

Hersh v Beda
2022 NY Slip Op 31513(U)
May 10, 2022
Supreme Court, New York County
Docket Number: Index No. 160061/2020
Judge: Debra James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

MARK HERSH,

Plaintiff,

- v -

ROBERT BEDA, SHIRLEY REINFELD A.K.A. SHIRLEY
PODOLSKY, SHARON OLSON A.K.A. SHARON
PODOLSKY and JAY PODOLSKY,

Defendants.

-----X

INDEX NO. 160061/2020

MOTION DATE 12/11/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

ORDERED that the motion brought by plaintiff Mark Hersh for summary judgment, consolidation, a preliminary injunction, and an order directing nonparty Hotel 237, LLC to pay unpaid rent and/or use and occupancy to nonparty G.M. Canmar Residence Corp. is denied; and it further

ORDERED that any temporary injunctive relief issued on September 13, 2021 (NYSCEF Doc No. 49) is hereby vacated; and it is further

ORDERED that the cross motion brought by defendants Robert Beda, Shirley Reinfeld a.k.a Shirley Podolsky, Sharon Olson a.k.a. Sharon Podolksy and Jay Podolsky for summary judgment and for the imposition of monetary sanctions against plaintiff Mark

Hersh, his attorneys and nonparty H.E.L.P. Social Service Corp. is granted to the extent of granting summary judgment dismissing the complaint as against defendant Jay Podolsky only and the complaint is dismissed as against defendant Jay Podolsky, and the balance of the motion is otherwise denied; and it is further

ORDERED that such claims against defendant Jay Podolsky are severed and the balance of the action shall continue against the remaining defendants; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Jay Podolsky dismissing the claims made against him in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the caption be amended to reflect the dismissal of the complaint as against defendant Jay Podolsky and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the amended caption is as follows:

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

-----x
MARK HERSH,

Index
No. 160061/2020

Plaintiff,

- against -

ROBERT BEDA, SHIRLEY REINFELD A.K.A.
SHIRLEY PODOLSKY and SHARON OLSON
A.K.A. SHARON PODOLSKY,

Defendants.
-----x

; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that counsel are directed to transmit to SF-Par59@nycourts.gov and to SFC-Par59-Clerk@nycourts.gov and to post on NYSCEF a proposed preliminary conference order or

competing proposed preliminary conference orders at least two days before August 18, 2022, 11 AM, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

Plaintiff Michael Hersh moves by order to show cause for an order: (1) granting summary judgment in his favor pursuant to CPLR 3211 (c); (2) consolidating this action with an action captioned Hotel 237, LLC v G.M. Canmar Residence Corp., Sup Ct, NY County, index No. 657772/2019 (the Hotel/GM Action) for joint trial under CPLR 602 (a); (3) directing nonparty Hotel 237, LLC (Hotel) to pay unpaid rent and/or use and occupancy to nonparty G.M. Canmar Residence Corp. (GM); (4) directing Hotel to pay ongoing use and occupancy to GM; and (5) granting plaintiff a preliminary injunction enjoining defendants Robert Beda (Beda), Shirley Reinfeld a.k.a Shirley Podolsky (Reinfeld), Sharon Olson a.k.a. Sharon Podolksy (Olson) and Jay Podolsky (Podolsky) (collectively, defendants) or their agents, employees and servants from interfering with or terminating the tenancy, subtenancy or occupancy rights of nonparty H.E.L.P. Social Service Corp. (HELP) related to the building located at 237 West 107th Street, New York, New York (the Building) during the pendency of this action.

Defendants oppose the motion and cross move for an order:
(1) granting defendants sanctions against plaintiff, his counsel and HELP under 22 NYCRR 130-1.1, and (2) granting defendants summary judgment pursuant to CPLR 3211 (a) and 3212 (b).

BACKGROUND

Plaintiff was the sole owner and member of non-party 237 Hotel, LLC (Hotel), a domestic limited liability company (NY St Cts Elec Filing [NYSCEF] Doc No. 33, Steven Kirkpatrick [Kirkpatrick] affirmation, Ex D, ¶ 3; NYSCEF Doc No. 58, defendants' counterstatement of material facts, ¶ 1). A deed recorded in the Office of the City Register on July 7, 2005 identifies non-party G.M. Canmar Residence Corp (GM) as the Building's owner (NYSCEF Doc No. 41, plaintiff aff, Ex E).

Pursuant to a lease dated January 1, 2010 between Hotel, as tenant, and GM, as owner, Hotel leased the Building for a five-year term ending December 31, 2014, with an option to renew for an additional five-year term ending December 31, 2019 (NYSCEF Doc No. 33, ¶ 5; NYSCEF Doc No. 42, plaintiff aff, Ex F at 1). Plaintiff executed the lease on behalf of GM as its president and a duly authorized shareholder (*id.* at 28).

On January 1, 2010, plaintiff, as assignor, and Beda, Reinfeld and Olson, as assignees (collectively, the Assignees), executed an Assignment and Assumption of Interest agreement (the Assignment) whereby plaintiff sold and assigned his interest in

Hotel to the Assignees for \$670,000, to be paid simultaneously with the execution of the Assignment (NYSCEF Doc No. 37, plaintiff aff, Ex A at 1). The Assignment reads, in pertinent part:

"Assignees represent that this Assignment will be null and void and the interest in the Company revert back to Assignor in the event Assignees fail to pay Assignor Six Hundred Thousand (\$600,000.00) dollars on or before December 1, 2014 after which there shall be no sums due and owing. Notwithstanding the above, in the event Assignees fail to tender said sum on or before December 1, 2014, Assignor shall notify Assignees in writing by certified mail, return receipt requested that Assignees have [not] paid said sum. Upon receipt of said notification, Assignees shall have an additional 30 days to pay said sum and retain the membership interest in the Company"

(*id.*).

It is undisputed the first payment of \$670,000 was made (NYSCEF Doc No. 58, ¶ 5), but the second payment of \$600,000 (the Second Payment) was not (NYSCEF Doc No. 28, plaintiff's statement of material facts, ¶ 8).

Plaintiff commenced this action on November 20, 2020 (NYSCEF Doc No. 31, Kirkpatrick affirmation, Ex B). The amended complaint asserts four causes of action for: (1) a judgment declaring that plaintiff holds 100% of the membership interests in Hotel, and that defendants do not hold any membership interests in Hotel; (2) a permanent injunction compelling defendants and/or their successors to execute documents required

to take other actions necessary to effectuate the reversion and transfer of their interests in Hotel to plaintiff; (3) conversion for defendants' wrongful receipt of rents and other sums paid to Hotel; and (4) a money judgment for \$600,000 in the event the Assignees are determined to hold membership interests in Hotel. In the amended complaint, plaintiff alleges that the Assignees transferred a portion of their interest in Hotel to Podolsky (NYSCEF Doc No. 33, ¶ 8).

In their amended answer, defendants interposed a single counterclaim for a judgment declaring that plaintiff has no interest in Hotel, the Assignees are the sole holders of the interests in Hotel, and defendants owe no monies to plaintiff (NYSCEF Doc No. 34, Kirkpatrick, Ex E). Defendants also raised the statute of limitations as a tenth affirmative defense.

Meanwhile, plaintiff's counsel served defendants with a 30-day notice dated May 12, 2021 (the Notice) demanding that the Second Payment be made by June 30, 2021 or else the Assignment would be deemed null and void (NYSCEF Doc No. 36, ¶ 17; NYSCEF Doc No. 39, plaintiff aff, Ex C). These motions now follow.

DISCUSSION

A. Summary Judgment

Plaintiff alleges he is entitled to a judgment declaring the Assignment null and void with 100% of the interests in Hotel

reverting to him.¹ Plaintiff avers he was never paid the Second Payment nor have defendants responded to the Notice (NYSCEF Doc No. 36, ¶¶ 13 and 17).

In response, defendants posit that triable issues of fact preclude granting plaintiff's motion. First, defendants contend that Podolsky is not a proper party to the action and urge the court to grant their cross motion dismissing the complaint as against him. Podolsky avers he is not a signatory to the Assignment and denies owning any interest in Hotel (NYSCEF Doc No. 53, Podolsky aff, ¶¶ 3 and 10). Second, defendants argue plaintiff waived his right to receive the Second Payment. Reinfeld avers the Assignees tendered the Second Payment to plaintiff in fall 2014, but he declined to accept it because he wished to "avoid having his family receive said money" (NYSCEF Doc No. 52, Reinfeld aff, ¶ 13). Defendants also allege plaintiff served the Notice six months after he commenced the action and more than six years after the Second Payment was due. As such, they contend the action is time-barred and should be dismissed because the alleged breach occurred on December 1, 2014, when the Second Payment was due. Last, defendants argue plaintiff's motion is premature because of his misstatements that must be explored in discovery.

¹The court presumes plaintiff seeks summary judgment on only the first cause of action.

In reply, plaintiff rejects Podolsky's assertion that he is not a proper party, but counters that Podolsky indeed has an interest in Hotel as he acted on behalf of the Assignees. Plaintiff tenders a statement Podolsky signed on behalf of Assignees dated January 28, 2010 in which he states that the Assignment is not valid until it is countersigned and delivered to plaintiff (NYSCEF Doc No. 60, plaintiff reply aff, Ex H). Plaintiff also argues that his motion is not premature due to lack of discovery, as plaintiff affirms that while he appeared at the date, time and location noticed in defendants' notice of deposition, no one was there to depose him (NYSCEF Doc No. 59, plaintiff reply aff, ¶¶ 14 and 16).

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).² The "facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-

²Plaintiff's order to show cause refers to CPLR 3211 (c). The court presumes plaintiff meant to refer to CPLR 3212, as his moving papers all refer to summary judgment as opposed to dismissal.

moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (Alvarez, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

Preliminarily, plaintiff admits Podolsky is not a signatory to the Assignment (NYSCEF Doc No. 33, ¶ 5). Such a statement in a verified complaint constitutes a formal judicial admission (P. Zaccaro, Co., Inc. v DHA Capital, LLC, 157 AD3d 602, 603 [1st Dept 2018], *lv denied* 31 NY3d 907 [2018]). Therefore, Podolsky could not have received an interest in Hotel by way of the Assignment.

Further, plaintiff has failed to rebut Podolsky's averment that he owns no interest in Hotel with any admissible evidence. The complaint alleges "upon information and belief" that Podolsky owns an interest in Hotel (NYSCEF Doc No. 33, ¶ 8), but "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The contention that Podolsky is a proper party because he acted on behalf of the Assignees is similarly unpersuasive as plaintiff has failed to offer any caselaw to support this proposition. The document on which he relies shows only that Podolsky signed on behalf of the Assignees, not that he intended

to be personally bound (see Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1, 4 [1964]). Accordingly, plaintiff's motion insofar as it seeks summary judgment against Podolsky is denied, and defendants' cross motion for summary judgment dismissing the complaint as against Podolsky is granted.

Turning to plaintiff's motion against the Assignees, defendants have raised a triable issue of fact that precludes granting plaintiff summary judgment. "A waiver, by definition, is the intentional relinquishment of a known right, it must be clear, unequivocal and deliberate" (Benedetto v Hyatt Corp., __ AD3d __, 2022 NY Slip Op 01732, *1 [1st Dept 2022] [citation omitted]). A waiver may be implied where a "party is misled to his or her prejudice into the belief that a waiver was intended" (Jin Ming Chen v Insurance Co. of the State of Pa., 165 AD3d 588, 589 [1st Dept 2018], *affd* 36 NY3d 133 [2020] [internal quotation marks and citation omitted]). Here, the parties present conflicting evidence on whether plaintiff waived receipt of the Second Payment, particularly since plaintiff waited nearly six and one-half years after the date it was due before he served the Notice. Additionally, it does not appear that a prior demand for payment was ever made. Accordingly, plaintiff's motion for summary judgment in his favor is denied.

On their cross motion for summary judgment, defendants argue the action is untimely. It is well settled that the court

must look to the gravamen of the claim to determine the statute of limitations for a declaratory judgment cause of action (Gress v Brown, 20 NY3d 957, 959 [2012]). Generally, CPLR 213 (1) provides for a six-year limitations period for actions not otherwise covered under a time limitation specifically prescribed by law. Here, plaintiff alleges defendants failed to make the Second Payment by December 1, 2014. The conduct underlying the claim sounds in contract, and a cause of action for breach of contract is subject to a six-year statute of limitations that begins to run at the time of the breach (CPLR 213 [2]; Hahn v Automotive Warehouse, Inc. v American Zurich Ins. Co., 18 NY3d 765, 770 [2012]). Defendants maintain that service of a 30-day notice constitutes a condition precedent to suit, and plaintiff waited until May 2021 to serve the requisite Notice. They submit the action is time-barred because plaintiff failed to satisfy this condition precedent. Defendants, though, have not established that service of a 30-day notice is a condition precedent.

"[A] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises'" (MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 [2009] [citation omitted]; see also U.S. Bank N.A. v DLJ Mtge. Capital, Inc., 33 NY3d 72, 80 [2019] [explaining the

difference between a substantive condition precedent, which requires the occurrence of an act or event before a party is obligated to perform, from a procedural condition precedent, which affects the ability to maintain an action]). A condition precedent must be "expressed in unmistakable language"

(Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 691 [1995] [internal quotation marks and citation omitted]).

"The use of terms such as 'if,' 'unless' and 'until' constitutes 'unmistakable language of condition'" (MHR Capital Partners LP, 12 NY3d at 645 [citation omitted]). The phrases "in the event" and "notwithstanding" precede the Assignment discussing service of the 30-day notice. Use of such latter terms, though, does not imply that plaintiff must serve the notice upon the Assignees before they tender their performance (see 37 E. 50th St. Corp. v Restaurant Group Mgt. Servs., L.L.C., 156 AD3d 569, 570 [1st Dept 2017] ["We do not find the phrase 'upon thirty . . . days notice to [defendant] of default, which default remains uncured, and which [defendant] does not commence diligent effort to cure' to be a condition precedent"]). Critically, the Assignment does not condition the commencement of a lawsuit upon service of a prior notice and opportunity to cure (see I.J. Litwak & Co. v General Signal Corp. O-Z Gedney Div., 293 AD2d 713, 713 [2d Dept 2002], *lv denied* 98 NY2d 613 [2002] [granting summary judgment dismissing a complaint where the plaintiff

failed to satisfy the lease provision that required service of a written notice of default and time to cure as a condition precedent before it could sue for damages]). Furthermore, plaintiff commenced the instant declaratory judgment cause of action within six years of the date the Second Payment was due. Accordingly, defendants' cross motion for summary judgment dismissing the complaint is denied.

B. Consolidation

Plaintiff moves to consolidate this action with the Hotel/GM Action for joint trial. Defendants argue the two actions involve different parties and facts and are at different procedural stages.

CPLR 602 governs consolidation of actions and provides, in relevant part:

"(a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Consolidation is meant to "reduce the cost of litigation, make more economical use of the trial court's time, and speed the disposition of cases" (Matter of New York City Asbestos Litig., 121 AD3d 230, 241 [1st Dept 2014] [internal quotation marks and citation omitted]). It is within the court's

discretion to order consolidation (Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 73 [1st Dept 2002]).

Here, plaintiff fails to proffer the pleadings from the Hotel/GM Action, identify any common questions of law or fact between the two actions, or provide any case law in support of this branch of the motion. Thus, plaintiff has not sustained his burden of demonstrating that consolidation is appropriate. Even assuming plaintiff had offered the pleadings in the Hotel/GM Action, the two actions do not arise out of the same nucleus of facts (see Kukielka v Santana, 191 AD3d 532, 533 [1st Dept 2021] [denying consolidation where the actions did not involve common questions of law and fact]). The Hotel/GM Action involves different parties than the parties herein. The complaint in the Hotel/GM Action, of which the court may take judicial notice (see Bennett v Gordon, 99 AD3d 539 [1st Dept 2012]), pleads a single cause of action for a judgment declaring that Hotel properly extended its lease with GM through December 31, 2019 and again through December 31, 2029, and that Hotel is entitled to remain in possession of the Building (NYSCEF Doc No. 28, complaint, in the Hotel/GM Action). The issues in the action at bar relate to whether the Assignment is null and void. The essential facts underlying both actions do not overlap and involve different documentary evidence and legal issues.

Accordingly, plaintiff's motion seeking consolidation for joint trial is denied.

C. Use and Occupancy

Plaintiff seeks an order directing Hotel to pay unpaid rent and/or use and occupancy and ongoing use and occupancy to GM. Defendants contend Hotel is not a party to this action.

Ordinarily, a tenant occupying a space where no agreement on the amount of rent exists or where an existing lease has been terminated shall pay the owner use and occupancy, or the "reasonable value of the space in question" (7 Warren's Weed, New York Real Property § 82.02 [2022] [Note: online treatise]). Hotel, though, is not a party to this action, nor has it been served with the motion. Indeed, the order to show cause provides for service upon defendants, only, not Hotel (NYSCEF Doc No. 49). As plaintiff has not demonstrated that this court has jurisdiction over Hotel in this action, plaintiff's motion for an order directing Hotel to pay GM rent and/or use and occupancy is denied.

D. Injunctive Relief

Plaintiff moves for a preliminary injunction restraining defendants and their agents from interfering with HELP's tenancy, subtenancy or occupancy rights at the Building during the pendency of this action. Plaintiff avers that HELP has expressed its wish to extend its tenancy at the Premises beyond

the expiration of its current lease by letter to counsel for GM dated December 31, 2019 (NYSCEF Doc No. 36, ¶ 24; NYSCEF Doc No. 40, plaintiff aff, Ex D). Luis J. Cordero (Cordero), the associate vice president for HELP USA, Inc., an affiliate of HELP, avers that HELP is a tenant at the building under a lease agreement with non-party Veterans Hospitality, LLC (Veterans), in effect from January 1, 2014 through December 31, 2021 “unless sooner terminated” (NYSCEF Doc No. 44, Cordero aff, ¶¶ 1 and 4; NYSCEF Doc No. 45, Cordero aff, Ex A at 1). HELP operates an emergency homeless shelter at the Premises pursuant to a contract with nonparty City of New York Department of Homeless Services (DHS) (NYSCEF Doc No. 44, ¶ 7). Cordero submits that HELP is current on its rental payments through August 31, 2021 and can meet its payment obligations through June 30, 2022 (*id.*, ¶ 9). Cordero submits that 125 adults would be displaced if the shelter were to move from the Premises (*id.*, ¶ 10). In a supplemental affidavit, Cordero corrects a misstatement on his prior affidavit and states that HELP is current on its rent only through May 31, 2021 (NYSCEF Doc No. 48, Cordero supplemental aff, ¶¶ 2-3).

Defendants oppose and argue that neither plaintiff nor defendants are HELP’s landlord. As such, there is no contractual privity or a landlord-tenant relationship between HELP and any of the parties to this action. Moreover, Veterans

terminated HELP's lease on August 7, 2020 (NYSCEF Doc No. 55, Alex M. Estis affirmation, Ex A).

CPLR 6301 provides that the court may grant a preliminary injunction "in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action." "A party seeking a preliminary injunction must demonstrate by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (Gilliland v Acquafredda Enters., LLC, 92 AD3d 19, 24 [1st Dept 2011], citing CPLR 6301 and Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]). The moving party bears the burden of satisfying each element of this three-part test to be entitled to a preliminary injunction (Doe v Axelrod, 73 NY2d 748, 750 [1988]).

As applied here, plaintiff fails to demonstrate a likelihood of success with clear and convincing evidence (see Uber Tech., Inc. v American Arbitration Assn., Inc., __AD3d__, 2022 NY Slip Op 02503, *2 [1st Dept 2022] [denying the plaintiff's motion for a preliminary injunction because it failed to establish a likelihood of success on its claims]). To begin, the motion fails to specify what actions defendants have

undertaken or threatened to undertake to interfere with or terminate HELP's lease. As defendants correctly point out, none of them are HELP's landlord. Hotel, likewise, is not HELP's landlord. In addition, plaintiff does not dispute defendants' proof that Veterans terminated HELP's lease in August 2020, three months before he commenced the present action. As a preliminary injunction is meant to maintain the status quo while an action is pending (Uniformed Firefighters Assn. of Greater N.Y. v City of New York, 79 NY2d 236, 239 [1992]), granting an injunction would be of no use because the lease has been terminated. More importantly, a preliminary injunction should relate to an alleged threat to "plaintiff's rights respecting the subject of the action" (CPLR 6301). Plaintiff has not demonstrated how HELP's occupancy at the Building relates to his rights under the Assignment.

E. Sanctions

Defendants also cross-move for sanctions against plaintiff, his counsel, and HELP for their frivolous conduct.

Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (a) provides that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct

as defined in this Part.” Conduct is considered frivolous if it is “completely without merit in law,” “is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another” or “asserts material factual statements that are false” (22 NYCRR 130-1.1 [c]). To determine whether conduct is frivolous, the court must look at “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 or factual basis was apparent, or should have been apparent, was brought to the attention of counsel or the party” (*id.*). It is within the court’s discretion to award sanctions (see Levy v Carol Mgt. Corp., 260 AD2d 27, 33 [1st Dept 1999]).

The court declines to award sanctions at this time as the conduct complained of is not such that it is frivolous within the meaning of 22 NYCRR 130-1.1 (c) (see Schuette v Brookford LLC, 200 AD3d 479, 480 [1st Dept 2021]).

Debra A. James

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<u>5/10/2022</u> DATE					<u>DEBRA JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE