Liles v Abraham
2009 NY Slip Op 32475(U)
October 16, 2009
Supreme Court, New York County
Docket Number: 114355/08
Judge: Carol R. Edmead
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[* 1]
SCANNED ON 10/23/2009

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 114355/2008

LILES, LAUREN

vs

ABRAHAM, AJITA ELIZABETH

Sequence Number : 003

COUNSEL FEES, EXPENSES

INDEX NO.

MOTION DATE 9/10/09

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to ____ 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

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED, that plaintiff's motion for sanctions pursuant to 22 NYCRR §130-1.1 against defendants Ajita Elizabeth Abraham and Zerline Lehman Goodman, is denied; and it is further

ORDERED, that defendants' cross-motion for sanctions pursuant to 22 NYCRR §130-1.1 against plaintiff is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of this Court.

Dated: 10/16/09

HON. CAROL EDMEAD J.S.C.

Check one: ✓ FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
---X
LAUREN LILES,

Plaintiff,

INDEX NO. 114355/08

-against-

AJITA ELIZABETH ABRAHAM and ZERLINE LEHMAN GOODMAN,

Defendants.
---X
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

After having prevailed on her motion for summary judgment for the return of her down payment, plaintiff Lauren Liles ("plaintiff") now moves pursuant to Part 130 of the Rules of the Chief Administrator, for sanctions, including legal fees, costs and financial penalties, against defendants Ajita Elizabeth Abraham and Zerline Lehman Goodman (collectively, "defendants") for engaging in frivolous conduct during the course of this litigation.

Defendants oppose the motion and cross move for sanctions as well.

Factual Background

By a contract of sale, dated as of July 11, 2008 (the "Contract"), defendant Ajita Elizabeth Abraham ("Ms. Abraham") agreed to sell and plaintiff agreed to purchase 150 East 56th Street, Condominium Unit #6C, New York (the "Premises") for $867,500. Pursuant to the Contract, plaintiff deposited $86,750 (the "down payment") with Zerline Lehman Goodman ("Ms. Goodman"), Ms. Abraham's transactional real estate attorney, which was held in Ms. Goodman's IOLA account. After failing to obtain a mortgage for the premises in accordance with the mortgage contingency clause of the Contract, plaintiff canceled the contract and requested the

return of her down payment, to no avail.

Plaintiff then commenced this breach of contract action for the return of her down payment, and defendants cross moved for summary judgment in their favor as well as to disqualify plaintiff's attorney. By Decision & Order dated April 13, 2009, this Court (1) granted plaintiff summary judgment and dismissed defendants' counterclaims; (2) denied defendants' cross-motion for summary judgment in their favor, and (3) deemed defendants' cross-motion to disqualify plaintiff's attorney as moot.

Plaintiff's Motion

In support of her claim for sanctions, plaintiff argues that defendants, both of whom are attorneys, took advantage of the power of their licenses to practice law to extort money from the plaintiff. These frivolous actions violated the integrity and honesty that the legal profession is sworn to uphold. Ms. Abraham and her counsel ignored the mandates of DR7-102 which prohibit an attorney from filing suit, asserting a position or taking any other action when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Plaintiff contends that in opposing her previous motion for summary judgment, defendants failed to supply any non-hearsay factual support in opposition thereto. Also, defendants' legal arguments were rejected due to the merger clause in the Contract and the parole evidence rule. Yet, defendants continued to litigate this matter in contravention of Rule 130-1(a)'s bar of continuing litigation once a party knows or should know that its position is frivolous. Defendants' positions have been completely without merit in law and unsupported by any reasonable argument. Instead, defendants sought to obtain an advantage based on their

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assertion of a meritless claim to the Contract down payment. The seller/defendant and her husband, as attorneys, were aware that their actions constituted a "hold-up," and used the litigation process to extract an undeserved return from the plaintiff, a young girl trying to purchase her first home; such conduct was not that of a "reasonable attorney."

Defendants' Opposition and Cross-Motion for Sanctions

Defendants argue that their claims in the underlying action had merit. Defendants argue that plaintiff had decided to renege on her contractual obligations and refused to provide defendants with information, as required under the Contract. This litigation was commenced by the plaintiff, although plaintiff failed to provide defendants with the letters showing she had been rejected for a loan by two mortgage letters and such information was not provided until she moved for summary judgment. Had plaintiff provided such information to defendants back on August 15, 2008 and August 27, 2008 when requested, this litigation would have been unnecessary. Therefore, plaintiff has no basis for seeking sanctions against the defendants; instead, this Court should impose sanctions on plaintiff for her frivolous motion and the frivolous conduct of her attorney.

Plaintiff's Reply

Although defendants contend that they were entitled to "free" discovery, and blame the plaintiff for failing to turn over her loan applications as the cause of defendants' frivolous actions, defendants fail to explain why they vigorously opposed plaintiff's motion for summary judgment when the information then provided was sufficient to warrant the return of her down payment.

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Discussion

Plaintiff's Motion

A plaintiff is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]; *Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] *citing Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [2d Dept 1998]). In the case at bar, plaintiff seeks attorney's fees and sanctions pursuant to Part 130 of the Uniform Rules of the Chief Administrator (22 NYCRR § 130-1.1), Rule 22 NYCRR §130-1.1 permits the court to impose sanctions, including reasonable attorney's fees, for conduct if it is found to be "frivolous," *i.e.*, if (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, or (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another (130-1.1[c]; *Solow v Bethlehem Steel Corp.*, 204 AD2d 227, 612 NYS2d 402 [1st Dept 1994]). To determine whether conduct is frivolous, the court considers, "among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party" (22 NYCR §130-1.1.).

Although defendants did not prevail in opposition to plaintiff's summary judgment motion, it cannot be said that their action in opposing plaintiff's motion was frivolous so as to merit sanctions pursuant to 22 NYCR §130-1.1. While plaintiff's motion was granted, "that

judgment, in and of itself, does not necessarily automatically entitle her to sanctions herein" (*see Dunn v Khan*, 19 Misc 3d 1121, 862 NYS2d 814 [Sup Ct Nassau County 2008]).

Paragraph 22 of the Contract states in relevant part:

> Purchaser shall (i) *make prompt application to an Institutional Lender for such mortgage loan, (ii) furnish accurate and complete information on Purchaser and members of Purchaser's family, as required*, (iii) pay all fees, points and charges required in connection with such application and loan, (iv) *pursue such application with diligence*, (v) cooperate in good faith with such Institutional Lender to the end of securing such first mortgage loan and (vi) promptly give Notice to Seller of the name and address of each Institutional Lender to which Purchaser has made such application. . . . If such commitment is not issued on or before the Commitment Date, then, unless Purchaser has a commitment that does not comply with the requirements set forth above, Purchaser may cancel this Contract by giving Notice to Seller within 5 business days after the Commitment Date, in which case this Contract shall be deemed cancelled and thereafter neither party shall have further rights against, or obligation or liabilities to, the other by reason of this Contract except that the Downpayment shall be promptly refunded to Purchaser and except as set forth in para. 22. If Purchaser fails to give Notice of cancellation or if Purchaser shall accept a commitment that does not comply with the terms set forth above, the Purchaser shall be deemed to have waived Purchaser's right to cancel this Contract and to receive a refund of the Downpayment by reason of the contingency contained in this para. 23 [*sic*].
> (Contract, ¶ 22) (*emphasis added*)

It is uncontested that defendants did not receive any documents from plaintiff establishing her inability to obtain a mortgage until plaintiff filed her motion for summary judgment. When plaintiff moved for summary judgment, plaintiff did not submit her applications for a mortgage, but solely evidence of the denial of her applications. Therefore, although defendants' claims that the plaintiff pursued her loans in bad faith and that the affirmations and email print-outs she submitted as evidence of her denial letters were insufficient to permit her to cancel the Contract, defendants' claims raised colorable defenses. Accordingly, defendants' conduct was not completely frivolous so as to warrant the imposition of sanctions and costs pursuant to 22 NYCRR 130-1.1 (*see, e.g.*, *Chase v Stendhal*, 851 NYS2d 57, 16 Misc3d 1137 [Supreme Court

New York County 2007]).

Further, the cases to which plaintiff cites involved sanctions against an attorney for frivolous appeals (*see Yenom Corp. v 155 Wooster Street, Inc.*, 33AD3d 67, 818 NYS2d 210 [1st Dept 2006]; *Levy v Carol Mgmt. Corp.*, 260 AD2d 27, 698 NYS2d 266 [1st Dept 1999]; *Stocker v Heller*, 189 AD2d 601, 591 NYS2d 837 [1st Dept 1993]). In the instant case, defendants have not appealed this Court's decision awarding plaintiff summary judgment.

The remaining cases on which plaintiff relies are also distinguishable. Plaintiff cites to *Principe v Assay Partners* (154 Misc 2d 702, 586 NYS2d 182 [Supreme Court New York County1992]) for the principle that a court must determine whether the attorney adhered to the standards of a reasonable attorney. However, in *Principe*, the attorney made sexist remarks during depositions and improper suggestions regarding the notarization of documents. The defendants have not been accused of such egregious conduct in the instant case.

Plaintiff's reliance on *Sakow v Columbia Bagel, Inc.*, (6 Misc 3d 939 [Supreme Court New York County 2004]) is also misplaced, since *Sakow* sanctioned an attorney for protracting the litigation even after it became obvious that she did not have sufficient proof for her case by, *inter alia*, preparing and tendering altered exhibits and not providing a usable accounting or financial expert. Therefore, plaintiff's motion for sanctions is denied.

Defendants' Cross-Motion for Sanctions

Defendants' cross-motion for sanctions against plaintiff and her attorney for filing this action is also denied, as lacking in merit. Notably, the cases defendants cite to do not support their claim for sanctions under these circumstances. The Court in *Patterson v Balaquiot* (188 AD2d 275 [1st Dept 1992]) affirmed sanctions against plaintiffs' attorney who cross-moved for

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sanctions against defendants for refusing to acknowledge the mail service plaintiffs had purportedly made upon defendants. The court found the plaintiffs' claim that defendants were required to acknowledge such service lacking in merit, and that the request for sanctions was itself frivolous because the relief plaintiffs' sought would have been warranted "only if the acknowledgment plaintiffs sought was clearly and unequivocally mandated by existing law" (*Id.*). Defendants' also rely on *Shelly v Shelly* (180 Misc 2d 275, 688 NYS2d 439 [Supreme Court Westchester County 1999]), where the court held that a baseless cross-motion for imposition of sanctions against moving party is a form of frivolous conduct warranting the imposition of sanctions. (*Id.*). Unlike the plaintiff in *Patterson,* plaintiff's substantive claim herein had merit. Further, unlike the "knee jerk" cross-motions of the plaintiff in *Patterson* and the defendant in *Shelly*, the motion by plaintiff here, although unsuccessful, was not a completely baseless "knee-jerk" cross-motion.

Defendants also cite to *Southern Blvd. Sound, Inc. v Felix Storch, Inc.* (167 Misc 2d 731, 643 NYS2d 882 [App Term 1st Dept 1996]). In *Southern*, the court denied defendant's request for sanctions and stated in relevant part, that "[w]hile in appropriate circumstances a baseless request for sanctions itself may constitute frivolous conduct within the meaning of rule 130 (*see, Patterson v Balaquiot*, 188 AD2d 275), it has not been shown in this case that the sanctions request accompanying defendant's dismissal motion was frivolous. The thin record so far developed, limited in scope to the narrow issue of the facial sufficiency of the short-form complaint, provides no basis to assess either the substantive merits of plaintiffs' stated cause of action or the bona fides of defendant's sanctions request in response thereto." (*Id.*). Here, plaintiff's request for sanctions, though unwarranted, is not completely frivolous under the

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circumstances.

Conclusion

Based on the foregoing, it is hereby

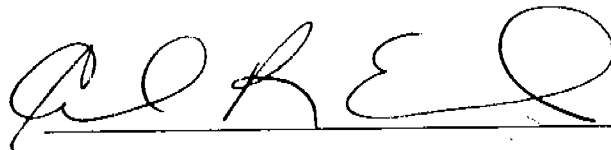
ORDERED, that plaintiff's motion for sanctions pursuant to 22 NYCRR §130-1.1 against defendants Ajita Elizabeth Abraham and Zerline Lehman Goodman, is denied; and it is further

ORDERED, that defendants' cross-motion for sanctions pursuant to 22 NYCRR §130-1.1 against plaintiff is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of this Court.

Dated: October 16, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

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