

<b>Private Capital Group LLC v Connor</b>
2022 NY Slip Op 31746(U)
May 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 2531/2009E
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

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X**PRIVATE CAPITAL GROUP LLC,****Plaintiff,****-against-****DECISION/ORDER****Index No. 2531/2009E****PEARL CONNOR, ADRIAN CUTTING, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD, et al,****Defendants.**

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***Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' oral motion for sanctions pursuant to Uniform Rule 130-1.1.***

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This foreclosure action was sent to the undersigned for a bench trial in January of 2022. Both sides are represented by counsel. A pre-trial conference was held virtually on January 18, 2022. The trial was scheduled for March 2, 2022. Both sides agreed the trial would be held virtually. It was adjourned to March 24, 2022, at plaintiff's request. Prior to that date, but less than 24 hours before the trial, both sides e-mailed the court numerous documents which they stated they intended to admit into evidence. The property is located at 919 Dumont Avenue, Brooklyn, NY, Block 4062, Lot 50.

Defendant and mortgagor Pearl Connor is alleged to have closed and taken title to the property in 2002. She is claimed to have executed the mortgage at issue in this action at the same time, March 8, 2002, but neither the deed nor the mortgage were recorded until 2006, when a court order directed the NYC Register to permit photocopies to be recorded. The index number for that action, *Morequity Inc. v Connor*, is 18248/2004. The court order was recorded on April 28, 2006, along with the documents.

On March 24, 2022, counsel for the parties appeared, virtually, and the court asked if the attorneys wished to make opening statements. Defendants' attorney then made an oral motion to dismiss the complaint, pursuant to RPAPL §1301(3), as described in her Pre-Trial Memo of Law, e-filed as Document 3, and for sanctions and attorneys' fees. She stated that a judgment had been entered in 2007 for the same mortgage, before this action was commenced. The plaintiff's counsel stated that he could not provide any basis to oppose the motion. The motion was granted, and an order of dismissal was issued [Doc 54]. The court neglected to vacate the notice of pendency, which was recently extended [Doc 4], which is rectified herein.

The court referred to the court's computer to confirm the facts in defendants' memo, and also reviewed the documents e-filed by the attorneys on March 23, 2022. Specifically, a Judgment of Foreclosure and Sale was issued [on defendant's default] in 2007 under Index number 15741/2006 for the same mortgage, with the same plaintiff and the same borrower, Pearl Connor, as defendant. Then, an auction was conducted on March 6, 2008, by a court appointed-referee, and the plaintiff was the high bidder, but it never closed. Instead, plaintiff commenced this action on or about February 2, 2009, as if there had not been a prior action that was reduced to a judgment. It is of no moment that Pearl Connor transferred title to the house to her son, defendant Adrian Cutting, as he took title in November 2008, after the judgment of foreclosure and sale was issued and entered, and it had already become a lien on the property.

As is clear from a recent decision, (*U.S. Bank Trust, N.A. v Biggs*, 204 AD3d 724 [2d Dept 2022]), "RPAPL 1301(3) provides that "[w]hile [an] action is pending . . . , no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." Also "The

object of the statute is to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt” (*Bayview Loan Servicing, LLC v Starr-Klein*, 193 AD3d 807, [2d Dept 2021], quoting *Deutsche Bank Natl. Tr. Co. v O'Brien*, 175 AD3d 650, 651 [2d Dept 2019]).

Here, since the plaintiff commenced the instant action without leave of the court in which the prior action was brought, and as judgment had been entered in the prior action, and is still in full force and effect, as was acknowledged by plaintiff’s attorney on the record, dismissal was warranted under RPAPL §1301(3) (see *Cent. Mtge. Co. v Wallace*, 187 AD3d 1130 [2d Dept 2020]; *Bayview Loan Servicing v Starr-Klein*, 193 AD3d 807, 808 [2d Dept 2021], which cites *Aurora Loan Servs., LLC v Reid*, 132 AD3d 788, 789; *Aurora Loan Servs., LLC v Spearman*, 68 AD3d 796; *Security Natl. Servicing Corp. v Liebowitz*, 281 AD2d 615). While the intent behind the statute appears to be to bar a mortgagee who elects foreclosure from also commencing an action to collect on the note, it is certainly applicable here (*Deutsche Bank Natl. Trust Co. v Gould*, 189 AD3d 576, 576 [1st Dept 2020]).

The court notes that RPAPL §1301(1) provides that “Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where he resides, if he resides within the state, or if he resides without the state, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.” This provision permits a second action in this circumstance, which is not applicable here. The court in *Sabbatini v Galati*, 43 AD3d 1136 [2d Dept 2007] described this section as a “condition precedent to an action

to foreclose a mortgage” for the same debt.

With regard to defendants’ oral motion for counsel fees and/or sanctions, the dismissal order pointed out that RPL §282 [regarding counsel fees] was unavailable, as it was not applicable to cases commenced in 2009 and set the matter down for a hearing on the issue of defendants’ request for sanctions and attorneys’ fees. A hearing is necessary, as 22 NYCRR 130-1.1[d] requires the party from whom sanctions are sought to have a “reasonable opportunity to be heard,” and requires the court to issue a written decision setting forth the conduct on which the award is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate (see 22 NYCRR 130-1.2; *DeSouza v Manhattan RX LLC*, 203 AD3d 540 [1<sup>st</sup> Dept 2022]). The hearing was scheduled for April 6, 2022, and it was held on that date. Decision was reserved.

At the hearing, plaintiff’s counsel stated, as relevant here, that he does not represent plaintiff Private Capital Group LLC, but that he represents the current assignee of the mortgage, described on his Notice of Appearance [Doc 2] as “Palm Avenue Hialeah Trust, a Delaware Statutory Trust, for and on behalf and solely with respect to Palm Avenue Hialeah Trust Series 2014-1, as successor in interest to PRIVATE CAPITAL GROUP LLC.” He said he had asked to change the name of the plaintiff in the caption in his motion for summary judgment and an order of reference. That motion was denied by another justice of this court, the order stating that plaintiff had failed to establish standing, dated June 8, 2019, thereby requiring a trial, and the branch of his motion with regard to the caption was not addressed and perhaps was overlooked. The court confirmed that this was a request in the notice of motion. Counsel argued that he has never represented the named plaintiff Private Capital Group LLC,

the entity which commenced this action, and therefore he did not conduct any title or lien search, and that he was not aware of the prior judgment until defendants' counsel informed him of it a day or two before the trial. Nonetheless, he pursued the action to trial without determining that it was not frivolous. He claimed he had not read the defendants' pre-trial memo, dated February 22, 2022, which states that there is a prior judgment on page one: "Plaintiff filed this action despite the prior 2006 foreclosure action which resulted in entry of a final judgment." This document was e-filed a month before the trial. However, he specifically asked to adjourn the trial as "I need to respond to the Defendant's memo as there are glaring issues that need to be resolved before a trial. . . Further, the statutes cited in this memo were not included in the Defendant's Answer and require further research to determine their applicability, if any. In order to have a focused trial, I think it is best if I am provided the opportunity to draft a response memo and we then have a conference with the court so we are clear what issues will be heard/decided at trial" [e-mail 2/24/22]. He requested an adjournment of the trial and required the court to reserve for him a full day to conduct a trial in this case-- for no good reason.

Plaintiff's counsel Ross Eisenberg, Esq. himself signed the consent to change attorney filed in 2016, when plaintiff's third firm appeared. He said at the hearing that he "took the client with him" when he left that firm and started his own practice. But his current client was not assigned the mortgage until 2017, and in the consent to change attorney he signed in 2016, it states that his firm was to be the new counsel for ARCPE 1 LLC, an assignee of the mortgage prior to Palm Avenue Hialeah Trust. His claim that he only "recently" became plaintiff's assignee's counsel, so he had no obligation to ascertain the merits of the action is exactly the sort of unreasonable and unacceptable

representation by an attorney which entitles defendants to seek sanctions. He has been actively involved in this case since 2016.

The assignments of mortgage provided by plaintiff as prospective trial exhibits indicate that Private Capital Group LLC was assigned the mortgage in 2005. They obtained the prior judgment. After this action was commenced in 2009 by Private Capital Group LLC, the mortgage was assigned several times, most recently to "Palm Avenue Hialeah Trust, a Delaware Statutory Trust, for and on behalf and solely with respect to Palm Avenue Hialeah Trust Series 2014-1" by assignment dated February 28, 2017.

Plaintiff's counsel next stated that defendants made two motions to dismiss this action, and neither of them were on this basis, that is, that there was a prior judgment. He argued that somehow the defendants thereby waived the right to make the oral motion at the commencement of the trial, which motion is essentially a claim that the plaintiff lacks subject matter jurisdiction. Subject matter jurisdiction is not waivable.

This action was commenced in 2009, and defendants answered the complaint a few weeks later. Since that date, there have been three motions, and plaintiff filed a note of issue on 12/16/19. To be clear, ten years passed after the action was commenced and before the note of issue was filed, and the fact that plaintiff already had a judgment was not mentioned by either side until now. Defendants changed lawyers once, in 2014. Plaintiff has changed lawyers many times, mostly because the mortgage was assigned many times, despite the entry of the judgment and the auction. In 2019, the firm that plaintiff's current counsel was working for was replaced with a different firm, then, in 2021, that firm was replaced by plaintiff's current firm.

The court file indicates that, other than recent trial preparation, defendants'

attorneys did the following work. A prior attorney answered the complaint in 2009. In 2016, defendants' current attorneys filed the RJI and made a motion for leave to amend their answer or to dismiss the complaint. This motion was decided on February 28, 2017, and granted defendants leave to amend their answer. The next motion was filed by plaintiff on December 21, 2017, and sought, *inter alia*, summary judgment. It was denied in 2018, with a two - sentence decision. Justice Dear concluded that there was no admissible evidence of standing. Defendants had opposed the motion. There is no mention in the papers of the prior judgment. On June 28, 2019, defendants made their second motion, which asked for various forms of relief, including dismissal. There is no mention in defendants' papers of the prior judgment. It was granted solely to the extent of tolling the interest for a specified time period, due to plaintiff's delays, by order dated November 14, 2019. The plaintiff then filed the note of issue a few weeks later, but, apparently due to the COVID-19 Pandemic, it was not sent out for trial until 2022.

Defendants' counsel Margarita Gaitas was sworn in at the hearing, and she authenticated and submitted into evidence [#1] her firm's billing statements for the period of time that the firm has represented defendants, 2013 to 2022. These bills total \$111,184.55. They reflect that defendants have paid the firm \$73,579.45 of this sum, and the balance is still due. This is an exorbitant sum for the work described above. She also submitted [#2] the firm's 2014 retainer agreement, which is solely with Ms. Connor's son, co-defendant Adrian Cutting. It requested a \$5,000 retainer, which presumably was paid. It provides for hourly billing, at \$350 per hour for attorneys' fees, plus fees for paralegals and disbursements. Also submitted [Ex #3] were documents that Mr. Cutting passed up to her to admit into evidence during the hearing. They were not items she could authenticate, but plaintiff's counsel did not object. One page is a

photocopy of the carbon copies of three checks Mr. Cutting paid, one for the \$5,000 retainer, and two checks he paid to his prior attorney in this matter. Also included in this exhibit is a copy of a retainer agreement executed by Adrian Cutting, wherein he retained a different law firm, Rubin & Licatesi, P.C., on October 3, 2018, not to represent him in litigation, but to review the court file for this case as well as the files for three other actions against his mother, Pearl Connor, and to discuss the “options and potential remedies as otherwise may be available to defendant”.

One of the four cases listed for review by this law firm is the prior action which had gone to default judgment, *Private Capital v Connor*, 15741/2006. The very same action that defendants’ counsel stated that she did not know about until this matter came to trial in 2022. Another of the cases listed is the action discussed above which resulted in the order permitting the recording of copies of the allegedly lost documents, *Morequity Inc. v Connor*, 18248/2004. A statement is also provided which indicates that the firm completed the requested analysis a few weeks later, had “closed out the file” and returned the balance of the retainer to Mr. Cutting. These exhibits will be e-filed by the court before they are returned to defendants’ counsel.

## Discussion

The court finds that Mr. Cutting was aware of the prior foreclosure action in 2018, if not before. The affidavit of service of the summons and complaint in the prior action states that Pearl Connor was served (in 2006) by service on a person of suitable age and discretion at the address which is still her home address. Her attorney represented in court that neither defendant has ever resided at the subject property. The defendants' motion, in 2019, which sought to dismiss the action but did not mention the prior judgment as a reason to dismiss the action, would have ended the case had Mr. Cutting disclosed to his attorneys what he clearly knew.

First, 22 NYCRR § 130-1.1 (a) states:

§ 130-1.1. Costs; sanctions. (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . 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. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart.

Further, 22 NYCRR § 130-1.1 (b) states that "sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated."

Finally, 22 NYCRR § 130-1.1 (c) states that:

For purposes of this part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Rule 22 NYCRR 130-1.1(a) thus permits a court, in the exercise of discretion, to

award costs in reimbursement of actual expenses reasonably incurred, as well as attorneys' fees, resulting from frivolous conduct, that is, conduct completely without merit in law or fact and which cannot be supported by a reasonable argument for an extension, modification or reversal of existing law (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 25 [1st Dept 1992]).

In *Levy v Carol Management Corporation* (260 AD2d 27, 33 [1st Dept 1999]) the Court stated that in determining if sanctions are appropriate, the court must look at the broad pattern of conduct by the offending attorneys or parties. Further, "22 NYCRR 130-1.1 allows us to exercise our discretion to impose costs and sanctions on an errant party" and [at 34], "[s]anctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the Bar at large." The court, in *Kernisan, M.D. v Taylor* (171 AD2d 869 [2d Dept 1991]), noted that the intent of the Part 130 Rules "is to prevent the waste of judicial resources and to deter vexatious litigation and dilatory or malicious litigation tactics." The instant action, in this court's determination, from its commencement in 2009, was "a waste of judicial resources." This conduct, as noted in *Levy*, must be deterred.

In *Navin v Mosquera* (30 AD3d 883 [3d Dept 2006]) the Court instructed that when considering if specific conduct is sanctionable as frivolous, "courts are required to examine whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent (22 NYCRR 130-1.1 [c])." The Court, in *Sakow ex rel. Columbia Bagel, Inc. v Columbia Bagel, Inc.* (6 Misc 3d 939, 943 [Sup Ct, New York County 2004]), held that "[i]n assessing whether to award sanctions, the Court must consider whether the attorney adhered to the standards of a reasonable

attorney (citing *Principe v Assay Partners*, 154 Misc 2d 702 [Sup Ct, NY County 1992])."

The court finds that both plaintiff's counsel and defendants' counsel failed to act in a reasonable fashion in connection with this matter. Both have wasted judicial resources and engaged in frivolous conduct, seemingly solely for the purpose of continuing to bill their clients. Defendants knew about the prior action at least four years ago, if not earlier. Plaintiff's counsel surely has a file for this action, which would include the title or lien search prepared in 2009 so the action could properly be commenced. Schedule A to the complaint, the metes and bounds description, states that it was prepared by "Prime Title Search, LLC Title No. PT-53521-09 (File No. 0000002457)." Surely counsel could have requested a copy if he did not get the full file when he was retained. He could have ordered an update. The complaint does acknowledge that there was a prior foreclosure action, but states that [Doc 24] "THIRTEENTH: There are no other actions or pending proceedings at law to collect or enforce the note and mortgage, except that a prior proceeding was commenced to collect or enforce the note and mortgage, which action has either been discontinued or is in the process of being discontinued. It is the intent of Plaintiff that this action be the only pending action to enforce the note and mortgage." This statement, included to comply with CPLR 1301, was not accurate.

### Conclusion

Accordingly, it is **ORDERED** that, after conducting a hearing to determine if Ross Eisenberg, Esq., of Ross Eisenberg Law PLLC, engaged in "frivolous conduct," as defined in the Rules of the Chief Administrator, 22 NYCRR § 130-1.1 (c), and finding that Ross Eisenberg, Esq. was granted "a reasonable opportunity to be heard," pursuant to the Rules of the Chief Administrator, 22 NYCRR § 130-1.1 (d), the Court

finds that Ross Eisenberg, Esq. engaged in "frivolous conduct," as defined in 22 NYCRR § 130-1.1, in the instant matter; and it is further

**ORDERED** that Ross Eisenberg, Esq., pursuant to the Rules of the Chief Administrator, 22 NYCRR § 130-1.2, shall pay costs of \$10,000.00 to defendants, payable to them jointly and mailed to their counsel, for reimbursement of defendants' reasonable attorney's fees in connection with the instant matter, within thirty (30) days after service upon him of notice of entry of this decision and order; and it is further

**ORDERED** that Ross Eisenberg, Esq., pursuant to the Rules of the Chief Administrator, 22 NYCRR § 130-1.3, shall pay a sanction of \$5,000.00 to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210, within thirty (30) days after service upon him of notice of entry of this decision and order. The court has mailed a copy of this order to the Fund.

**IT IS FURTHER ORDERED** that the Notice of Pendency filed with the Kings County Clerk on April 6, 2009, by the plaintiff, in an action to foreclose a mortgage for real property located at 919 Dumont Avenue, Brooklyn, New York (Block 4062, Lot 50, County of Kings), and subsequently extended, most recently on March 14, 2022, is hereby cancelled.

This constitutes the decision and order of the court.

Dated: May 31, 2022

ENTER :



Hon. Debra Silber, J.S.C.