

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BIDZIRK, LLC, DANIEL G. SCHMIDT,)
III, and JILL PATTERSON,)
)
Plaintiffs,)
)
v.)
)
PHILIP RUSS SMITH,)
)
Defendant.)

Civil Action No. 6:06-CV-00109-HMH

RESPONSE TO
MOTION FOR SANCTIONS

COMES NOW BidZirk, LLC (“BidZirk”), Daniel G. Schmidt, III and Jill Patterson, Plaintiffs in the above-captioned action, and file this their response to Court’s sua sponte motion for sanctions, and show the Court as follows:

INTRODUCTION

The Court convened a status conference on September 17, 2007. At that conference, the Court inquired of counsel regarding the reasons for Plaintiffs’ having filed a notice of lis pendens in this action. The Court, sua sponte, moved for sanctions, and provided Plaintiffs 10 days in which to respond.

ARGUMENT

The notice of lis pendens was filed October 23, 2006. See Exhibit 1. Following a hearing before Magistrate Judge Catoe, Plaintiffs on May 2, 2007 provided to the Court a letter brief outlining authority regarding the notice of lis pendens. See Exhibit 2. The Court, by order

of May 7, 2007, rejected Plaintiffs' arguments, and ordered that the notice of lis pendens be released. See Doc. 89. Plaintiffs duly released the notice on May 9, 2007. See Exhibit 3.

Defendant has alleged that he has attempted to sell the condominium at issue, but most recently Defendant is still listed as the record owner of the home. See Exhibit 4. Whether Defendant is a party to an agreement to sell his condominium at a later date is unknown to Plaintiffs. Plaintiff most recently stated that "As soon as the 'Judge mandated' lis pendens removal took place my condo sold." See Doc. 114. However, Defendant still continues to receive mail at his condominium's address. On September 27, 2007, Defendant filed materials intended to supplement his oral motion for summary judgment, some of which address themselves to the issue of Plaintiffs' filing of the notice of lis pendens. See Doc. 128. In this submission, Defendant avers that he "just finished coming close to a closing until the buyer saw the lis pendens (even though removed) when doing the title search." See Doc. 128, p. 4. This information indicates that Defendant's condominium has not in fact sold, though the lis pendens was released nearly five months ago. At this time, Plaintiffs cannot ascertain whether Defendant has incurred any special damages through the filing of the notice of lis pendens.

As indicated in Plaintiffs' letter brief, see Exhibit 2, at the time that the notice was filed, Plaintiffs were entitled to summary judgment, as Defendant had failed to respond to requests for admission, which failure established his liability. However, Plaintiffs and counsel understand that the fact that Defendant was subject to summary judgment does not create of this action a case regarding the title to Defendant's real property. Malice did not motivate the filing of the notice of lis pendens, as Plaintiffs' only concern was preserving the collectability of their

expected judgment. In acting upon this concern, Plaintiffs and counsel were more aggressive than permitted. See S.C. Code § 15-11-20. For this gun-jumping, Plaintiffs and counsel sincerely apologize to Defendant and to the Court.

Counsel shows the Court that (1) Magistrate Judge Catoe has admonished counsel and ordered the release of the lis pendens, which was accomplished nearly five months ago; (2) Defendant has resort to an action for slander of title, outside the context of the instant case, if Defendant wishes to pursue a remedy against Plaintiffs or counsel; and (3) whether Defendant has suffered any damages as the result of the filing of the notice of the lis pendens is at best unclear. While Plaintiffs and counsel understand and appreciate the Court's displeasure at the filing of the notice of lis pendens, the issue was addressed by Magistrate Judge Catoe. See Doc. 128, p. 4 (referencing Magistrate Judge Catoe's having "FURIOUSLY reprimanded" counsel). To the extent that the Court apprehends any value in further retributive action, counsel prays that the Court direct any censure or fine to counsel personally, and not to Plaintiffs. If there is a transgression that has not already been remedied, the insult was part of an undertaking of counsel, and not of Plaintiffs. The filing of the notice of lis pendens was an unfortunate misjudgment, which should impact none of Plaintiffs' claims in this case, and counsel prays that the Court spare Plaintiffs themselves any discipline in this matter. For counsel's part, the Court is assured that the episode will not be repeated, before this or any other tribunal.

This 27th day of September, 2007.

/s/ Kevin M. Elwell

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing RESPONSE TO MOTION FOR SANCTIONS upon the following parties by electronic mail, and by depositing same in the United States Mail on September 28, 2007 in a properly-addressed envelope with adequate postage affixed to:

Philip J. Smith
601 Cleveland Street
Apartment 5-C
Greenville, South Carolina 29601

This 27th day of September, 2007.

/s/ Kevin M. Elwell

KEVIN M. ELWELL
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