SHORT FORM ORDER

INDEX No. 12-17525

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 12-14-12 (#001)
MOTION DATE 1-29-13 (#002)
ADJ. DATE 1-29-13
Mot. Seq. # 001 - MD
002 - MotD

EAST END RESOURCES, LLC, f/k/a EAST END DEVELOPMENT, LLC, Plaintiff, - against - VALERIE SCOPAZ, Defendant.	AMATO LAW GROUP, PLLC Attorney for Plaintiff 666 Old Country Road, Suite 901 Garden City, New York 11530 ANTHONY B. TOHILL, P.C. Attorney for Defendant 12 First Street, P.O. Box 1330 Riverhead, New York 11901

Upon the following papers numbered 1 to 39 read on this motion to dismiss and cross motion to amend pleading; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers 13 - 24; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers 26 - 27, 28 - 37 ; Other memoranda of law 11 - 12, 25, 38 - 39 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3211 (a) (3), (5), (7), CPLR 3211 (c) and CPLR 3211 (g) dismissing the complaint or, in the alternative, awarding her summary judgment pursuant to CPLR 3212 (h) and directing that this matter be set down for an inquest to determine damages and an award of attorney's fees on the defendant's counterclaim, is denied; and it is further

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3025 (b) permitting it to amend its complaint to reflect its correct name, pursuant to CPLR 3211 (a) dismissing the defendant's counterclaim, and pursuant to CPLR 3211 (b) dismissing the third, fourth and fifth affirmative defenses contained in the defendant's answer, is granted to the extent that the plaintiff is granted leave to amend its complaint in the form annexed to the moving papers, absent the "red-lining" included therein, and is otherwise denied; and it is further

ORDERED that the defendant shall serve her answer to the amended complaint within 20 days after the date of service upon her attorney, and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8 (f) on June 25, 2013 at the Supreme Court, DCM Part, One Court Street, Riverhead, New York at 10:00 a.m.

In this action, the plaintiff seeks to recover damages due to the defendant's alleged improper actions and interference in the plaintiff's application for site plan approval which was reviewed by the Town of Southold Planning Department (Department). The complaint sets forth three causes of action as follows: tortious interference with contract, tortious interference with prospective business relations, and prima facie tort. The plaintiff alleges that it entered into a contract in May of 2002 to purchase land which was conditioned on obtaining municipal approval for its development as a condominium community, that the defendant had made a prior offer to purchase the land which was rejected by the owner, that the defendant was the director of the Department between 1987 and 2005, and that the defendant was a planning consultant to the Town of Southold (Town) thereafter. The plaintiff further alleges that the defendant "embarked on a campaign to sabotage the Contract of Sale and the Site Plan."

The defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a) (3), (5), (7), CPLR 3211 (c) and CPLR 3211 (g). That is, respectively, on the grounds that the plaintiff lacks capacity to sue, that the action is barred by the applicable statute of limitations, that the complaint fails to state a cause of action, that the Court may treat the motion as one for summary judgment, and that the action involves public petition and participation and the plaintiff has failed to demonstrate that the cause of action has a substantial basis in law.

Initially, the Court notes that the defendant has served her answer. Because issue has been joined, and the defense of lack of capacity to sue and the statute of limitations defense are not permissible grounds for a post-answer motion to dismiss (*see* CPLR 3211 [e]), these branches of the motion should have been brought under CPLR 3212. Whenever a court elects to treat such an erroneously labeled motion as a motion for summary judgment, it must provide "adequate notice" to the parties (CPLR 3211 [c]) unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005], *lv denied* 82 NY2d 657, 604 NYS2d 556 [1993]; ***Singer v Boychuk***, 194 AD2d 1049, 599 NYS2d 680 [3d Dept 1993]). Here, upon review of the papers, it cannot be said that the parties have deliberately charted such a course regarding the defenses of lack of capacity to sue and the statute of limitations, and the Court declines to treat these branches of the motion as a motion for summary judgment after providing notice to the parties.

However, a motion to dismiss pursuant to CPLR 3211 (a) (7) may be made at any time (*see* CPLR 3211 [e]). In reviewing this branch of the motion, the Court finds that the defendant's motion to dismiss for failure to state a cause consists of two implied elements. One concerns whether the complaint adequately sets forth cognizable causes of action, the other whether the action involves the exercise of free speech involving public issues. Civil Rights Law section 76-a was passed by the Legislature in 1992 (L.1992, c.767) to protect citizens facing law suits arising out of their public

opposition to certain applications for permits, zoning changes, leases, licenses or other authorizations from a government body (*see* ***600 W. 115th Street Corp. v Von Gutfeld***, 80 NY2d 130, 589 NYS2d 825 [1992]). Its purpose was to deter Strategic Litigation Against Public Participation, or SLAPP suits, brought by public applicants seeking to discourage public opposition to their project (*see* ***Singh v Sukhram***, 56 AD3d 187, 866 NYS2d 267 [2d Dept 2008]). Because this legislation creates a new cause of action for victims of SLAPP suits and places additional restrictions on the ability of such public applicants to seek redress in the courts, it has been held to be "in derogation of the common law and must be strictly construed" (***Hariri v Amper***, 51 AD 3d 146, 151, 854 NYS 2d 126 [1st Dept 2008]; ***Guerrero v Carva***, 10 AD3d 105, 779 NYS2d 12 [1st Dept 2004]).

Among the additional restrictions placed upon public applicants pursuant to the subject legislation was the enactment of CPLR 3211 (g) which provides:

> Standards for motions to dismiss in certain cases involving public petition and participation. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

Here, the second element of the defendants' motion to dismiss for failure to state a cause of action is based on the contention that this is an action involving free speech on public issues subject to dismissal pursuant to CPLR 3211 (g), or the Noerr-Pennington doctrine, which shields those who petition the government for redress of grievances (*see* ***Eastern R.R. Presidents Conference v Noerr Motor Frgt.***, 365 US 127 [1961]; ***United Mine Workers v Pennington***, 381 US 657 [1965]).

Initially, the Court notes that the complaint sets forth cognizable causes of action for tortious interference with contract, tortious interference with prospective business relations, and prima facie tort with respect to the first element in this branch of the defendant's motion. Pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d

730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

Here, the parties have submitted affidavits regarding the instant motion. On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see* ***Leon v Martinez***, *supra*; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314 [1976]; ***DaCosta v Trade-Winds Envtl. Restoration, Inc.***, 61 AD3d 627, 877 NYS2d 373 [2d Dept 2009]). When evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; ***Scoyni v Chabowski***, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; ***Peter F. Gaito Architecture, LLC v Simone Dev. Corp.***, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]). Dismissal under CPLR 3211 is not warranted unless it is established "conclusively that the plaintiff has no cause of action" (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010] quoting ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]; ***Rovello v Orofino Realty Co.***, *supra*). Here, a review of the affidavits submitted do not establish that the plaintiff does not have causes of action as set forth in its complaint, and there is evidence that remedies any alleged defects in its complaint.

The moving papers do not conclusively establish, that the subject causes of action do not exist, and the Court finds that a review of the complaint reveals that the plaintiff has adequately plead the three causes of action set forth therein. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19 [2005]; *see also* ***AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.***, 5 NY3d 582, 808 NYS2d 573 [2005]; ***Jacobs v Macy's E.***, 262 AD2d 607, 693 NYS2d 164 [2d Dept1999]). Accordingly, that element of the branch of the defendant's motion which alleges that the complaint fails to state a cause of action is denied.

However, the defendant also contends that she is shielded from liability pursuant to Civil Rights Law section 76-a and the Noerr-Pennington doctrine. This remaining element is concerned with whether this is an action involving free speech on public issues subject to dismissal pursuant to CPLR 3211 (g), or the Noerr-Pennington doctrine. In this regard the motion to dismiss is being used to attack the merits of the claim rather than to attack the manner in which it was plead, and the "criterion for determining such a motion is akin to that used to decide a motion for summary judgment" (Siegel, N.Y. Prac. § 265 [5th ed.]). It is for this reason that the Court has the discretion to convert the motion to one for summary judgment (CPLR 3211 [c]). However, for the reasons set forth below the Court declines to do so.

The Court now turns to that branch of the defendant's motion which seeks summary judgment pursuant to CPLR 3212 (h). Said statute was enacted simultaneously with CPLR 3211 (g) as an additional restriction placed upon public applicants pursuant to the legislation governing SLAPP suits, and provides:

> Standards for summary judgment in certain cases involving public petition and participation. A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

In essence, the branches of the defendant's motion which seek to dismiss the complaint pursuant to CPLR 3211 (g) and CPLR 3211 (h), and seek to dismiss the complaint based on her counterclaim and affirmative defenses which allege that this is a SLAPP action and that she is entitled to constitutional protection, require the Court to apply summary judgement standards. While the Court is cognizant of the fact that the subject CPLR sections place the burden on the plaintiff in opposing a motion to dismiss or for summary judgment in a SLAPP action, in this case the defendant has failed to establish that this is such an action. A plain reading of the subject sections of the CPLR reveals that they contemplate that the moving party must demonstrate that the matter is one involving public petition and participation.

A review of the record reveals that there are issues of fact which prevent the Court from determining as a matter of law whether this is a SLAPP action or whether the Noerr-Pennington doctrine is applicable. The plaintiff submits an affidavit from the owner of the land and putative seller, who swears that the defendant made an offer to purchase the property before she contracted with the plaintiff. It is undisputed that the defendant submitted a letter dated July 2, 2007 to the Town of Southold Planning Board which raised a number of concerns regarding the plaintiff's application, although the import of that letter is hotly disputed. There is evidence in the parties submissions which indicate that the defendant was directly involved in the department responsible for reviewing the plaintiff's application for a period of time, and that she remained a planning consultant to the Town of Southold. In other words, there are multiple issues of fact as to whether the defendant is a person who is protected under Civil Rights Law section 76-a or was acting instead as a government official or insider (***Yeshiva Chofetz Chaim Radin, Inc. v Village of New Hempstead***, 98 F Supp 2d 347 [SDNY 2000]), and whether the defendant's activities fall within the "sham" exception to the Noerr-Pennington doctrine. Said exception applies where activity ostensibly directed toward influencing governmental action is a mere sham to cover what is actually an attempt to interfere in business relations (***Eastern R.R. Presidents Conference v Noerr Motor Frgt.***, *supra*; ***Alfred Weissman Real Estate v Big V Supermarkets***, 268 AD2d 101, 707 NYS2d 647 [2d Dept 2000].

Here, the plaintiff has not yet had an adequate opportunity to conduct any discovery into relevant matters that are exclusively within the knowledge of the defendant to enable the plaintiff to oppose this motion (*see* CPLR 3212 [f]; ***Colombini v Westchester County Healthcare Corp.***, 24 AD3d 712, 808 NYS2d 705 [2d Dept 2005]; ***Mazzola v Kelly***, 291 AD2d 535, 738 NYS2d 246 [2d Dept 2002]). Therefore, the Court finds that the facts surrounding the defendant's actions, if any, that would fall outside the intended protections of the Civil Rights Law and the Noerr-Pennington doctrine must be

examined to permit a reasoned decision herein. Accordingly, the defendant's motion for accelerated judgment herein is denied as premature.

The plaintiff cross-moves for leave to amend its complaint to reflect its correct name, and for an order dismissing the counterclaim and the third, fourth and fifth affirmative defenses contained in the defendant's answer. In support of its application for leave to amend the complaint, the plaintiff submits the affidavit of its managing member, Alfred L. Amato, who swears that he has been the managing member of the plaintiff since it was formed under the name East End Development, LLC in February 2000, that he decided to change the company name in 2005, and that he considered two possible names. He states that he chose the name East End Company, LLC and caused the company name to be changed accordingly, that "for reasons unclear to me at this time," he began mistakenly referring to the company as East End Resources, LLC., which was his second choice.

Pursuant to CPLR 3025 (b) leave to serve an amended pleading should be freely given upon such terms as are just. Leave to amend will generally be granted provided the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious (*see* ***Kiaer v Gilligan***, 63 AD3d 1009, 883 NYS2d 224 [2d Dept 2009]; ***Kinzer v Bederman***, 59 AD3d 496, 873 NYS2d 692 [2d Dept 2009]; ***Charleson v City of Long Beach***, 297 AD2d 777, 747 NYS2d 802 [2d Dept 2002]). Courts are unlikely to deny the request if the proposed amendments do not prejudice the opponent by changing the basic issues of the action, or, by adding significant factual allegations of which the party is unaware (***Symphonic Electronic Corp., v Audio Devices, Inc***., 24 AD2d 746, 263 NYS2d 676 [1st Dept 1965]; ***Rogers v South Slope Holding Corp***., 255 AD2d 898, 680 NYS2d 772 [4th Dept 1998]; *see also* ***Francis v Bein-Aime***, 4 Misc3d 1002A, 791 NYS2d 869 [Sup Ct, Bronx County 2004]; ***Rodriguez v State***, 153 Misc2d 363, 581 NYS2d 972 [Ct Cl 1992]).

Here, the record reveals that the company as originally named entered into the subject land purchase contract, and that everyone concerned, including the parties, the Department, and the sellers of the land, proceeded under the mistaken impression that the company's name had been changed to East End Resources, LLC. In addition, the defendant has failed to establish that she would be prejudiced by the proposed amendment. Accordingly, that branch of the plaintiff's motion which seeks leave to amend the complaint is granted.

The second branch of the plaintiff's motion seeks to dismiss the counterclaim against it pursuant to CPLR 3211 (a) (7). Said counterclaim contends that the plaintiff's action is a SLAPP suit and that she is entitled to dismissal of said action as well as compensatory damages and attorney's fees. A review of the subject counterclaim, having been liberally construed, and accepting the facts alleged as true, and every possible favorable inference given to defendant reveals that the counterclaim states a cause of action ***(Leon v Martinez***, *supra*).

The third branch of the plaintiff's cross motion seeks to dismiss the third, fourth and fifth affirmative defenses contained in the defendant's answer pursuant to CPLR 3211 (b). The defendant's third affirmative defense alleges that the plaintiff's action constitutes a SLAPP action in violation of the

Civil Rights Law. The fourth and fifth affirmative defenses allege that the defendant is shielded from liability under the Noerr-Pennington doctrine, and under the First Amendment respectively. CPLR 3211 (b) provides: "Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Initially, the Court notes that the subject defenses are pleaded with sufficient particularity to withstand a motion to dismiss. In addition, the Court cannot find the defenses set forth therein to be without merit. For the reasons set forth above, there are issues of fact whether the defendant engaged in any activities which would preclude her from benefitting from the protection of the Civil Rights Law or the Noerr-Pennington doctrine. Accordingly, those branches of the plaintiff's motion which seek to dismiss the defendant's counterclaim and the third, fourth and fifth affirmative defenses in her answer are denied.

The Court notes that the proposed amended complaint attached to the plaintiff's motion is identical to the complaint served herein except for the name of the plaintiff. In that light, and considering the important policy considerations raised by the defendant in asserting that this action involves her exercise of free speech involving public issues, the Court has scheduled a preliminary conference in this action. Because the amended complaint contains a minor, and relatively insignificant, change from the complaint, said conference shall be held whether or not the plaintiff has served said amended complaint or the defendant has served her answer thereto. In addition, the parties are directed to make every effort to agree to an expedited schedule for the completion of disclosure in this action.

Dated: MAY 24, 2013.

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**