To commence the statutory time 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 WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

----------X
NANCE M. HUTTER

Plaintiff,

-against-

CITIBANK N.A. STINSON FINANCIAL GROUP INC., WATERMARK CAPITAL INC., NICHOLAS JOUTZ AND CLINT ELLIOT

Defendant.
----------X

Index No.: 57298/2011

**DECISION & ORDER**
Seq. 6

The Court has considered the following papers in connection with the motion.

| **PAPERS** | **NUMBERED** |
|---|---|
| Notice of Motion/Affidavit/ Exhibits A-E | 1-7 |
| Memorandum of Law | 8 |
| Affirmation/Affidavits (2) in opposition | 9-11 |
| Memorandum of Law in Opposition | 12 |
| Affirmation in Reply/Exhibit(s) A | 13-14 |

Upon the foregoing papers it is ordered that this motion is GRANTED.

**FACTUAL & PROCEDURAL BACKGROUND**

Plaintiff filed a summons and complaint on October 17, 2011, seeking damages due to the defendants' fraudulent actions. Plaintiff alleges that she was solicited by a mortgage broker to refinance her residence located at 175 Hickory Kingdom Road, Bedford, NY. Plaintiff submitted a loan application to Citibank, N.A. ("Citibank") for a

home equity line of credit ("HELOC"), which stated that her income was $27,500 a month and that she was employed by Industrial Distribution Corp., a company owned by her husband. Plaintiff alleges in her complaint that she was actually not employed, did not have income of $27,500, that those statements made on the loan application were lies and misstatements written by the broker and that she was not given a chance to review the application before she was told to sign it.

Plaintiff alleges that all the defendants conspired to defraud her and the defendants determined that she could afford the home equity line of credit, not because of her income or savings available to make the monthly payments, but because the market value of her house was high enough for her to sell or refinance the house to allow her to repay the loan.

Defendant Citibank previously filed a motion to dismiss, which motion was granted by Decision and Order of this Court dated September 14, 2012. Plaintiff filed a motion seeking a default judgment against Stinson Financial Group, Inc. ("Stinson"), which this Court denied by Decision and Order dated June 4, 2014.

Defendants Watermark Capital, Inc ("Watermark") and Nicholas Joutz ("Joutz") now files this motion to dismiss seeking dismissal of the action against them and sanctions against plaintiff.

Plaintiff submitted opposition papers, which included an Order Discontinuing Plaintiff's Case Against Defendants Watermark and Joutz Only signed on April 15, 2014 by the attorney for plaintiff and the attorney for Watermark and Joutz. Plaintiff states in her opposition papers that she discontinued the action against Watermark and Joutz because Watermark was not yet incorporated on January 16, 2006 when plaintiff

executed the $421,500 HELOC and Joutz testified in his deposition that he did none of the brokerage work for the HELOC. However, defendants Watermark and Joutz continue to seek sanctions against plaintiff.

**DISCUSSION**:

The court, in its discretion, may award any party or attorney in any civil action or proceeding, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct. (22 NYCRR §130-1.1 [a].) Conduct is deemed frivolous if: (1) it is completely without merit in law or fact 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 determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the (1) 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. (Id.).

Plaintiff contends that although Watermark did not exist on January 16, 2006, when she executed her HELOC, her suit against Watermark and Joutz was not frivolous because a corporation can be liable for the earlier misconduct of a business that the corporation takes over and continues to operate and plaintiff alleges that this is what Watermark did here.

Plaintiff avers that if Stinson had not defaulted on answering the complaint, but had been available to answer discovery, that plaintiff would ***probably*** have obtained concrete evidence to prosecute the lawsuit against Watermark and Joutz successfully. Plaintiff argues that Joutz and another person Dragna had their own unincorporated mortgage-brokerage business, that Watermark took over when it incorporated on January 20, 2006; that Joutz and Dragna were not employees of Stinson and not licensed in New York, but did plaintiff's brokerage work for Stinson, and therefore Watermark and Joutz could be liable for the unlicensed mortgage brokerage work that was done on plaintiff's HELOC.

In reply, Watermark and Joutz contend that plaintiff still seems to be arguing for the viability of her suit, yet she has discontinued such suit. Defendants contend that plaintiff was informed on numerous occasions that she was suing the wrong parties and that such was recognized by plaintiff's counsel who brought an order to show cause to be relieved, in which plaintiff's opposition affidavit states that the attorney is saying that he sued the wrong people and made the wrong claims. Defendants argue that once discovery was undertaken, it was clear that neither Watermark or Joutz had any involvement with the loan and counsel was offered an opportunity to discontinue the action at that point and advised that if defendants were forced to incur the cost of filing a summary judgment motion that sanctions and fees would be sought. Defendants argue that there is no link between Stinson and Watermark, that there is no evidence to support a link and that plaintiff's attorney acknowledged in his papers that the principles of the companies are not the same.

Defendants contend that plaintiff had a period of approximately four months after discovery was completed and before defendants filed their summary judgment motion,

to withdraw and did not discontinue her action against Watermark and Joutz during that time. They argue that once the Note of Issue was filed, the parties had a specified period of time in which to file their motions for summary judgment and that plaintiff's failure to voluntarily discontinue the action within that time resulted in defendants incurring fees and costs they should not have had to incur. Defendants argue that plaintiff did in fact discontinue her action against them, supporting their position for sanctions and fees.

Trial judges should be accorded wide latitude to determine whether sanctions in the form of a fee award are appropriate in any particular case, see *Sawh v. Bridges,* 120 A.D.2d 74, 78–79 (2d Dept. 1986) *lv. dismissed* 69 N.Y.2d 852 (1987 ). Under the circumstances presented, the Court has determined that fees and costs incurred to file the instant motion, are warranted. (see 22 NYCRR 130–1.1[c] ).

The Court has considered the issues in the case, the time available to investigate the lack of legal and factual basis of the allegations made against the defendants and the fact that such was brought to the attention of counsel for plaintiff. Plaintiff ultimately withdrew her action against Watermark and Joutz, but not before they incurred the expense of filing this motion seeking summary judgment and fees. Plaintiff had ample time to research and analyze the legal theories and facts of her case to determine if she had a viable suit and chose not to withdraw her claim against these defendants until after they filed their motion.

Although plaintiff, in her opposition papers, continues to claim that she may still have a viable claim, it is all just speculation and she provided no proof of such viability, but stated that she could have proven her claim if Stinson had not defaulted. Therefore, this Court will grant the defendants attorneys fees and costs.

The parties are directed to appear before the Settlement Conference Part on July 16 2014 at 9:30 am in Courtroom 1600 to schedule a hearing on the amount of fees to be awarded.

This constitutes the Decision and Order of this Court.

Dated: June 4, 2014
White Plains, New York

HON. SAM D. WALKER, J.S.C.