustained the claimed lost earnings. Nor do they raise a triable issue of fact warranting a hearing on such damages.

Haven LLC also claims that it is entitled to lost profits resulting from Dermot's continuation of the notice of pendency. Specifically, Haven LLC contends that it planned to convert the apartments into condominiums and sell them once it acquired the property. It seeks damages for the alleged depreciation in value of the property, claiming that this conversion will be unattainable in the current real estate market. On this record, however, Haven LLC fails to submit evidence that shows with reasonable certainty, or raises a triable issue of fact as to, its entitlement to these claimed losses. (See generally Cross Props., Inc. v Brook Realty Co., Inc., 76 AD2d 445 [2nd Dept 1980] [internal quotation marks and citations omitted] [holding damages for "increased costs of improvement does not have that ring of clear predictability of consequence for which an unsuccessful good faith litigant should ordinarily be held responsible"].) Haven LLC's claims for damages relating to difficulty in obtaining financing and favorable interest rates are also too speculative and remote. (See Diblasi v Aetna Life and Cas. Ins. Co., 147 AD2d 93, 103 [2nd Dept 1989]. See also EFH Leasing Corp. v Computer Sys. of Am., Inc., 115 AD2d 312 [4th Dept 1985], lv denied 67 NY2d 609 [1986].) Nor does Haven LLC put forth any evidence that it is still obligated to purchase the property at the same price as in its

original contract with Haven Co. so as to justify an award for a decline in market value.

Finally, the court holds that defendants would not be entitled, pursuant to CPLR 3217(b), to greater or different damages than those awarded above pursuant to CPLR 6514. The court has considered the other contentions of the parties and finds them without merit.

It is accordingly hereby ORDERED that the cross-motions of defendants 200 Haven Company and 200 Haven LLC for damages are granted to the following extent: Defendants are awarded reasonable attorney's fees, costs, and expenses incurred in defending the above captioned action for the period from the date of the Appellate Division decision finding triable issues of fact until the date of Dermot's discontinuance of the action, provided that such attorney's fees shall not include fees in connection with Haven LLC's motion to amend its answer or the appeal from this court's denial of that motion; and it is further

ORDERED that the matter is referred to a Special Referee for a hearing, consistent with this opinion, on 1) the amount of attorneys' fees, costs, and expenses incurred by 200 Haven Company in defending the above captioned action; and 2) the amount of attorneys fees, costs, and expenses incurred by 200 Haven LLC in defending the above captioned action; and it is further

ORDERED that the Special Referee shall hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that defendants' cross-motions are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or

receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

This constitutes the decision and order of the court.

Dated: New York, New York
September 11, 2009

MARCY FRIEDMAN, J.S.C.