8/8/12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

HAMAD ALI, 2591 REALTY, INC., 800 REALTY CORP., and RKAN REALTY, LLC.,

DECISION/ORDER

Plaintiffs,

-against-

Index No.: 381035/11

FARES ALI, SELIM ZHERKA, SILAS METRO HOLDINGS CORP., JAMES G. DIBBINI AND ASSOCIATES, P.C., JAMES G. DIBBINI, ESQ., SIGNATURE BANK, CUSTOM TITLE SERVICES, INC.,

Defendants.

X

The following papers numbered 1 to 8 read on the below motions noticed on April 16, 2012 and duly submitted on the Part IA15 Motion calendar of **May 4, 2012**:

Papers Submitted	Numbered
Pls' Affirmation in support of motion, exhibits	1,2
Def. Signature's Cross-Motion, exhibits	3,4
Def. Custom Title's Aff. in Opposition	5
Def. Silas' Aff. in Opposition	6
Pl.s' Affirmation in Reply and Opposition to Cross-Motion, Exhibits	7,8

In an action involving an allegedly fraudulent real estate transaction, the plaintiffs move for an order pursuant to CPLR 2221(e)(2), to renew plaintiffs' previous motion to appoint a temporary receiver, which was denied by this Court by decision and order dated January 31, 2012 and entered on February 15, 2012. Defendants Signature Bank ("Signature"), Silas Metro Holdings, LLC. ("Silas"), and Custom Title Services, Inc. ("Custom") oppose the motion. Signature cross-moves for sanctions against plaintiffs pursuant to 22 NYCRR §130-1.1.

Taking into account the record before it, this Court previously determined that Plaintiffs failed to demonstrate the requisite "clear evidentiary showing" of the necessity of such an appointment in order to conserve the property and protect the litigants' interests. *Schachner v.*

Sikowitz, 94 A.D.2d 709 (2nd Dept. 1983); *Harmon v. Marks*, 175 A.D.2d 44 (1st Dept. 1991). The existence of a Federal action against defendant Selim Zherka, filed in March 2011, does not satisfy plaintiff's burden in its initial motion. Moreover, Plaintiffs do not assert an acceptable "reasonable justification" for the failure to present the alleged "new facts" on its prior motion. CPLR 2221(e). The Federal action is a matter of public record and could have reasonably been discovered previously. "Renewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." *Chelsea Piers Mgt. v. Forest Elec. Corp.*, 281 A.D.2d 252 (1st Dept. 2001)(internal citations omitted). Plaintiffs' motion to renew is therefore denied.

Signature has cross-moved for costs and sanctions against plaintiffs pursuant to 22 NYCRR §130-1.1, since plaintiffs' motion is frivolous. Under §130-1.1(c)(3), conduct is "frivolous" if it asserts material factual statements that are false.

In its affirmation, attorney Christopher Lynn states that plaintiffs' motion is based upon "new facts" and a "new matter" since the Federal action was not filed until March 9, 2012 (Lynn Aff., Par. 5), which was "well after the decision of this Court on February 15, 2012" (*Id.* at the following paragraph, incorrectly numbered "5"). However, the various PACER electronic filings of the Federal action, attached to plaintiffs' moving papers, were done throughout March, April, May, and July 2011, and the most recent filings were on January 10, 2012. In reply and in opposition to the cross-motion, Mr. Lynn affirms that his entry of "March 9, 2012" was a typographical error, and he meant March 9, "2011". The reply affirmation goes on to allege, for the first time, an alleged "reasonable justification" for failure to present the Federal action previously. (Lynn Aff. in Opp., at Par. 4). Specifically, plaintiffs allege in reply that the Federal action is "in another state and another Court system" and was only recently discovered, after the motion to appoint a temporary receiver had been filed, because defendants Zherka and Silas brought a different Federal action in November 2011 against plaintiff Hamad Ali and defendant Fares Ali. These arguments are not found in plaintiffs' moving affirmation, which explicitly basis its renewal motion on the fact that the Federal action was filed on March 9, 2012 and thus was filed *after* this Court's February 15, 2012 decision and order. Plaintiffs' counsel now asserts that its entry of "March 9, 2012" was a typographical error.

An award of costs or the imposition of sanctions may be made upon the court's own initiative, after a reasonable opportunity to be heard (22 NYCRR 130–1.1[d]). In determining whether the conduct undertaken was frivolous, the court shall consider, (1) the circumstances under which the conduct took place, including the time available for investigating the factual basis of the conduct, and (2) whether or not the conduct was continued when its lack of factual basis was apparent, or should have been apparent. (*See* 22 NYCRR 130–1.1[c]). The Court must look at the "broad pattern of conduct" by the offending attorney or parties. *Levy v. Carol Management Corp.*, 260 A.D.2d 27, 33 (1st Dept. 1999). Although counsel's alleged "typo" is suspect, his annexed PACER documents did demonstrate that the Federal action was filed in 2011, and it appears that counsel did not attempt to conceal those submissions from the Court, and was not intentionally attempting to mislead the Court. Under the circumstances, therefore this Court deems that counsel's conduct does not require imposition of costs or sanctions.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion to renew this Court's decision and order entered February 15, 2012 is denied, and it is further,

ORDERED, that Signature's cross-motion for sanctions and costs is denied.

The above constitutes the Decision and Order of this Court.

Dated: July 26, 2012

Hon. Mary Ann Brigantti-Hughes, J.S.C.