

Financial Freedom Acquisition, LLC v Braunsberg
2017 NY Slip Op 31683(U)
August 4, 2017
Supreme Court, Suffolk County
Docket Number: 41334/2010
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 5/24/17
SUBMIT DATE: 6/7/17
Mot. Seq. 014 - After Sanctions
Submissions Pursuant to Order: 4/11/17
CDISP: YES

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FINANCIAL FREEDOM ACQUISITION, LLC, :

Plaintiff, :

-against- :

LINDA C. BRAUNSBURG, individually and as :

Distributee and Executrix of the Estate of Mary :

Falcone, MARY DIAZ, as heir at law of the :

Estate of Mary Falcone, CATHERINE SUMMA, :

as heir at law of the Estate of Mary Falcone, :

PHILLIP JAMES COLASANTO, as alternate :

devisee of the Estate of Mary Falcone, :

GIOVANNA MARIE COLOSANTO, as alternate :

devisee of the Estate of Mary Falcone, INTERNAL :

REVENUE SERVICE OF UNITED STATES :

OF AMERICA, NEW YORK STATE DEPT. OF :

TAXATION & -TAX COMPLIANCE DIVISION :

C.O. ATC, NYS CHILD SUPPORT :

ENFORCEMENT, NEW YORK STATE DEPT. :

OF TAXATION & FINANCE, CITY OF NEW :

YORK DEPARTMENT OF TRANSPORTATION :

PARKING VIOLATIONS BUREAU, CITY OF :

NEW YORK ENVIRONMENTAL CONTROL :

BOARD, NEW CITY ADJUDICATION :

BUREAU, :

Defendants. :

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WINDELS, MARX, LANE, ET AL

Attys. for Plaintiff

156 West 56th Street

New York, NY 10019

MICHAEL BRAUNSBURG, ESQ.

Atty. For Defendants Braunsberg, Diaz,

Summa and Colosanto

370 Powells Street

Staten Island, NY 10312

Upon the following papers numbered 1 to 7 submitted by the defendant Braunsberg and the remaining individual defendants set forth in the caption and their counsel, Michael P. Braunsberg, Esq. on May 24, 2017 in accordance with the prior order of this court dated April 11, 2017; and papers numbered 8 - 9 submitted by plaintiff's counsel in response; and the supplemental and reply affirmation submitted by defense counsel numbered 10-11; 12-13, all of which have been read by the court; and upon the prior Order of this court dated April 11, 2017, and all others issued, it is,

ORDERED that defense counsel, Michael P. Braunsberg, Esq., engaged in frivolous conduct as that term is defined in 22 NYCRR Part §130-1.1(c)(1)(2) and (3) by his interposition of motions sequenced as #012 and #013, each of which were without basis in law and unsupported by any reasonable argument for an extension, modification or reversal of existing law and undertaken primarily to delay the resolution of this action and/or to harass the plaintiff following the issuance of the judgment of foreclosure and sale on July 27, 2015; and it is further

ORDERED that the plaintiff is awarded costs in the form of reasonable attorneys fees in the amount of \$10,692.00 that were incurred in defending against motions sequenced as #012, #013 and in interposing the plaintiff's own motion sequenced #014 for relief against the defendants' engagement in motion practice considered to be frivolous under 22 NYCRR § 130-1.1(c); and it is further

ORDERED that the foregoing award of costs, in the amount of \$10,692.00, is hereby assessed against defense counsel, Michael P. Braunsberg, Esq., personally, pursuant to 22 NYCRR Part §130-1.1(a) and (b), and he is adjudged to be personally liable for the payment of such fees within sixty (60) days of the date of this order; and it is further

ORDERED that pursuant to 22 NYCRR § 130-1.2 and CPLR 2222, the Clerk is directed to enter this order as a money judgment in the amount of \$10,692.00 in favor of the plaintiff against attorney, Michael P. Braunsberg, Esq., personally, and to docket said judgment.

This foreclosure action was commenced by the plaintiff in November of 2010. Therein, the plaintiff sought a judgment foreclosing the lien of a reverse mortgage in the amount of \$1,938,000.00 given by the defendants' decedent, Mary Falcone, on April 2, 2008. The premises encumbered by such mortgage consist of residential real property located in East Hampton, New York, which had previously been owned by one or more of the named defendants since 2001 (*see* Order dated April 4, 2012 [Emerson, J.]). Following service of the summons and complaint, defendant, Linda Braunsberg, an attorney, appeared herein by an answer prepared by her husband, attorney Michael F. Braunsberg, Esq. Defendants Diaz, Summa and Colosanto separately appeared herein by an answer likewise prepared by Michael F. Braunsberg, Esq.

By Short Form Order dated April 4, 2012 [Emerson, J.], on motion #001, the plaintiff was awarded summary judgment dismissing the affirmative defenses set forth in the answers served and further awarded summary judgment on the plaintiff's complaint for foreclosure and sale against the answering defendants and a separate order of reference. The plaintiff was also awarded default judgments against all other defendants served with process and the appointment of a referee to compute. Thereafter, the appearing defendants moved (#002) to renew their opposition to the plaintiff's motion (#001) and for a mandatory settlement conference, which motion (#002) was denied by order dated November 15, 2012 [Emerson, J.]. While that motion was pending, the answering defendants interposed a separate motion (#003) returnable September 27, 2012 for a stay of all proceedings, which motion was denied by order dated November 26, 2012 [Emerson, J.].

The plaintiff's second application for relief (motion sequence #004) was returnable in March of 2013 and it therein sought confirmation of the report of the referee to compute and the issuance of a judgment of foreclosure and sale. The court's consideration of that motion and the defendants'

opposition thereto was delayed by numerous appearances before the previously assigned Justice at court conferences aimed at resolving the matter even though said Justice had previously determined that the conference settlement proceedings mandated by CPLR 3408 were not applicable to this action because the mortgaged premises were encumbered by a reverse mortgage (*see* Order issued on motion sequence #002 dated November 15, 2012 [Emerson, J.]). These conferences concluded in August of 2014 without resolution of any matter in issue.

This action was thereafter administratively transferred to the civil case inventory of this court on December 31, 2014, after which, the plaintiff's motion for judgment (#004), together with the opposition thereto, was calendared for June 12, 2015 and marked submitted on that date. In response, the answering defendants filed a barrage of separate motions all asserting challenges to the issuance of any judgment of foreclosure and sale and to the judgment once issued. The first four of those separate motions, namely, #005 (Stay proceedings & Removal); #006 (Dismissal); #007 (Stay Proceedings); and #008 (Dismissal) were denied as lacking in merit in two separate orders of this court dated July 27, 2015, the last of which warned the defendants and their counsel "to refrain from the interposition of further motions which do not comport with the procedural requirements imposed upon motions by CPLR 2214 *et. seq.*, and are without basis in law or fact, as such conduct is frivolous as defined in 22 NYCRR Part 130-1 and may subject defendant Braunsberg and her counsel to the imposition of sanctions, costs and fees of the type set forth therein" (*see* Order on motion sequences #007 & #008 dated July 27, 2015).

Also issued on July 27, 2015, was a separate Memo Decision and Order [Whelan, J.], in which the court granted the plaintiff's motion (#004) for confirmation of the referee's report and issuance of a judgment and a separate judgment of foreclosure and sale issued on that date. The defendants' opposition was rejected as lacking in merit due to, among other things, violations of the rules prohibiting re-litigation of matters previously decided.

The answering defendants nevertheless interposed three further motions all of which were returnable on separate dates in July of 2015. Each of these were found to be equally lacking in merit due the absence of any basis in fact or in law. In motion sequenced as #009, the defendants sought an order to "withdraw cases" and "removing this action to federal court". In a separate motion sequenced as #010, the defendants sought a vacatur of the judgment and/or dismissal of the action under CPLR 6513. The defendants then sought by motion sequenced as #011, an order cancelling the Notice of Pendency. These motions were denied by this court in separate orders dated August 6, 2015 and August 17, 2015 as academic due to the defense counsel's production of a July 28, 2015 notice of removal of this action to a nearby federal court. By order dated June 16, 2016, Judge Arthur D. Spratt of the Eastern District federal court in New York rejected the removal attempt by defense counsel finding that its "sole purpose" was aimed at "effectively reversing the multiple, well reasoned opinions of Suffolk County Supreme Court Justices, and a final judgment in favor of the plaintiff".

In February of 2017, the plaintiff filed a consent to change its attorney to its current counsel and served the appearing defendants with notice of the Clerk's entry of the July 27, 2015 judgment of the judgment of foreclosure on August 7, 2015.

Thereafter, the answering defendants interposed two more motions. In the first, sequenced as #012, the defendants sought an order pursuant CPLR 5519(c) to stay all proceedings herein pending a purported appeal of the judgment of foreclosure and sale entered herein on August 17, 2015 and for a renewal of a prior motion (#010) by defendants for relief pursuant to CPLR 6513. In the second motion, sequenced as #013, the defendants sought a "reconsideration" of the July 27, 2015 judgment that was entered on August 17, 2015 by the Clerk. These motions were opposed by the plaintiff who interposed its own motion (#014) seeking to restrain the answering defendants from interposing further baseless motions and for an award of costs and/or sanctions of the type contemplated by 22 NYCRR Part 130-1.1.

By order dated April 11, 2017, this court denied the defendants' motion (#012) for a stay of this action pursuant CPLR 5519 as being without a basis in law. The court further denied the defendants' motion (#013) for a "reconsideration" of the of July 27, 2015 judgment of foreclosure as without basis in law in or in fact. In that same order, the court granted the plaintiff's responsive motion (#014) for injunctive relief. The remaining portions of the plaintiff's motion (#014) wherein it sought an award of fees, costs and/or the imposition of monetary sanctions against the defendants and their counsel was granted to the extent that the defendants and their counsel were afforded the opportunity to show cause why an order should not be issued and entered imposing monetary sanctions and/or fees and costs against the defendants or their counsel by the submission of affidavits and/or an affirmation on these issues on or before **May 24, 2017**, in response to which, the plaintiff shall have the opportunity to reply by way of affidavit and/or affirmation of counsel.

In its April 11, 2017 order, the court went on to direct, upon its own motion made pursuant to 22 NYCRR § 130-1.1(d), that counsel for the respective parties "show cause why an order should not be issued and entered imposing monetary sanctions and/or fees and costs against the defendants or their counsel due to their engagement in facially frivolous conduct in interposing motions sequenced #005 - #012 and in pursuing an attempt to remove this action to federal court, by the submission of affidavits and/or affirmations on these issues on or before **May 24, 2017**". This directive was premised upon the following findings set forth on page 6 of the April 11, 2017 order of the court: "This court finds that the conduct of the defendants and their counsel in filing and serving the motions sequenced as #005, #006, #007, #008, #009, #010 and #011, in addition to the filing and service of motions sequenced #012 and #013 that are addressed above, are presumptively frivolous under 22 NYCRR § 130-1.1(c)(1), (2) and possibly (3). The court further finds that the conduct of defense counsel regarding the various e-mails complained about in the plaintiff's moving papers is also presumptively frivolous in that it contained misleading if not false allegations of fact. The court also finds that all such conduct constituted an abuse by defense counsel of the legal system in as much as it was used as a vehicle for unjustified and undue delay, harassment, ill will and/or spite, all of which, prejudiced the remedies granted to the plaintiff under prior orders and the judgment of this court entered in August of 2015".

The court is now in receipt of the parties' submissions regarding the existence or absence of frivolous conduct as framed in the order of this court dated April 11, 2017. Having read and duly considered these submissions and, after consideration of 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, should have been apparent or was brought to the attention of counsel or the party (*see* 22 NYCRR 130-1.1(c):

Marrero v New York City Tr. Auth., 150 AD3d 1097, 52 NYS3d 652 [2d Dept 2017), this court finds as follows: that the conduct of defense counsel in filing motions sequenced as #012 and #013 following the unsuccessful application to remove this action to federal court falls well within the ambit of 22 NYCRR § 130-1.1(1)(c) in that such conduct was: 1) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; and (2) was undertaken primarily to delay or prolong the resolution of this action and to harass the plaintiff. The relief sought in these two motions (#012 and #013), which were interposed within days of each other, lacked substantive merit and were repetitive of previously rejected applications that were similarly interposed and were equally lacking in merit. Defense counsel's conduct was also aimed at delaying or deterring the public sale of the premises and at harassing the plaintiff by compelling it to defend against the defendants' frivolous motions (#012 and #013) and thus frivolous under 22 NYCRR Part 130-1.1(b). There was more than sufficient time for defense counsel to investigate the legal and factual basis for those applications and the lack of merit therein should have been apparent under the circumstances, particularly in light of prior warnings from the court with respect to engagement in frivolous conduct on the part of the defendants or their counsel.

The foregoing conduct of defense counsel was thus frivolous under 22 NYCRR § 130-1.1(c) (a) and (b) (*see Accocella v Wells Fargo Bank, N.A.*, 139 AD3d 647, 32 NYS3d 187 [2d Dept 2016]). The contentions, claims and averments set forth in the papers submitted by the defendants and their counsel, in an effort to show the absence of frivolous conduct on their part and/or their counsel, failed to do so. Nor did the defendants challenge or contest the nature or amount of costs in the form of counsel fees demanded by the plaintiff.

Under these circumstances, the plaintiff is awarded costs in the amount of \$10,692.00, which amount the court finds to be the reasonable attorneys fees incurred by the plaintiff in connection with its defense of motions sequenced as #012 and #013 and those incurred with the preparation and interposition of its own motion (#014) in which it sought injunctive relief and an award of costs under 22 NYCRR Part 130-1 due to the defendants' engagement in motion practice considered to be frivolous and harassing. The court declines to award costs in the form of attorneys fees in excess of \$10,692.00, as it finds that the additional sums requested for fees and disbursements by the plaintiff are beyond that which were necessary, reasonable and justly attributable to the frivolous conduct found by this court to have been undertaken by defense counsel Michael P. Braunsberg, Esq.

Accordingly, the award of costs in the form of reasonable counsel fees actually incurred by the plaintiff in the amount of \$10,692.00 is hereby assessed against defense counsel Michael P. Braunsberg, Esq., personally, pursuant to 22 NYCRR Part §130-1.1(a) and (b), and he is adjudged to be personally liable for the payment of such fees within sixty (60) days of the date of this order. Pursuant to 22 NYCRR § 130-1.2, and CPLR 2222, this order shall be entered as a money judgment in the amount of \$10,692.00 in favor of the plaintiff against attorney Michael P. Braunsberg, Esq., personally, and docketed as such by the Clerk of this court.

DATED:

8/4/17


THOMAS F. WHELAN, J.S.C.