SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. LEWIS J. LUBELL, J.S.C.

SUPREME COURT : ORANGE COUNTY

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MAKAN LAND DEVELOPMENT-THREE, LLC,

Plaintiff,

-against-

GEORGINE O. PROKOPOV, as Trustee of PROKOPOV FAMILY TRUST,

Defendant.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 556/06
Motion Date: April 7, 2006

The following papers numbered 1 to 9 were read on the motion by defendant to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) or in the alternative for summary judgment pursuant to CPLR 3212 and plaintiff's cross-motion to amend its complaint:

Notice of Motion to Dismiss and for Summary Judgment-Affidavit of R.J. Smith-Affirmation-Exhibits 1-4

Memorandum of Law in Support of Motion to Dismiss and Summary Judgment 5
Notice of Cross-Motion-Affirmation-Exhibits 6-8

Reply Affirmation in Support of Cross-Motion to Amend 9

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

Preliminarily, the Court did not consider defendant's opposition to plaintiff's cross-motion in that it was received by the Clerk on April 10, 2006, after the return date of the motion in defiance of the Court's rule that all submissions be received no later than 12:00 p.m. on the return date of the motion.

Defendant moves to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) claiming that documentary evidence demonstrates that plaintiff's complaint is meritless. In the alternative, defendant moves for summary judgment. Plaintiff cross-moves to amend its complaint and opposes defendant's motion for summary judgment.

This is an action alleging fraudulent inducement into contract and unjust enrichment stemming from a contract pertaining to a parcel of undeveloped real estate located in Wallkill, New York. The plaintiff entered into a contract with defendant for plaintiff to purchase said parcel contingent upon plaintiff obtaining certain municipal approvals. To that end, plaintiff was given 60 days within which to conduct a due diligence search to ascertain whether such approvals would be forthcoming. If plaintiff chose to pursue the project after the due diligence period expired, plaintiff was given 2 years within which to secure the municipal approvals. Just prior to the expiration of the initial 60 day due diligence period, the parties renegotiated their contract to grant plaintiff extensions of the due diligence period. Plaintiff continued to explore obtaining the required municipal approvals and ultimately waived any further contract contingency concerning the due diligence. Plaintiff even renegotiated the purchase price in defendant's consideration of the difficulty plaintiff was having obtaining the necessary approvals. Ultimately, defendant would not agree to plaintiff's terms in extending the approvals deadline clause of the contract and plaintiff waived its right to terminate the contract thus assuming the risk that it would not obtain the necessary approvals.

Defendant's motion seeks dismissal of plaintiff's complaint noting that the complaint fails to state a cause of action for fraud, that the notice of pendency filed by plaintiff was improper and that plaintiff's actions are sanctionable abuses of the legal process. Plaintiff partially opposed defendant's motion and cross-moved to amend its complaint.

The Court initially notes that defendant made out a prima facie case based upon the affidavit, affirmation of counsel and evidentiary submissions, requiring plaintiff to come forward with evidence in admissible form warranting denial of defendant's motion. The Court further notes that plaintiff's counsel's attorney's affirmation in opposition and in support of the cross-motion is not signed, and as such lacks any force and effect. *See, In Matter of American Security Insurance Company v Austin*, 110 AD2d 697 (2nd Dept. 1985). The mere typing of an attorney's name is ineffective since CPLR 2106 requires that the affirmation be subscribed. *See, Macri v St. Agnes Cemetery, Inc.*, 44 Misc2d 702, 704 (Sup. Albany, 1965). An unsigned attorney's affirmation in opposition to a motion pursuant to CPLR 3211 cannot be considered. *See, Fried v Caracappa*, 9 Misc3d 1115(A) *1 (Dist. Ct., Nassau 2005). Moreover, opposition to motions for summary judgment consisting solely of an attorney's affirmation together with inadmissible hearsay documents is insufficient to warrant denial of summary judgment. *See, Heifets v Lefkowitz*, 271 AD2d 490, 491 (2nd Dept. 2000); *Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324, 325 (1st Dept. 2004).

In the instant case, plaintiff's cross-motion and opposition is supported by an unsigned attorney's affirmation and therefore may not be considered by this Court. Additionally, plaintiff's cross-motion lacks an affidavit by anyone with personal knowledge of the facts of the case or of any of the documentary evidence submitted by plaintiff. Motions for leave to amend pleadings must include an affidavit or merits from one with personal knowledge of the facts and evidentiary proof just as would be required on a motion for summary judgment. *See, Marinelli v Shifrin*, 260 AD2d 227, 229 (1st Dept. 1999); *Nab-Tern Constructors*, 123 AD2d 571, 572 (1st Dept. 1986); *Zaid Theatre Corp. v Sona Realty Co.*, 2005 WL 1216221 *2 (1st Dept. May 24,

2005); *Weller v Colleges of the Senecas*, 261 AD2d 852, 852-853 (4th Dept. 1999). Affidavits submitted by counsel in support of a motion for leave to amend a pleading lack probative value and are insufficient as a matter of law to support such an application. *See, Walden v Nowinski*, 63 AD2d 586, 586-587 (1st Dept. 1978); *O'Hara v Tidewater Oil Co.*, 23 AD2d 870, 871 (2nd Dept. 1965). In the instant case, plaintiff's counsel failed to include any such supporting documentation and therefore plaintiff's cross-motion must be denied in its entirety.

Moreover, given the fact that defendant's motion was unopposed by anyone with personal knowledge of the fact nor by a signed attorney's affirmation, defendant's motion is granted to the extent that the plaintiff's complaint is dismissed and the notice of pendency is canceled.

Turning to the issue of costs and sanctions, the Court notes that conduct is frivolous and can be sanctioned under 22 NYCRR 130-1.1 if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law " or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c][1][2]; *see Stow v Stow*, 262 AD2d 550 (2nd Dept. 1999); *Matter of Gordon v Marrone*, 202 AD2d 104 (2nd Dept. 1994); *Tyree Bros. Envtl. Servs. v Ferguson Propeller*, 247 AD2d 376 (2nd Dept. 1998)). "Making claims of colorable merit can constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1 if 'undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another' "(*Stow v Stow, supra* at 551, quoting 22 NYCRR 130-1.1[c][2]; *see also Matter of Gordon v Marrone, supra; Tyree Bros. Envtl. Servs. v Ferguson Propeller, supra*). Specifically, Section 130-1.1 of the Rules of the Chief Administrator of the Courts states in pertinent part:

> (a) The court, in its discretion, may award to any party in any civil action or proceeding before the court, except where prohibited by law, 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.
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> © For the purposes of this Part, conduct is frivolous if:
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> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another;
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> In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) 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.

As expressed in *Park Health Center v Country Wide Ins. Co.*, 2 Misc3d 737, 740 (N.Y.City Civ.Ct.,2003):

> "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal and factual basis for 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." (*Id.*) [22 NYCRR 130-1.1©]
> While the factors listed above are precatory in determining sanctionable conduct, "what remedy [to impose] is dictated by considerations of fairness and equity." (*Levy v. Carol Management Corp.*, 260 A.D.2d 27, 34, 698 N.Y.S.2d 226 [1st Dept. 1999]). Moreover, "[s]anctions are retributive in that they punish past conduct. They are also 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 goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics. citation omitted"(*Levy*, 260 A.D.2d at 34, 698 N.Y.S.2d 226). The measure of sanctions should be proportionate to the amount sought in the lawsuit, the culpability of the party's conduct and prejudice to the adversary. (*See Vicom v. Silverwood*, 188 A.D.2d 1057, 591 N.Y.S.2d 919 [4th Dept. 1992]).

In the instant case, it is clear from the submissions that plaintiff's undertaking of the filing of a lis pendens without first ascertaining whether that remedy was appropriate was improper.

Furthermore, after being informed of the impropriety of the remedy, plaintiff did nothing to cancel the lis pendens. In his unsigned opposition affirmation, plaintiff's counsel admits that based upon the complaint which was filed, the lis pendens was improper. Moreover, plaintiff's counsel opposes a motion to dismiss and a motion for summary judgment with an unsigned affirmation of an attorney lacking personal knowledge of the facts and cross-moves to amend plaintiff's complaint without even so much as an affidavit of merit. Plaintiff's conduct in this matter demonstrates a repeated disregard for proper procedure and the law, and as such, plaintiff' s conduct is frivolous.

> CPLR 8303-a calls for the award of "costs and reasonable attorney's fees not exceeding ten thousand dollars" against a party, his attorney, or both, who are found to have brought a *frivolous action* in bad faith or as a means of "harass[ing]" the successful adversary. A similar alternate imposition of costs and financial sanctions is available under the Rules of the Chief Administrator of the Courts for *frivolous conduct* in pursuit of such litigation (22 NYCRR Subpart 130-1). Once there is a finding of frivolousness, sanction is mandatory (*Grasso v. Mathew*, 164 A.D.2d 476, 564 N.Y.S.2d 576, *lv. denied*78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443), especially in the wake of frivolous defamation litigation (*Mitchell v. Herald Co.*, 137 A.D.2d 213, 529 N.Y.S.2d 602, *appeal dismissed*72 N.Y.2d 952, 533 N.Y.S.2d 59, 529 N.E.2d 427).

Nyitray v New York Athletic Club in City of New York, 274 AD2d 326, 327 (1st Dept., 2000).

The Court hereby directs that a hearing shall be held on **May 9, 2006** at 9:00 a.m. at Orange County Government Center, Courtroom #4 for the purposes of taking testimony to

ascertain the time and expenses of defendant in defending this action and reasonable attorney's fees.

The foregoing constitutes the decision and order of the court.

Dated: April 19, 2006 E N T E R
Goshen, New York

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HON. LEWIS J. LUBELL,
J.S.C.

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