Titan Capital ID, LLC v Eshaghpour
2016 NY Slip Op 31925(U)
October 13, 2016
Supreme Court, New York County
Docket Number: 650128/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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TITAN CAPITAL ID, LLC *et al.*,

Decision and Order

Plaintiffs, Index No. 650128/2016

-against-

ROBIN ESHAGHPOUR et al.,

Defendants.

----------X

O. PETER SHERWOOD, J.:

Plaintiffs Titan Capital ID, LLC ("TC"), and Titan Willard ("TW", and together, "Titan") filed this suit against Robin Eshaghpour, 90-67 Sutphin Boulevard Corp. ("Sutphin"), 245-02 Merrick Blvd, LLC, entities owned and controlled by Eshaghpour ("Merrick", and together with Eshaghpour and Sutphin, the "Prior Action 2 Plaintiffs"), Claude Castro & Associates PLLC ("CCA"), Claude Castro, Esq. ("Castro"), and D. Paul Martin, Esq ("Martin", and together with CCA and Castro, the "Castro Defendants"). Plaintiffs alleged claims for abuse of process, malicious prosecution, and attorney misconduct under Judiciary Law § 487 related to two prior actions – one in this court, the other in Queens. On this motion sequence number 001, defendants move to dismiss the complaint.

I. Facts as Alleged

As this is a motion to dismiss, these facts are taken from the Verified Complaint ("Complaint") and accepted as true.

A. Prior Action 1

On or about April 11, 2012, Eshaghpour signed a promissory note for $400,000 and delivered it to TC. Eshaghpour subsequently defaulted. TC sued in this court (Index No. 651336/2013, "Prior Action 1"). CCA appeared in that action as counsel for Eshaghpour. On or about July 9, 2013, TC

moved for summary judgment and on March 26, 2014 the motion was granted. A money judgment of almost $516,000 was entered on August 11, 2014. Eshaghpour refused to pay the judgment.

TC then sought discovery in aid of collection, but the Castro Defendants and Eshaghpour deliberately delayed and frustrated TC's efforts by, *inter alia*, refusing to produce documents or appear for a deposition. On October 8, 2014, TC moved to hold Eshaghpour in contempt of court. The motion was withdrawn without prejudice on December 23, 2014. TC made a similar motion on January 20, 2015. At oral argument on the motion held on April 15, 2015, Eshaghpour was ordered to produce documents and appear for his deposition. He failed to comply. On May 15, 2015, TC moved by Order to Show Cause for an order holding Eshaghpour, contempt. At oral argument held on June 2, 2015, Eshaghpour requested additional time and the oral argument was adjourned to June 16. On June 16, the Court instructed TC to provide a proposed Order of Arrest for Eshaghpour. Before the Order of Arrest was signed, Elena Eshaghpour, the co-judgment debtor, paid in full and satisfied the judgment.

B. Prior Action 2

1. Background - Merrick Action

On or about March 6, 2009, Metropolitan National Bank ("Metropolitan") commenced a foreclosure action (the Merrick Action), related to mortgages (the "Merrick Mortgages") on real property owned by Merrick at 245-02 Merrick Blvd. and 245-16 Hook Creek Blvd ("Merrick Premises"). The Merrick Mortgages secured loans by TC to Merrick. TC sold the Merrick Mortgages to Metropolitan, retaining a junior participation interest. Metropolitan filed a notice of pendency against the Merrick Properties ("Merrick Notice of Pendency"). On or about April 27, 2012, TC and Metropolitan entered into an agreement with Merrick and Eshaghpour (the "Repayment and Release Agreement") in which Merrick and Eshaghpour would pay a reduced sum in satisfaction of the mortgage, and TC and Metropolitan would discontinue the foreclosure location.

2. Sutphin

On May 4, 2011, TC received a judgment of foreclosure on a mortgage given by defendant Sutphin in favor of TC. That mortgage encumbered a property located at 90-67 Sutphin Blvd.,

Jamaica, NY ("TW Premises"). Sutphin is owned and controlled by Eshaghpour. TC purchased the TW Premises at auction on July 15, 2011. On April 27, 2012, TC entered into an Option Agreement with Sutphin and Eshaghpour, by which Eshaghpour got the opportunity to redeem the TW Premises. The option which was limited to one year, was not exercised. On May 3, 2013, TW, as TC's nominee, took title to the TW Premises.

C. Prior Action 2

While the summary judgment motion in Prior Action 1 was pending, Eshaghpour, Sutphin, and Merrick ("Prior Action 2 Plaintiffs") filed suit in Queens Supreme Court against Titan and Metropolitan on October 31, 2013 (Index No. 704939/2013, NYSCEF Doc. No. 3) for breach of the Repayment and Release Agreement and the Option Agreement, a declaratory judgment that the option's expiration date should be extended, specific performance of the Option Agreement, and intentional interference with contractual rights, business relations and economic advantage (" Prior Action 2"). The action was premised on the theory that TC's and Metropolitan's failure to cancel the Merrick Notice of Pendency damaged Merrick and Eshaghpour by preventing a refinancing, preventing use of the option, and causing Merrick to breach an agreement with a third party lessee. Prior Action 2 Plaintiffs simultaneously filed a notice of pendency on the TW Premises (the "TW Notice" or the "Sutphin Notice").

During the pendency of Prior Action 2, Metropolitan served the Prior Action 2 Plaintiffs with discovery requests. The Prior Action 2 Plaintiffs ignored the requests but finally responded (approximately seven months later) that "due to our [presumably Castro Defendants'] very heavy motion and trial schedule . . . we have been unable to address this matter" (*id.*, ¶ 74). Metropolitan filed a motion to compel, which was adjourned due to Castro Defendants' scheduling issues until 11 months after the initial requests were served (*id.* ¶ 77). Prior Action 2 Plaintiffs were subsequently ordered to comply, but failed to do so (*id.* ¶¶ 82-84).

On January 20, 2014, Prior Action 2 Plaintiffs were notified that the Merrick Notice of Pendency had expired as a matter of law. On May 11, 2015, Prior Action 2 was dismissed for failure to state a cause of action. In this case, plaintiffs allege defendants knew the allegations and claims in Prior Action 2 were without merit and that Prior Action 2 and the TW Notice were purely for the

purpose of gaining leverage in settling Prior Action 1 (*see* Complaint, ¶ 6). Prior Action 2 Plaintiffs' strategy was merely to file suit and a notice of pendency and then do nothing. This was done merely to burden the plaintiffs. The Castro Defendants aided them in this improper procedure (*id.*, ¶¶ 88-89). These actions resulted in legal costs and disbursements to the plaintiffs, and injury to TW, including causing the failure of TW to sell/refinance its premises.

D. Connecticut Action

Plaintiffs also describe a nuisance litigation brought in Connecticut by a company owned by Eshaghpour against plaintiffs' affiliate (the "CT Action") to burden plaintiffs and discourage their pursuit of Prior Action 1 (*id.*, ¶¶ 62- 66). That action was discontinued shortly after Eshaghpour's company received a letter threatening to counter sue for "vexatious litigation, abuse of process, and unfair trade practice" (*id.* at ¶¶ 65, 67).

In this action, Plaintiffs alleged the following claims:

1. Abuse of Process against all defendants for filing Prior Action 2 and the TW Notice of Pendency as leverage in Prior Action 1;

2. Malicious Prosecution against all defendants for filing Prior Action 2 and the TW Notice of Pendency as leverage in Prior Action 1; and

3. Attorney Misconduct under Judiciary Law § 487 against Castro Defendants for actions taken by them in litigating Prior Action 1 and Prior Action 2. The Judiciary Law § 487 claim has been withdrawn (*see* Transcript dated August 2, 2016, at p. 19, NYSCEF Doc. No. 63).

II. ARGUMENTS

A. Defendants' Motion to Dismiss

Defendants move to dismiss the entire complaint pursuant to CPLR 3211 (a) (1) and (7) and on the grounds that the relief sought is against New York State Public Policy. They also assert that two of the causes of action are barred by the statute of limitation but make no mention of CPLR 3212 (a) (5).

1. Statute of Limitations

Defendant argues that the Abuse of Process and Malicious Prosecution claims are subject to a one-year statute of limitations, which begins to run when the underlying action terminates (*see* Memo at 3). As the final decision in Prior Action 1 was issued over a year before the instant Complaint was filed, the claims premised on Prior Action 1 are barred by the state of limitations and must be dismissed pursuant to CPLR 3211 (a) (5).

As to that branch of the motion to dismiss pursuant to CPLR 3211 (a) (1), defendants present as documentary evidence the transcript of an oral argument held on January 21, 2014 in connection with the motion for summary judgment in lieu of complaint in Prior Action 1(*see*, NYSCEF Doc. No. 27). Defendants seize on a statement the court made during that oral argument that the Eshaghpour Defendants "may have a breach of contract claim arising out of the Settlement Agreement," but that the court would not consider that issue because the claim was not properly before it. Defendants argue that this statement establishes that Eshaghpour had a valid underlying claim, and shows that Prior Action 2 was not, as plaintiffs argue, "slapped together" from "whole cloth" (*see* Memo at 6, NYSCEF Doc. No. 38). Defendants also argue that the court's statement shows the defendants attempted to raise these issues in Prior Action 1 but were thwarted, thereby making it necessary to file Prior Action 2. Accordingly, the case was not filed just to harass (*id.*).

Defendants also rely on the Decision and Order of Honorable Orin R. Kitzes granting the motion to dismiss Prior Action 2 ("Action 2 Decision", attached as Exhibit C to Castro Aff., NYSCEF Doc. No. 28). Defendants point out that the Action 2 Decision did not dismiss Prior Action 2 as frivolous, but instead held that the complaint failed to state a cause of action (*see* Memo at 8).

2. Failure to State a Claim

Defendants also argue the Titan failed to state a claim in that there is no proper allegation that Prior Action 2 was brought with malice.

a. Abuse of Process

Defendants argue that plaintiffs failed to allege any facts with particularity to show improper intent in filing the Prior Actions (*see* Memo at 10). Defendants assert that plaintiffs only state legal conclusions. Further, the mere filing the action is not sufficient, instead "process must be used improperly after it has been issued" *(id., quoting Stoock & Stoock & Lavan v Beltramini*, 157 AD 2d 590, 591, [1st Dept 1990]). Here, plaintiffs fail to make an allegation of abuse after the process was issued. As to the allegations of delay in discovery, defendants state that the complaint itself acknowledges a reasonable excuse for the delay, specifically the Castro Defendants' busy schedule. Defendants also note the Prior Action 2 court never sanctioned or punished the defendants for their behavior.

Defendants also argue that plaintiffs do not allege facts to support their conclusion that Prior Action 2 was filed only to obtain leverage for the Settlement negotiations in Prior Action 1. (*see* Memo at 11). Defendants add that, in any event, such an allegation would be insufficient to support a claim for abuse of process (*id., quoting Stoock & Stoock*, 157 AD2d at 591) and even a collateral objective to obtain negotiating advantage would not be sufficient (*see* Memo at 11).

Finally, defendants maintain that plaintiffs have not alleged misuse of the TW Notice (*id.* at 13).

b. Malicious Prosecution

Regarding the malicious prosecution cause of action, defendants argue that such a claim requires an allegation of malice, and plaintiffs have failed to make such an allegation (*id.* at 14). Nor have plaintiffs pled the required harm beyond the costs of litigation (*see id., quoting Engel v CBS, Inc.*, 93 NY2d 195, 201 [1999]). Also missing are any allegations of plaintiffs' attempts to sell or refinance the property and what damages accrued from the notice of pendency (*Memo* at 16).

B. Plaintiff's Opposition

As to allegations regarding defendants' bad conduct, plaintiffs point to defendants' intentional resistance of plaintiffs' attempts collect on the judgment in Prior Action 1, and to removal

of the TW Notice. Specifically, plaintiffs highlight defendants' failure to produce documents and to produce Eshaghpour for his deposition, failure to respond to motions for contempt and disobeying court orders (*see* Opp. at 1, NYSCEF Doc. No. 43).

1. Statute of Limitations

Plaintiffs assert that the claims for abuse of process based on Prior Action 2 are undisputedly timely as that action terminated on May 11, 2015, and this action was commenced less than a year later, on January 11, 2016. As to Prior Action 1, plaintiffs argue that the statute of limitations which usually starts to run when the underlying action is terminated may begin after that "if the defendants maintain their abusive tactics following the judgment" (*id.* at 11, citing *Honzawa v Honzawa*, 268 AD2d 327, 330 [1st Dept 2000]). Plaintiffs maintain that the statute of limitations did not start running until June 2015, when TC finally collected on the judgment in Prior Action 1 . Plaintiffs contend the running of the statue was tolled because of the defendants' behavior in the enforcement proceedings in Prior Action 1. As to the malicious prosecution claim, plaintiffs contend that the statute must be measured from the May 11, 2015 dismissal of Prior Action 2 (*see* NYSCEF Doc. No. 27). This case was commenced on January 11, 2016, well within the one year period.

2. Documentary Evidence

In response to defendants reliance on the transcript dated January 21, 2014, defendants assert that such documentary evidence is not sufficient to support a motion to dismiss the complaint under CPLR 3211 (a) (1), and further that the transcript is not dispositive of the issues raised (*see* Opp. at 13). Plaintiffs maintain that the merits of Prior Action 2 were not before the court in Prior Action 1 and that there were no relevant findings (*id.* at 14).

Plaintiffs also argue that the Decision and Order in Prior Action 2 shows that Prior Action 2 was meritless as it was based on the documentary evidence of cancellation of the Merrick Notice, the Agreements, and the expiration of the option period (*id.* at 15). Plaintiffs claim the decision supports their position that just because Metropolitan, a non-party, failed to cancel a notice of pendency on unrelated premises does not provide defendants with a basis for filing the TW Notice (*id.*).

3. States a Cause of Action

a. Malicious Prosecution

The complaint alleges that initiation of Prior Action 2, was unfounded (*see* Opp. at 16, citing *Facebook, Inc v DLA Piper LLP* [US], 134 AD3d 610, 614 [1st Dept 2015] ["a plaintiff must allege that the underlying action was filed with 'a purpose other than the adjudication of a claim" and that there was an "entire lack of probable cause in the prior proceeding"]). Plaintiffs argue that Prior Action 2 was based on the Merrick Notice, which expired and was a nullity prior to execution of the Option Agreement on April 27, 2012 and thus constituted a ("patent lack of probable cause" (*sic*]) (Opp. at 17). As to malice, plaintiffs argue this can be shown by inference from the facts and circumstances alleged (*see id.* quoting *Ramos v City of New York*, 285 AD2d 284, 289 [1st Dept 2001]). Plaintiffs assert that the complaint alleges that defendants maliciously commenced and prolonged Prior Action 2 without reasonable grounds; that their sole purpose in doing so was to frustrate TC's ability to obtain judgment on the Note at issue in Prior Action 1; and that defendants' aim was to gain an advantage in the collateral proceeding (*see* Opp. at 17). Plaintiffs also claim they have pled the required special damages, more than the costs of defending a lawsuit, in that defendants filed a notice of pendency which was baseless at its inception (*id* at 18 citing *Chu v Greenpoint Bank*, 257 AD 2d 589, 590 [2d Dept 1999]). The notice of pendency related costs and losses satisfy the requirement, since it "demonstrate[s] interference with [a plaintiff's] property" (Opp. at 18 quoting *Chu*, 257 AD 2d at 590). Further, the notice left TC unable to refinance the TW Premises. Plaintiffs also submit the affidavit of David Saferstein to remedy any omission related to plaintiffs' efforts to refinance the property. Saferstein states that TW was in the process of refinancing when the TW Notice was filed. The plan behind the refinancing was to obtain funds to improve the property and get a more profitable lease. The TW Notice made that impossible (*see* Opp. at 18-19). TW experienced additional special losses from expenses incurred during the unsuccessful refinancing process.

b. Abuse of Process

Plaintiffs argue the TW Notice was regularly issued process, sufficient to support the abuse of process claim (*Opp.* at 20). The complaint alleges that defendants filed the TW Notice to

frivolously encumber title, to force plaintiffs to incur fees, and for the collateral objective of giving an unfair advantage in settlement negotiations in Prior Action 1 (*id.*).

C. Defendants' Reply

In reply, defendants assert a new argument that plaintiffs claim for relief in this case should have been and was, raised in the action before Justice Kitzes, but the parties there stipulated to its withdrawal. Accordingly, plaintiffs should not be allowed to bring the claim here.

As to the statue of limitations defense, defendants distinguish *Honzawa* on the ground that the defendant there was the plaintiff in the underlying case, making that defendant's conduct in the underlying action an abuse of its own process. Here defendants did not file Prior Action 1, so cannot have abused any process in that action (*see* Reply at 2). Accordingly, defendants contend, the statute of limitations bars any claim based on Prior Action 1.

Regarding the malicious prosecution claim, defendants argue that malice can only be inferred where there has been a finding of no probable cause in the underlying action, which did not happen here (*id.* at 3 citing *Facebook*, 23 NYS 3d at 178). Defendants also argue the transcript should qualify as documentary evidence as it is unambiguous, authentic, and the evidence is undeniable (*id.* at 3-4). Defendants note the plaintiffs do not dispute that the Prior Action 2 decision qualifies as documentary evidence, and argue that it supports the defendants' position (*id.* at 5). Defendants also claim to have had probable cause for commencing Prior Action 2, as the expired notice of pendency was still inhibiting them, and would continue to do so until it was cancelled (*id.* at 6, citing *Pacific Lime, Inc., v Lowenberg Corp.*, 77 AD2d 737 [3d Dept1980]).

As to special damages, defendants argue the TW Notice of pendency can only qualify as such damages if the court in the underlying action had found that notice to be baseless and there was no such finding (*id.* at 7). The plaintiffs' inability to refinance the property, according to defendants, is not malicious, but the simply a "natural result of a properly filed notice of pendency" (*id.*).

With respect to the abuse of process claim, defendants reiterate that Prior Action 1 cannot provide a basis for this claim, as defendants did not file the process in that case (*id.* at 8). While certain defendants filed Prior Action 2, defendants argue there was no abuse, as plaintiffs have

acknowledged a valid reason for defendants' discovery delays and the materials were eventually produced (*id.*). Nor was there a finding in Prior Action 2 of defendants' bad faith. Defendants argue that plaintiffs conceded the notice of pendency in that action was proper, as they did not file a motion to dismiss that notice (*id.* at 9-10). According to the defendants, judicial estoppel bars plaintiffs' claim here because that motion would have been the proper response (*id.* at 11).

III. DISCUSSION

A. Standard on a Motion to Dismiss

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; 219 *Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [*citation omitted*]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" *(EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are

not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe* 1, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, *citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B*, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85).

B. Statute of Limitations

As it is undisputed that Prior Action 2 terminated within the one-year limitations period, claims based on that action are timely. Judgment was issued in Prior Action 1 in August 2014, more than one year before this action was filed in January 2016. A satisfaction of judgment in Prior Action 1 was filed on August 10, 2015. While a judgment was entered in that case, it by no means marked the final termination of the case. In fact, most of the conduct complained of in this case occurred in connection with TC's efforts at collection of the judgment. The statute of limitations may be calculated from a different triggering event (*see Honzawa* 268 AD2d at 330 [1st Dept 2000]). In *Honzawa*, it was letters sent by the plaintiff demanding release of certain funds in response to court decisions in the underlying case (*id.*). While "[i]t is long settled that those causes of action accrue 'when plaintiff [s] first become[ ] entitled to maintain the action[,]i.e., when there is a determination favorable to plaintiff[s], notwithstanding the pendency of an appeal'" (*10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc.*, 81 AD3d 1366, 1369 [4th Dept 2011] quoting *Lombardo v County of Nassau*, 6 Misc 3d 836, 840 [Sup Ct 2004]), the conduct complained of in Prior Action 1 occurred after the judgment was entered in that action, and so the cause of action had not accrued at the time of the judgment. Here, the plaintiffs allege actions by the defendants during 2015 to thwart collection of the judgment in Prior Action 1. This complaint was filed on January 11, 2016.

Accordingly, the one-year statute of limitations for that conduct has not yet run, and the claims in this action are timely.

D. Malicious Prosecution

The malicious prosecution claim relates to defendants' actions in filing Prior Action 2 and filing the TW Notice as leverage in connection with Prior Action 1. The elements of malicious prosecution are: "initiation or continuation of a proceeding despite the lack of probable cause, termination of that proceeding favorable to the party there sued and now aggrieved as plaintiff, and a showing of malice in the pursuit of that underlying proceeding" as well as a showing of some special damage to, or interference with, personal or property rights beyond the damages normally attendant upon being sued" (*Honzawa*, 268 AD2d at 329)` It is undisputed that defendants initiated Prior Action 2, and that it was resolved favorably to Titan.

Defendants contend that the documentary evidence shows they had probable cause to file Prior Action 2 and that plaintiffs both failed to plead facts showing any attempt to sell or refinance the property and also failed to show damages. Plaintiffs have remedied the latter omission with the Saferstein affidavit, recounting TW's attempt to refinance the property at the time the TW Notice was filed, making refinancing impossible, resulting in lost refinancing costs and lost opportunities for Titan. As to the question of probable cause for pursuing Prior Action 2, defendants rely on this court's statement on the record in Prior Action 1, when Eshaghpour (through *Castro*) argued that the promissory note at issue was not an instrument for the payment of money only because the settlement agreement that generated the promissory note contained other conditions which had not been met, and Eshaghpour asked the court to consider a possible breach of that underlying settlement agreement (Prior Action 1 tr. 9:5-12:5, Castro aff, exhibit B, NYSCEF Doc. No. 27). The court responded:

> "It sounds, to me, Mr. Castro, that your, client may well have - - and I'm not saying - - I'm not trying to decide - - this case is not performing - - that he may have a breach of contract, claim, arising, out of, the Settlement Agreement.
>
> But what is before me today is something quite narrow, which is the enforcement of a promissory note"

(*id.* at 11:22- 12:3). This comment provides no support to plaintiffs. The first sentence served merely as a postulate in order to dismiss it so as to highlight the issue then before the court. It is neither a finding of fact nor even an opinion as to a possible claim. Even if defendants' interpretation of the quoted language were accepted, it does not utterly refute plaintiffs' claims or definitively dispose of any issues in the current case as CPLR 3211(a)(1) requires.

Defendants also rely on the Order of Justice Kitzes in Prior Action 2, in which that judge dismissed the action, but did not go on to find that the action had been brought without probable cause or that the TW Notice had been improper. Defendants provide no case law supporting the conclusion that merely because a court dismisses claims on their merits without more, the claims must be viewed as having had probable cause. Justice Kitzes' decision is silent on the issue and is not dispositive.

Defendants then point to the Merrick Notice, which had expired (apparently shortly after the filing of Prior Action 2). Defendants claim that the expired Merrick Notice can still provided a basis for the claims in Prior Action 2 because it prevented them from getting financing to exercise the Option (*see* Reply at 6, citing *Pac. Lime Inc. v Lowenberg Corp.*, 77 AD2d 737, 738 [3d Dept 1980]). *Pacific Lime,* however, merely recounts that the Appellate Division has "held that as to parties acquiring and/or perfecting an interest in real property after the expiration of a notice of pendency, the notice would have no effect" but it remains in effect "as to interests acquired and/or perfected during the effective period" (*id.*). Contrary to defendants' argument, once a notice has lapsed, it does not affect any interests acquired after its expiration (*see Polish Nat. All. of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.*, 98 AD2d 400, 405 [2d Dept 1983]). Accordingly, the Merrick Notice is not documentary evidence fully dispositive of the claim, as it is not clear that the expired notice continued to prevent any financing of the affected property.

Finally, plaintiffs have alleged malice and special damages. Outside of the costs of litigation, the TW Notice constitutes interference with plaintiffs' property (*see Chu*, 257 AD2d at 590). As far as defendants argue that such interference qualifies as special damages only if the notice was baseless, that is circular reasoning. If Prior Action 2 and the TW Notice were premised on probable cause, then this claim will fail, making the issue moot. As to malice, plaintiffs have alleged that

defendants continued to pursue Prior Action 2 after termination of the Notice of Pendency, and after there was no probable cause to continue that action, thereby allowing malice to be inferred (*see id.*, *Ramos v City of New York*, 285 AD2d 284, 301 [1st Dept 2001]).

Plaintiffs have pled the elements of malicious prosecution, and the claim survives the motion to dismiss.

E. Abuse of Process

In its broadest sense, abuse of process may be defined as the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process (*see Bd. of Ed. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO*, *38* NY2d 397, 400 [1975]). The elements of abuse of process are: "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Despite some cases supporting the interpretation that the alleged abusive conduct must have occurred after service of process, the Court of Appeals has reminded that "nothing in this Court's holdings would seem to preclude an abuse of process claim based on the issuance of the process itself," although that issue has yet to be definitively resolved (*Parkin v Cornell Univ., Inc.*, 78 NY2d 523, 530 [1991]).

In this case, process which is the first element, is undisputed. As to use of process in a perverted manner, plaintiffs have alleged that defendants filed the TW Notice in order to harass them and obtain leverage in Prior Action 1. Plaintiffs also allege the defendants engaged in a litigation strategy of extended stalling in order to place burdens on the plaintiffs (*see Ginsberg v Ginsberg*, 84 AD2d 573 [2d Dept 1981]). From the allegations in the complaint, intent to do harm may be inferred. Accordingly, plaintiffs have alleged the elements of abuse of process, and this claim may not be dismissed.

F. New Argument in Reply

While "the function of a reply . . . is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in

support of the motion, (*see Ritt by Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562, [1st Dept 1992]) the court has discretion to consider such an argument (*see Eujoy Realty Corp. v Van Wagner Communications LLC*, 22 NY3d 413, 422, [2013] ["even if Eujoy had, in fact, presented a new legal argument about the lease to Supreme Court in a reply brief, neither that court nor the Appellate Division would have been prohibited from considering it"]). Here, defendants raise a new argument in their reply that the plaintiffs already raised and withdrew these claims in Prior Action 2. Defendants cite to the Prior Action 2 Settlement Agreement (Castro aff, exhibit F, NYSCEF Doc. No. 31), but have not cited to any particular provision, and upon its review of the Settlement Agreement, the court has not found any relevant term. The new argument is untimely. Moreover, the agreement provides no support to the defense.

Accordingly, it is hereby

ORDERED that the motion of defendants to dismiss the complaint is denied; and it is further

ORDERED that the third cause of action for attorney misconduct pursuant to Judiciary Law § 487 is withdrawn on consent.

This constitutes the decision and order of the court.

DATED: October 13, 2016

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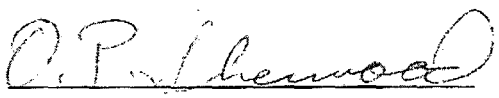

O. PETER SHERWOOD

J.S.C.