

**Alva v Gaines, Gruner, Ponzini & Novick, LLP**

2013 NY Slip Op 33758(U)

November 25, 2013

Supreme Court, Westchester County

Docket Number: 58524/2011

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
GERALYN ALVA and JAMES ALVA,

Plaintiff

**DECISION and ORDER**  
**Index No. 58542/2011**  
**Motion Date: Nov. 25, 2013**  
**Seq. No. 6**

-against-

GAINES, GRUNER, PONZINI & NOVICK, LLP and  
TED ALAN NOVICK,

Defendant

-----X  
GAINES, GRUNER, PONZINI & NOVICK, LLP and  
TED ALAN NOVICK,

Third-Party Plaintiffs

-against-

ROBERT B. MARCUS, P.C. and ROBERT B. MARCUS<sup>1</sup>,

Third-Party Defendants

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order vacating the note of issue and compelling plaintiffs to supplement their responses to defendants' notices of discovery dated February 10, 2012, and January 29, 2013, and to provide a full and complete response to defendants' notice of discovery dated July 11, 2013, and to appear for further limited depositions pertaining to the sale of their premises and their construction

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<sup>1</sup>The third-party complaint was dismissed by order of this court (Giacomo, J.), dated October 2, 2012.

loan/mortgage, together with such other and further relief as this court deems just and proper.

Order to Show Cause dated October 21, 2013  
Affirmation in Support  
Exhibits A- P  
Memo of Law in Support  
Affirmation in Opposition

Upon the foregoing papers and upon oral argument heard on November 25, 2013, this motion is determined as follows:

In 2005, plaintiffs hired John Atzl and Atzl, Scatassa & Zigler, Land Surveyors, PC (hereinafter to be referred to as Atzl), to prepare a property survey for a proposed home's foundation stake-out and location and an "as built certificate of occupancy" for a home they were building. Thereafter plaintiffs hired an excavator to dig the foundation for the house pursuant to Atzl's measurements. Problems arose which plaintiffs claimed were due to Atzl's negligence. In April, 2006, plaintiffs refused to pay Atzl. Atzl returned to the property and conducted a new survey which included a topographical survey of the area behind the home, contour base map and grading plan.

In their complaint dated November 11, 2011, plaintiffs allege that in or about March, 2008, they retained defendants to represent them in connection with property damage they sustained to their real property due to the alleged professional negligence of Atzl. Plaintiffs further allege that defendants did not commence an action but rather, in or about February, 2009, defendants referred their case to another law firm. Plaintiffs also allege that the Supreme Court, Rockland County, dismissed the majority of their claims in the underlying action based on expiration of the statute of limitations on the claims (relating to the 2005 survey). Plaintiffs settled the surviving claims (relating to the 2006 survey) for about \$ 4,000. Plaintiffs claim that had defendants diligently and skillfully prosecuted the underlying action, they would have been successful in the action and they would have recovered a judgment.

In their notice for discovery and inspection dated February 10, 2012, defendants sought, among other items: item # 10 -documents and communications pertaining to the premises including, but not limited to, deeds, plans, specifications, drawings and certificates of occupancy; item # 20- documents and communications pertaining to loans and/or mortgages pertaining to the premises, including but not limited to loan agreements, mortgage agreements, mortgage notes, correspondence, account statements and cancelled checks pertaining to payments on any loans and/or mortgages; item # 30- documents and communications constituting, concerning or relating to appraisals of the premises and/or structures and/or improvements thereon; and, item # 31-documents and communications constituting, concerning or relating to contracts of sale of the premises and/or any structures and/or improvements thereon.

The mortgage lender commenced a foreclosure proceeding against plaintiffs in the

Rockland County Supreme Court. By order dated November 8, 2012, the court in Rockland County granted the lender's motion for summary judgment to foreclose the mortgage on the subject property and referred the matter to a referee to compute the amount due to the mortgage lender. Defendants note that a judgment of foreclosure has not been entered.

In their notice for discovery and inspection dated January 29, 2013, defendants sought, among other items: item # 1- documents and communications constituting, concerning or relating to appraisals of the subject premises; item # 2- documents and communications constituting, concerning or relating to real estate listings of the subject premises; item # 3- documents and communications exchanged with Better Homes and Gardens and/or Lauren Miller concerning the listing of plaintiffs' home for sale; and, item # 4- documents and communications exchanged with Joe Yedowitz and Taylor Homes pertaining to the premises.

A note of issue in this matter was filed on or about April 19, 2013. Both parties moved for summary judgment. Plaintiffs moved for partial summary judgment on liability and defendants moved for summary judgment dismissing the complaint. Plaintiffs cross-moved for an order granting them leave to amend their complaint. Defendants allege that almost two months after the note of issue was filed they discovered that plaintiffs' premises was under contract of sale.

In their notice for discovery and inspection dated July 11, 2013, defendants sought: item # 1- communications with all real estate brokers and/or agents concerning the sale and/or prospective sale of the subject premises; item # 2- communications with actual and/or potential purchasers of the subject premises; item # 3- documents and communications constituting, concerning or relating to proposed, draft and/or executed contracts of sale of the subject premises; item # 4- documents and communications constituting, concerning or relating to judgments of foreclosure of the subject premises; item # 5- documents and communications relating to real estate listings for the subject premises; item # 6- documents and communications constituting, concerning or relating to notices of sale of the subject premises; item # 7- communications exchanged with the mortgagee of the premises and/or its counsel concerning sale of the premises and/or computation of damages allegedly owed to the mortgagee; and, item # 8- communications exchanged with the referee appointed by order of the Supreme Court, Rockland County dated November 8, 2012, concerning sale of the premises and/or computation of damages allegedly owed to the mortgagee.

By letter dated July 26, 2013, defendants requested further depositions of plaintiffs due to the changed circumstance; that is, that the subject premises was under contract of sale. According to defendants, plaintiffs did not respond to this request.

Defendants state that in August, 2013, they discovered that the subject premises had been conveyed to a third party on or about July 24, 2013 for \$ 481,000. By e-mail dated August 21, 2013, defendants again requested dates to take the further depositions of plaintiffs and they inquired as to when the documents they requested on July 11, 2013, would be sent.

After defendants requested a pre-motion conference, plaintiffs indicated, by e-mail dated August 27, 2013, that they would be willing to agree to a continued deposition after decision on the summary judgment motions. A conference was held on September 3, 2013. The court directed the parties to attempt to resolve their discovery dispute and scheduled another conference. The parties were unable to resolve this discovery dispute and at the conference on September 18, 2013, the court issued a briefing schedule for the instant motion.

Defendants presently are moving for an order vacating the note of issue and compelling further discovery from plaintiffs including responses to its notices of discovery and inspection and further depositions relating to the sale of the subject premises and their construction loan/mortgage. Defendants contend that the facts leading to the need for further discovery were not and could not have been discovered prior to the filing of the note of issue. Defendants further contend that the requested discovery relating to the sale of the premises and the resulting partial or full satisfaction of plaintiffs' mortgage obligations is critical to their defense of plaintiffs' claim that they have been damaged with respect to the alleged mortgage foreclosure of the premises and the reduction in the premises' value. Defendants note that if the note of issue is not vacated, they will be prejudiced as further time elapses towards a trial date in this matter without the opportunity to obtain necessary discovery.

This motion is opposed by plaintiffs. Plaintiffs contend that defendants failed to move to strike the note of issue within 20 days of its filing and therefore the court should deny the motion to vacate the note of issue. Plaintiffs further contend that, however, leaving the note of issue in place does not prevent defendants from obtaining discovery because plaintiffs do not contest that their post note of issue sales contract constitutes an unusual or unanticipated circumstance. However, plaintiffs claim that defendants' discovery demands are overbroad. Plaintiffs note that defendants state that the requested discovery is critical to their defense of plaintiffs' claim that they have been damaged with respect to the alleged mortgage foreclosure of the premises and reduction in the premises' value. Plaintiffs state that the only documents relevant to this demand are those arising from the actual sale of the premises. Plaintiffs ask that this court limit defendants' request. Additionally, plaintiffs request that the court not require plaintiffs to comply with defendants' discovery demands until after a decision on the respective summary judgment motions is issued. Plaintiffs note that should this court grant defendants' summary judgment motion, the case will be dismissed and any continued depositions would have needlessly caused plaintiffs to submit to further depositions.

The court notes that plaintiffs' notice of motion dated June 26, 2013, seeks partial summary judgment on the issue of defendants' negligence. It was fully submitted to the court on September 24, 2013. Defendants' notice of motion dated July 2, 2013, seeks summary judgment dismissing the complaint. Defendants argue that plaintiffs' alleged damages purportedly arise from a grading plan Atzl completed in 2001. Defendants further argue that plaintiffs contacted defendant in 2008, almost seven years after Atzl completed the grading plan, after the statute of limitations on any potential viable cause of action had expired. Defendants argue that because no viable cause of action existed when plaintiffs consulted them, they could not have caused any

damages to plaintiffs. This motion was fully submitted on October 9, 2013. The court notes that the discovery now requested by defendants relates to the issue of damages in this matter. Both pending motions for summary judgment relate to liability.

The note of issue states that discovery proceedings now known to be necessary were completed. Once the note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery and vacating the note of issue are governed by Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d)-(e). Pursuant to § 202.21(d), “[w]here unusual or unanticipated circumstances develop subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings.” Section 202.21 (e) provides that if more than 20 days has elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue.

Here, the sale of the subject premises, which occurred after plaintiffs filed the note of issue, constitutes unanticipated circumstances which requires additional discovery and the vacatur of the note of issue. The court notes that although defendants are in possession of an unofficial copy of the relevant Bargain and Sale Deed dated July 24, 2013, as well as unofficial copies of some of the recording documents from the Rockland County Clerk relating to the sale of the subject premises, it is unclear on this record how the sale occurred, what has occurred in the underlying foreclosure action and how and if the sale resulted in partial or full satisfaction of plaintiffs’ mortgage obligations. Accordingly, it is,

ORDERED that the branch of defendants’ motion seeking a vacatur of the note of issue is granted and the matter is stricken from the trial calendar; and it is further,

ORDERED that the branch of defendants’ motion seeking further discovery is granted to the extent that plaintiffs are directed to provide to defendants, on or before December 20, 2013, the following:

- (1) documents and communications constituting, concerning or relating to appraisals of the subject premises;
- (2) documents and communications constituting, concerning or relating to judgments of foreclosure of the subject premises;
- (3) communications exchanged with the mortgagee of the premises concerning sale of the premises and/or computation of damages allegedly owed to the mortgagee; and,
- (4) documents and communications exchanged with the referee appointed by order of the Supreme Court, Rockland County dated November 8, 2012, concerning sale of the premises and/or computation of damages allegedly owed to the mortgagee; or,

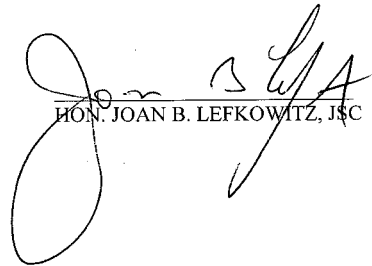
(5) their affidavit explaining, as to each item herein above listed that they cannot provide, the reasons why and/or that it does not exist; and it is further,

ORDERED that plaintiffs are directed to appear, on or before December 20, 2013, at a time and place to be mutually agreed to by the parties, for further depositions limited to questions solely relating to the sale of the subject premises and the status of their mortgage obligations and the pending foreclosure action as they relate to the subject premises; and it is further,

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on January 7, 2014; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon plaintiffs with notice of entry within 10 days of entry.

Dated: White Plains, New York  
November 25, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

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**CC: Chambers of Hon. William J. Giacomo, J.S.C.**