Rizzo v Brookside Mgt. Corp.
2019 NY Slip Op 34619(U)
November 4, 2019
Supreme Court, Dutchess County
Docket Number: Index No. 2017-52695
Judge: Christi J. Acker
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To commence the 30-day 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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CATHY RIZZO,

Plaintiff,

-against-

BROOKSIDE MANAGEMENT CORP., BROOKSIDE GARDENS LLC, BROOKSIDE GARDENS INC., BROOKSIDE GARDEN ASSOCIATES LLC and BROOKSIDE GARDEN APARTMENTS,

Defendants.

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DECISION AND ORDER

Index No.: 2017-52695

Motion Seq. #2

ACKER, J.S.C.

The following papers, numbered 1 to 25, were read on Defendant Brookside Gardens, Inc.'s (hereinafter "Brookside Inc.") motion pursuant to CPLR 3212 to dismiss the Complaint and for sanctions because of Plaintiff and Plaintiff's counsel's frivolous conduct:

Notice of Motion-Affirmation of Jonathan B. Nelson, Esq. with Exhibits A-N-Affidavit of Martin Rogowsky 1-17
Affirmation in Partial Opposition of Mark P. Cambareri, Esq. with Exhibits 1-5 18-23
Affirmation in Further Support of Jonathan B. Nelson, Esq 24

After the filing of the instant motion, Plaintiff circulated a stipulation of discontinuance as to Defendant Brookside Inc. and has indicated in its partial opposition that she no longer wishes to pursue her action against said Defendant. Accordingly, Defendant Brookside Inc.'s motion

for summary judgment dismissing the Complaint is granted in its entirety. Defendant's request for sanctions remains extant and will be addressed by the Court herein.

The instant action was commenced against the Defendants with respect to a trip and fall that occurred on or about February 11, 2016 at a premises known as "Brookside Garden Apartments" located in or around 1 Colonial Drive, Wappinger Falls, New York. According to the Affidavit of Martin Rogowsky, President of Defendant Brookside, Inc., said Defendant does not have and has never had any ownership interest, management responsibility or any other involvement with the property on which Plaintiff alleges to have fallen.

Pursuant to the Affirmation of Jonathan B. Nelson, Esq. (hereinafter "Mr. Nelson"), counsel for Defendant Brookside Inc., after receiving the Complaint, he contacted Plaintiff's counsel on June 12, 2018. Mr. Nelson advised Plaintiff's counsel that Defendant Brookside Inc. did not have any interest in the subject property. According to Mr. Nelson, Plaintiff's counsel reported that he would be serving notices to admit as to ownership and then would discontinue accordingly.

Pursuant to the Preliminary Conference Order dated July 18, 2018, Plaintiff was to serve notices to admit on or before August 1, 2018. When Plaintiff's office contacted Mr. Nelson seeking dates for depositions on July 27, 2018, Mr. Nelson responded that his client was not a proper party and that if his client was not let out of the case before depositions, he would move for summary judgment after depositions and seek sanctions against the Plaintiff and Plaintiff's counsel. Pursuant to an e-mail dated September 20, 2018, Mr. Nelson noted that Plaintiff had failed to serve the notices to admit by August 1, 2018 and again put Plaintiff's counsel on notice

that he would move for summary judgment and seek sanctions asserting that the action is frivolous without any supportable basis.

Appearances were held before this Court on October 1, 2018 and October 11, 2019 and a Notice to Admit was ultimately served by Plaintiff on that same day. Defendant Brookside Inc. responded to said notice on October 15, 2018, denying any involvement with the property in question. It is uncontested that Plaintiff did not offer to discontinue the action against Defendant Brookside Inc. until after said Defendant had filed the instant motion on October 31, 2018.

Notably, the opposition submitted by Plaintiff does not contain an affirmation or affidavit from the handling attorney regarding the allegations contained in Mr. Nelson's affirmation. Instead, Mark P. Cambareri, Esq. submits the partial opposition and asserts that Matthew Samraldi, Esq. could not submit the opposition because of the allegedly short time frame given for response. Mr. Cambareri details the purported pre-action investigation conducted by Mr. Samraldi in arriving at the various "Brookside" entities that were ultimately named as Defendants herein. Mr. Cambareri provides documentation showing that Defendant Brookside Management Corp., referred to by Plaintiff's counsel as the "lead" Defendant, was the owner of the property and that Brookside Associates was listed on a deed related to the property as a "Grantor." Notably, there is no specific documentary evidence submitted demonstrating that Defendant Brookside Inc. had any ownership interest in the property. Plaintiff's counsel asserts that the Secretary of State's website was searched for entities with "Brookside Gardens" in their name in case the deed owner had leased the premises to another similarly named entity. It appears that the other "Brookside" Defendants were named as parties herein merely because their corporate name contained "Brookside Gardens."

Nevertheless, Plaintiff's counsel asserts that the firm had a non-frivolous basis to continue to pursue the action against Defendant Brookside Inc. because the lead Defendant denied ownership of the property and asserted cross claims against the other Defendants. Moreover, Mr. Cambareri asserts that Mr. Samraldi was "leery" to act on Mr. Nelson's statements based only upon telephone conversations or e-mails. Although Mr. Cambareri seems to concede that Mr. Samraldi failed to timely serve the Notices to Admit, no explanation is provided for this failure. Moreover, Mr. Cambareri asserts that Defendant Brookside Inc. did not submit any discovery responses. However, it is uncontested that said Defendant responded to Plaintiff's Notice to Admit on October 15, 2018 and denied all ownership, management or other involvement with the property in question.

The Court notes that in seeking sanctions against Plaintiff, Defendant Brookside Inc. does not reference a rule or case law in support of the application. However, pursuant to 22 NYCRR 130–1.1, an award of costs, including an attorney's fee, may be imposed against a party for frivolous conduct. *RKO Properties, Ltd. v. Boymelgreen*, 77 AD3d 721 [2d Dept. 2010]. Conduct is defined as frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." 22 NYCRR 130–1.1(c). In making a determination whether the conduct 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 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." *Id.*

In the instant matter, it is uncontested that Plaintiff's counsel was apprised on or about June 12, 2018 by counsel that Defendant Brookside Inc. was not a proper party. Significantly, other than the lead Defendant's denial of ownership and its assertion of cross claims against the other Defendants, Plaintiff has not provided any valid basis upon which Defendant Brookside Inc. could have been considered a proper Defendant herein. Upon being advised in June 2018 that Defendant Brookside Inc. was not a proper party, Plaintiff's counsel could have requested an affidavit to this effect, or immediately served the Notice to Admit which would have provided sworn documentation supporting a discontinuance against said Defendant. Further, it is also uncontested that Plaintiff's counsel did not serve the Notices to Admit until October 11, 2018, four (4) months after being advised that Brookside Inc. was not a proper party and more than two (2) months past the court ordered date. Finally, Plaintiff did not offer to discontinue the action until after Defendant Brookside Inc. made the instant motion, even though the October 15, 2018 Response to the Notice to Admit specifically denied any involvement by Defendant Brookside Inc. in the property in question.

The Court also notes that this issue was discussed extensively at conferences on October 1 and 11, 2018. On October 1, 2018, it was noted on the record that Plaintiff had failed to serve the Notices to Admit and the attorneys were directed to return on October 11, 2018 to further discuss the discontinuance against Defendant Brookside Inc. and Defendant Brookside Garden Associates, LLC. The Court's notes reflect that at the October 11, 2018 conference, Plaintiff's counsel Matthew Samraldi, Esq. failed to appear in person and the Court conducted the conference in chambers, with Mr. Samraldi on the phone and Defendants' attorneys appearing in

person. The issues were discussed at length and Plaintiff's counsel could not provide a concrete basis upon which to continue the action against Defendant Brookside Inc. Even after receipt of the denial contained in the October 15, 2018 Response to the Notice to Admit, Plaintiff's counsel failed to discontinue against Defendant Brookside Inc.

Based upon the totality of the circumstances in this case, the Court finds that Plaintiff continued this action against Defendant Brookside Inc. after the lack of legal or factual basis was apparent. However, this lack was manifest only after the service of the Response to the Notice to Admit. Accordingly, the Court determines the following conduct as frivolous: Plaintiff's delay in serving the Notice to Admit and counsel's failure to discontinue after receipt of sworn proof that Defendant Brookside Inc. had no involvement with the property in question. As a result, counsel for Defendant Brookside Inc. was required to prepare a motion for summary judgment to secure the offer to discontinue the action. Moreover, Plaintiff's counsel was on notice that should counsel for Defendant Brookside Inc. have to make the motion, sanctions would be sought.

Mr. Nelson provided the billing information regarding his firm's work on this case as Exhibit A to his Affirmation in Further Support.[1] The Court has reviewed the billing summary and determines that $1,500.00 is an appropriate sanction in this case. Therefore, Plaintiff's counsel shall issue a check to Mr. Nelson's firm in the amount of $1,500.00. This amount is due only from Plaintiff's firm and shall not be charged to Plaintiff as a disbursement or fee.

As such, it is hereby

ORDERED that Defendant Brookside Gardens, Inc.'s motion for summary judgment is

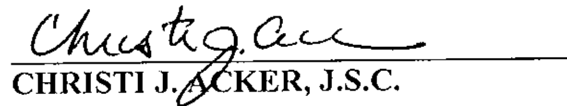
[1] The Court notes that Mr. Nelson submitted the Affirmation in Further Support without charge to his client.

GRANTED and the Complaint and any cross claims asserted against said Defendant are dismissed; and it is further

ORDERED that the Defendant Brookside Gardens, Inc.'s motion for sanctions is granted to the extent that said Defendant is awarded $1,500.00 in attorneys' fees to be paid for by Plaintiff's firm, without charge to Plaintiff herself.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
November 4, 2019



CHRISTI J. ACKER, J.S.C.

To: All parties via ECF