

**Mattituck Dev. Corp. v Hudson City Savs. Bank**

2012 NY Slip Op 31529(U)

June 7, 2012

Supreme Court, Suffolk County

Docket Number: 28886-2011

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

**Present:**  
HON. EMILY PINES  
J. S. C.

Original Motion Date: 10-25-2011  
Mot on Submit Date: 03-27-2012  
Motion Sequence No.: 002 MGCASEDISP

FINAL DISP  
 NON - FINAL DISP

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**MATTITUCK DEVELOPMENT CORP.,**

**Plaintiff,**

**-against-**

**HUDSON CITY SAVINGS BANK,**  
**Defendant.**  
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Attorney for Plaintiff  
Law Offices of Elliot S. Schlissel  
475 Merrick Road  
Lynbrook, New York 11563

Attorney for Defendant  
Kushnick Pallaci PLLC  
445 Broad Hollow Road, Suite 124  
Melville, New York 11747

Defendant, Hudson City Savings Bank (“HCSB”) moves, by Notice of Motion (motion sequence # 002) for an Order dismissing the Plaintiff Mattituck Development Corp’s (“MDC”) Complaint pursuant to CPLR §§ 3211 (a) (1), (4), and (7). As set forth in the motion papers, this action is related to another lawsuit, entitled Hudson City Savings Bank v End of the Road LLC, and Mattituck Development Corp., under Index # 36516-2010, previously pending before Justice Peter Mayer and recently transferred to this Court. It is the Defendant’s argument that the Plaintiff has failed to state a cause of action for Abuse of Process (the claim MDC asserts in this action) for several reasons, including: 1) that there exists another action in which the counterclaim of the Defendant in that lawsuit (Plaintiff herein) is essentially identical to the Complaint under the current action; 2) that MDC has failed to set forth a cause of action for Abuse of Process; and

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3) that the documentary evidence demonstrates that the entire basis for Plaintiff's claim herein and defense in the prior action is belied. As support for this third contention, Defendant annexes documents allegedly demonstrating that HCSB complied with the terms of the parties' lease and that no later than September 30, 2010, the subject premises had been specifically added to HCSB's policy as an insured premises and that by June 11, 2011 the prior owner had been added as an additional insured and certificate holder prior to the service upon the Defendant herein of a Notice to Cure. MDC opposes the motion, asserting that it has set forth a cause of action for Abuse of Process and is required to do so in an action separate from HCSB's Declaratory Judgment action and that the record demonstrates that HCSB has never complied with the terms of its lease and, therefore, its prior action and requests for injunctive relief were improper.

In the 2010 action, HCSB sued End of the Road LLC ("LLC") and MDC, 1) seeking a Declaratory Judgment that HCSB had not defaulted under the terms of its lease with the LLC (for real property in Mattituck subsequently transferred to MDC); 2) directing the LLC and MDC to specifically perform their obligations under the lease by turning over possession to HCSB the bank building on the property so that it could open its branch; 3) enjoining the Defendants from encumbering the property in any manner adverse to HCSB's rights; and, 4) awarding HCSB damages against the LLC for breach of contract. This action arose out of a written agreement between HCSB and the LLC in 2007, whereby the LLC was to construct a bank building on the property and HCSB was to build out the interior and related items and HCSB was to lease the subject premises for 20 years. After substantial construction had been completed, HCSB received a Notice of Default and Notice to Cure from the LLC on September 21, 2010 and the LLC transferred the subject property to MDC on September 29, 2010. HCSB asserted that the property transfer was not an arms length transaction. MDC counterclaimed in that action stating that the Plaintiff had interfered with its ownership interest in the property.

Interestingly, there is an extensive record in the related action which this Court believes has significant bearing on the issues raised in the current motion. First, the Defendant herein, HCSB, as Plaintiff in the 2010 action, was granted two preliminary injunctions, on April 21, 2011 and then again on October 6, 2011, preventing MDC from both transferring the property that is the subject of these litigations and also from terminating the lease with HCSB. In both motions, the Court (Mayer, J) heard extensive oral arguments and during both oral arguments, the substantive issues raised before the Court (Mayer, J) in the 2010 actions, have been raised again in the current action before this Court by MDC. In both cases, despite the argument of the prior owner of the real property that is the underlying subject of both lawsuits, that HCSB had failed to obtain proper insurance on the property and therefore was in substantial breach of the lease, the Court both granted HCSB's requested preliminary injunctions prohibiting the termination of the lease with HCSB and denying the motions of End of the Road LLC and MDC to dismiss HCSB's complaint. (Order of April 21, 2011, Tr. pp 19-23, 57); (Order of October 6, 2011, Tr. pp 80-85). The arguments raised herein by MDC, in addition, allege both that Defendant had failed to file its lease or a memorandum thereof with the County Clerk pursuant to Real Property Law §§ 291 et seq. and that HCSB had violated certain pre-possession construction provisions of the lease. Again, both of these arguments were raised by either MDC or the LLC in opposition to the motions for Preliminary Injunctive relief in the 2010 action (Order of April 21, 2011, pp 56-63). The Court (Mayer, J) after hearing the very arguments posited to this Court in opposition to the motion to dismiss, both granted the motions for Preliminary Injunctive Relief and denied the motions to dismiss due to the alleged failures to comply with the lease terms. Most significantly, on June 8, 2011, the Appellate Division, Second Department denied a motion by Mattituck Development Corp, on appeal from the April 2011 order, to vacate the preliminary injunction contained in the order of April 21, 2011 and, on its own motion, dismissed the appeal from the April 26, 2011 Order. The previously cited pages of transcripts before Justice Mayer, were part of the Record on Appeal.

In reviewing a motion to dismiss pursuant to CPLR § 3211 (a)(7), the Court must determine whether the allegations contained in the claim set forth a cause of action. In this regard, the claimant's allegations are presumed to be true and are to be liberally construed. **See, Strishak & Associates P C v Hewlett Packard Co**, 300 AD2d 608, 752 NYS2d 400 (2d Dep't 2002 ).


The essential elements of the tort of abuse of process are as follows: 1) regularly issued process compelling the performance of some prescribed act; 2) a person activating the process being motivated to do harm without economic or social excuse or justification; and 3) the person activating the process seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of process. **Hudson Valley Marine Inc v Town of Cortlandt**, 79 AD3d 700, 912 NYS2d 623 (2d Dep't 2010); **Hornstein v Wolf**, 109 AD2d 129, 491 NYS2d 183 (2d Dep't 1985). MDC has clearly failed to set forth the second and third prongs of this test. From the extensive record in the related action, in which the very issues that MDC states herein constitute evidence of HCSB's clear violations of the lease, it is clear that these arguments were raised, not to seek a collateral advantage outside the legitimate ends of process; but, rather, to prevent the LLC and MDC from frustrating HCSB's alleged entitlement to lease the subject property. On the several occasions during which the precise issues cited herein vis a vis the lease violations were raised before Justice Mayer and the Appellate Division, MDC did not convince those bodies that the lawsuit brought by HCSB and the preliminary injunctive relief sought were frivolous and, indeed, HCSB, thus far, has prevailed on the underlying issues. Nor has MDC even set forth in its complaint that the prior action was motivated to do harm to MDC outside of an economic justification. Whether HCSB did or did not violate the terms of its Lease, it clearly set forth its intention to preserve what it believed to be its economic right to preserve that agreement. While HCSB may or may not be entitled in the first action to prevail on its ultimate claim, its rights are clearly protected under that action and it has the right to demonstrate its entitlement to the property in question.

With regard to MDC's legal argument that an abuse of process claim must be set forth in a separate proceeding, that is clearly not the case. The issue decided in the case of **Dashew v Cantor**, 104 AD2d 477 (2d Dep't 1984) related to whether a plaintiff in an accounting proceeding could serve a supplemental complaint alleging abuse of process. It had nothing whatsoever to do with the right of one sued to assert a defense and/or counterclaim for abuse of process. The myriad cases cited by both parties both affirming and striking such counterclaims deal with the merits of these pleadings and not with the right to assert them in the form of a counterclaim. **See, e.g. Greco v Christofferson**, 70 AD3d 769, 896 NYS2d 363 (2d Dep't 2010); **Schwarz v Sayah**, 72 AD3d 790, 899 NYS2d 316 (2d Dep't 2010).

Accordingly, based upon the above, HCSB's motion to dismiss MDC's Complaint pursuant to CPLR § 3211 (a)(7) is granted. In view of the Court's determination, it need not address the other grounds for dismissal set forth.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: June 7, 2012  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.

FINAL DISP  
 NON - FINAL DISP