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SHORT FORM ORDER

INDEX No. 11-34766

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 4-2-13 (005)
MOTION DATE 9-10-13 (006- 008)
ADJ. DATE 10-2-13
Mot. Seq. # 005 - MD
006 - MD
007 - MG
008 - MD

JOHN F. WINNEGAR and MAUREEN V. WINNEGAR,

Plaintiffs,

- against -

LINDA RIOS,

Defendant.

BRODY, O'CONNOR & O'CONNOR, ESQS.
Attorney for Plaintiffs
7 Bayview Avenue
Northport, New York 11768

DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP
Attorney for Defendant/Third-Party Plaintiff
One North Lexington Avenue
White Plains, New York 10601

LINDA RIOS,

Third-Party Plaintiff,

- against -

THOMAS J. BYRNES and MARYANN BYRNES,

Third-Party Defendants.

GRASING & ASSOCIATES
99 Smithtown Boulevard
Smithtown, New York 11787

WILLIAM J. UPTON, P.C.
Attorney for Third-Party Defendants
52 Broadway
Greenlawn, New York 11740

Upon the following papers numbered 1 to 87 read on this motion for leave to serve amended answer; motion for leave to discontinue action; cross motion for dismissal; motion to punish for contempt : Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; 28 - 31; 69 - 81 ; Notice of Cross Motion and supporting papers 32 - 36 ; Answering Affidavits and supporting papers 37 - 62; 82 - 84; 85 - 87 ; Replying Affidavits and supporting papers 63 - 65; 66 - 68 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#005) by defendant/third-party plaintiff, the motion (#007) by plaintiffs, the cross motion (#006) by third-party defendants, and the motion (#008) by defendant/third-party plaintiffs are consolidated for purposes of this determination; and it is

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ORDERED that the motion by defendant/third-party plaintiff for leave to serve an amended answer is denied; and it is

ORDERED that the motion by plaintiffs for leave to discontinue this action, with prejudice, is granted; and it is

ORDERED that the cross motion by third-party defendants for leave to discontinue the third-party action is denied, as moot; and it is

ORDERED that the motion by defendant/third-party plaintiff for an order punishing plaintiffs for contempt is denied.

In November 2011, plaintiffs John Winnegar and Maureen Winnegar commenced this action for a declaration that they are the owners of a triangle-shaped parcel of land located between adjoining residential properties located on Lori Court in Northport, New York. Plaintiffs are the owners of the property known as 1A Lori Court, and defendant/third-party plaintiff Linda Rios is the owner of the property known as 3 Lori Court. By order dated September 20, 2012, this Court denied a motion by Rios for leave to serve an amended answer and a motion by plaintiffs for summary judgment in their favor. The factual background of this action, the legal claims asserted by plaintiffs and Rios, and the arguments raised in the prior motions for summary judgment and leave to serve an amended answer were set forth in detail in the order issued in September 2012 and will not be repeated herein, as the parties' familiarity with the same is assumed.

Shortly after issuance of the September 2012 order, plaintiffs moved for leave to renew and reargue their prior summary judgment motion. Plaintiff's motion was denied by order dated April 12, 2013. Meanwhile, by order to show cause dated February 23, 2013, Rios moved again for an order granting her permission to serve an amended answer. Rios also sought a temporary restraining order enjoining plaintiffs and their agents, pending a determination of the motion, from, among other things, "touching, moving, removing . . . working on, landscaping, driving, walking on, traversing or entering onto the disputed property," which was granted. The affirmation in support of the motion is by Raymond Grasing, Esq., of the law firm Grasing & Associates, P.C., and states the firm is appearing " for the defendant, Linda Rios, for the limited purpose of attempting to obtain the injunctive relief requested herein." The proposed amended answer annexed to the moving papers, entitled Verified Counterclaims, begins "Linda Rios, the Defendant and Counterclaim Plaintiff herein, by her Attorneys, The Law Firm of Grasing & Associates, P.C.," and asserts a counterclaim for ejectment and a counterclaim to quiet title; however, it does not address the allegations in the complaint or assert any affirmative defenses. In addition to seeking a judgment of possession and damages, the "wherefore" clause of the proposed amended answer seeks injunctive relief, including a judgment directing plaintiffs to remove a sign and planters allegedly encroaching on Rios's property.

Next, less than two weeks after the denial of plaintiffs' motion for renewal and reargument, Rios filed a third-party complaint against third-party defendants Thomas Byrnes and Maryann Byrnes, the prior owners of the property known as 3 Lori Court. The third-party complaint alleges that, in the event plaintiffs establish title to the disputed property by adverse possession, third-party defendants are liable for breach of the covenant against grantors' acts contained in the bargain and sale deed transferring title to Rios. Third-

party defendants' answer asserts various affirmative defenses, but no counterclaims. In July 2013, plaintiffs' counsel and third-party defendants' counsel executed a stipulation discontinuing, with prejudice, plaintiffs' adverse possession action against Rios.

Upon the parties' consent, the submission date for the motion seeking leave to serve an amended answer brought on by the law firm Grasing & Associates was adjourned. Plaintiffs now move for an order discontinuing their action against Rios, alleging she has refused to execute the stipulation of discontinuance. Arguing that the third-party complaint cannot survive if the main action is dismissed, third-party defendants move for an order discontinuing the third-party action. Rios opposes plaintiffs' motion and third-party defendants' cross motion, arguing she will be prejudiced by a voluntary discontinuance of the action, as she now seeks to assert counterclaims and a temporary restraining order previously granted by this Court prevented her "use and enjoyment of HER property for five months during the pendency" of plaintiffs' motion for summary judgment.

Rios also moves for an order punishing plaintiffs for contempt. An affidavit of Rios submitted in support of the motion alleges that on August 16, 2013, from 1:20 p.m. to 2:00 p.m., plaintiff John Winnegar violated the temporary restraining order granted with the order to show cause issued February 26, 2013, by walking on the disputed property and by directing a landscaper to perform work on underground sprinklers previously installed on such property by plaintiffs. Rios alleges the landscaper placed marking flags on the disputed property and began digging holes in the grass, but stopped working when her friend arrived and told him a temporary restraining order had been issued. According to her affidavit, the landscaper then filled in the holes, replaced the grass, and left the property. An affirmation by Raymond Grasing in support of the contempt motion states, among other things, that Rios "has, and continues to be, represented by DelBello Donnellan Weingarten Wise & Widerkehr, which was retained for her by her title insurance company," that Rios "retained Grasing & Associates for the express purpose of attempting to obtain the [ ]injunctive relief," and that Rios "has not retained Grasing & Associates to represent, and Grasing and Associates does not represent, Ms. Rios in any other capacity; it does not represent Ms. Rios' uninsured interest or her defense in this action, and has not assumed that defense." Plaintiffs oppose the contempt motion, alleging, among other things, that a serviceman had been called to their property on August 16 to make changes to the underground sprinkler system, so it would not run under the disputed property, and that Rios initially consented to the serviceman's presence on the disputed property.

Rios's motion for leave to serve an amended answer is denied. Generally, there is no authority for a party to be represented by more than one attorney in an action (***Kitsch v Riker Oil Co.***, 23 AD2d 502, 502, 256 NYS2d 536 [2d Dept 1965]), and the actions of an attorney not properly substituted as counsel should be disregarded (***Dobbins v Erie County***, 58 AD2d 733, 733, 395 NYS2d 865 [1977]; *see* ***Ottaviano v Genex Coop., Inc.***, 15 AD3d 924, 790 NYS2d 791 [4th Dept 2005]; ***Elite 29 Realty LLC v Pitt***, 39 AD3d 264, 833 NYS2d 456 [1st Dept 2007]). However, the courts have recognized that in circumstances where the interests of a single party may diverge, or where a case involves special circumstances or highly complex litigation, it is within the discretion of a trial judge to permit representation of a party by more than one attorney (***Chemprene v X-Tyal Intl. Corp.***, 55 NY2d 900, 449 NYS2d 23 [1982]; *see e.g.* ***Jana L. v West 129th St. Realty Co., LLC***, 32 AD3d 260, 820 NYS2d 230 [1st Dept 2006]). Here, no application was made to the Court seeking permission for Grasing & Associates to submit the motion on behalf of Rios for a temporary restraining order and leave to serve an amended answer, and no showing has been made that Rios needed

a second attorney to defend her property interests in this action or to move for leave to amend her pleading. Defense counsel's refusal to comply with Rios's request that a claim for injunctive relief be interposed on her behalf does not demonstrate that she has a need for two attorneys (*cf.* ***Chemprene, Inc. v X-Tyal Intl. Corp.***, 55 NY2d 900, 449 NYS2d 23). The Court notes the affirmation of Raymond Grasing submitted in support of the motion to punish plaintiffs for contempt states that Grasing & Associates authority is limited to obtaining injunctive relief on behalf of Rios. Granting the request for leave to amend the answer would allow Grasing & Associates to usurp the right of Rios's counsel of record to control the defense of this action without a showing of a conflict of interest between Rios and the title insurer. Rios's motion, therefore, is denied, and the temporary restraining order previously granted to her is a nullity (*see* ***Ottaviano v Genex Coop., Inc.***, 15 AD3d 924, 790 NYS2d 791; ***Dobbins v Erie County***, 58 AD2d 733, 395 NYS2d 865).

As to plaintiffs' motion and third-party defendants' cross motion, a plaintiff may voluntarily discontinue an action against a party by filing with the Clerk of the Court a written stipulation signed by the attorneys of record for all of the parties (CPLR 3217 [a]). The Court, as a matter of discretion, also has the authority under CPLR 3217 (b) to grant or deny a motion by "a party asserting a claim" to voluntarily discontinue an action. "[O]rdinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance [under CPLR 3217] should be granted" (***Tucker v Tucker***, 55 NY2d 378, 383, 449 NYS2d 683 [1982]; *see* ***Muy v Robert Bosch Power Tool Corp.***, 80 AD3d 681, 914 NYS2d 670 [2d Dept 2011]; ***Expedite Video Conferencing Servs., Inc. v Botello***, 67 AD3d 961, 890 NYS2d 82 [2d Dept 2009]; ***Parraguirre v 27th St. Holding, LLC***, 37 AD3d 793, 831 NYS2d 460 [2d Dept 2007]). However, CPLR 3217 (b) "cannot be the basis for a dismissal motion by a party defending a claim unless the party asserting the claim consents or joins in the motion" (***Shamley v ITT Corp.***, 67 NY2d 910, 911, 501 NYS2d 810 [1986]).

Plaintiffs' motion for an order granting leave to discontinue their adverse possession action against Rios is granted. Here, no showing has been made that Rios will suffer actual prejudice to a substantial right if plaintiffs' lawsuit is discontinued with prejudice (*see* ***Blackwell v Mikevin Mgt. III, LLC***, 88 AD3d 836, 931 NYS2d 116 [2d Dept 2011]; ***Parraguirre v 27th St. Holding, LLC***, 37 AD3d 793, 831 NYS2d 460; ***Christenson v Gutman***, 249 AD2d 805, 671 NYS2d 835 [3d Dept 1998]; *cf.* ***Tucker v Tucker***, 55 NY2d 378, 449 NYS2d 683). The speculative allegation by Rios's counsel that Rios will be prejudiced if plaintiffs' motion for a voluntary discontinuance is granted, because plaintiffs "will continue to use and claim the disputed property as their own, and Rios will be compelled to commence a new action for declaratory and injunctive relief," is insufficient to establish prejudice. Furthermore, having granted plaintiffs' application to discontinue their action, third-party defendants' motion for an order dismissing the third-party complaint is denied, as moot.

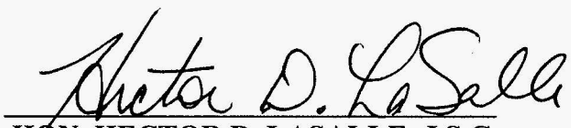
As to Rios's motion for an order holding plaintiffs in contempt, to prevail on a motion to punish for civil contempt, the movant must demonstrate that the alleged contemnor disobeyed "a lawful judicial order expressing an unequivocal mandate" (***McCain v Dinkins***, 84 NY2d 216, 226, 616 NYS2d 335 [1994]), that the alleged contemnor had knowledge of such order, and that the offending conduct defeated, impaired, impeded or prejudiced a right of another party to the litigation (*see* Judiciary Law §753; ***Rose v Levine***, 84 AD3d 1206, 923 NYS2d 689 [2d Dept 2011]; ***Manning v Manning***, 82 AD3d 1057, 920 NYS2d 126 [2d Dept 2011]; ***Kalish v Lindsay***, 47 AD3d 889, 850 NYS2d 599 [2d Dept 2008]; ***Giano v Ioannou***, 41 AD3d

427, 835 NYS2d 915 [2d Dept 2007]; *see also* ***Matter of McCormick v Axelrod***, 59 NY2d 574, 466 NYS2d 279 [1983]; ***Goldsmith v Goldsmith***, 261 AD2d 576, 690 NYS2d 696 [2d Dept 1999]). "Any penalty imposed for contempt is designed not to punish, but to compensate the injured private party or to coerce compliance with the court's mandate or both (***Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.***, 70 NY2d 233, 239, 519 NYS2d 539 [1987]; *see* ***Town Bd. of Town of Southampton v R.K.B. Realty, LLC***, 91 AD3d 628, 936 NYS2d 228 [2d Dept 2012]). It is not necessary that the disobedience is deliberate, as the mere act of disobeying is sufficient, but such disobedience must have harmed the rights of the party seeking an order punishing for contempt (*see* ***Casavecchia v Mizrahi***, 57 AD3d 702, 869 NYS2d 604 [2d Dept], *lv dismissed in part, denied in part* 12 NY3d 896, 884 NYS2d 678 [2008]; ***Great Neck Pennysaver v Central Nassau Publs.***, 65 AD2d 616, 409 NYS2d 544 [2d Dept 1978]). The burden of proof is on the party seeking a contempt order, and the contempt must be established by clear and convincing evidence (*see* ***Penavic v Penavic***, 109 AD3d 648, 972 NYS2d 269 [2d Dept 2013]; ***Gomes v Gomes***, 106 AD3d 868, 965 NYS2d 187 [2d Dept 2013]; ***Chambers v Old Stone Hill Rd. Assoc.***, 66 AD3d 944, 889 NYS2d 598 [2d Dept 2009], *appeal dismissed* 14 NY3d 747, 898 NYS2d 80 [2010]).

Absent permission to be represented by different attorneys, the motion on Rios's behalf filed by Grasing & Associates seeking to punish plaintiffs for violating the temporary restraining order is improper (*see* ***Dobbins v Erie County***, 58 AD2d 733, 395 NYS2d 865). It is noted that affirmations submitted in support of the motion to punish for contempt state Grasing & Associates' authority was limited to making an application for injunctive relief. Rios failed to show or even allege that plaintiff John Winnegar's alleged acts of walking on the disputed property and having a serviceman perform work on the sprinkler lines running under such property "defeated, impaired, impeded or prejudiced her rights" (*see* ***Giano v Ioannou***, 41 AD3d 427, 835 NYS2d 915; *cf.* ***Suissa v Baron***, 107 AD3d 690, 966 NYS2d 481 [2d Dept 2013]; ***Levy v Morgan***, 92 AD3d 1118, 938 NYS2d 659 [3d Dept 2012]; ***Hamilton v Murphy***, 79 AD3d 1210, 913 NYS2d 372 [3d Dept 2010], *lv dismissed* 16 NY3d 794, 919 NYS2d 508, *rearg denied* 16 NY3d 885, 923 NYS2d 412 [2011]). Rios also failed to submit evidence showing the alleged violation of the temporary restraining order caused injury or compensable damage to her property interest (*see* ***Chambers v Old Stone Hill Rd. Assoc.***, 66 AD3d 944, 889 NYS2d 598; ***Matter of Thorsen v Nassau County Civil Serv. Comm.***, 32 AD3d 1037, 821 NYS2d 273 [2d Dept 2006]; ***Matter of Augat v Hart***, 244 AD2d 800, 665 NYS2d 970 [3d Dept 1997]). Accordingly, Rios's motion for an order punishing plaintiffs for civil contempt is denied.

The foregoing constitutes the Order of this Court.

Dated: November 15, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION