SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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70-35 113TH STREET HOLDINGS, LLC,

Plaintiff,

Index No.: 701293/2021

-against-

Before the Honorable Leonard Livote, J.S.C.

AUBERGE GRAND CENTRAL LLC

Defendants.
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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

Introduction

This memorandum is respectfully submitted on behalf of plaintiff 70-35 113th St Holdings LLC in opposition to defendant's Order to Show Cause, which seeks an order: (i) dismissing plaintiff's complaint in its entirety, with prejudice, (ii) ordering the removal, expungement, vacation and dismissal of the notice of pendency filed by plaintiff, (iii) barring plaintiff, whether suing as 70-35 113th St Holdings LLC or 70-35 113th Street Holdings LLC, its agents and representatives, including but not limited to Sam Sprei, Chaim Miller and Chaim Babad, from filing another notice of pendency on the subject premises in any action or proceeding without prior court approval, (iv) awarding defendant legal fees, costs and disbursements, (v) awarding sanctions and costs against plaintiff and plaintiff's counsel, and (vi) granting defendant such other and further relief as may be just and proper under the circumstances.

Preliminary Statement

Defendant's order to show cause must be denied in its entirety.

The instant action was commenced pursuant to CPLR §3002, which provides that "[a] judgment denying recovery in a [prior] action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed." In other words, CPLR §3002 explicitly authorizes a subsequent action for reformation of contract, despite the issuance of a final judgment in a prior action. Accordingly, defendant's res judicata and collateral estoppel arguments are misplaced in the context of a statutorily authorized contract reformation action. Clearly, the New York State Legislature, by enacting CPLR §3002, paved the way for a new action to be commenced, seeking reformation of the underlying agreement, even after the issuance of a judgment in a prior action. Defendant is advocating for this Court to take a position (dismiss the instant contract reformation action) which would render a provision of the CPLR utterly meaningless.

Moreover, contrary to defendant's assertions, this action has been timely commenced within the applicable statute of limitations, as tolled by the Governor's Executive Order No. 202.8, *et seq*., through No. 202.67. Additionally, defendant's counsel accepted service of the notice of pendency in this action via NYSCEF and further acknowledged its filing by virtue of appearing in this action as well as making two applications (one under Index No. 707503/2015 as well as the instant motion) to dismiss the complaint and vacate the notice of pendency. It is disingenuous for defendant's counsel to now argue that the notice of pendency must be vacated because it was not physically served upon his client.

Finally, there is no legal or factual basis for the imposition of sanctions or an award of costs. An action commenced pursuant to a specific statutory provision of the CPLR cannot, by definition, be considered frivolous.

Facts and Procedural Background

The valuable commercial property which is the subject of this litigation is the former site of Parkway Hospital located at 70-35 113th Street, Forest Hills, New York (the "Property"). When Parkway Hospital shut down, the Property remained saddled with a mortgage debt of approximately $10.5MM (the “Mortgage Debt”). The Mortgage Debt was held at the time by Medical Capital Holdings. The defendant, Auberge purchased the defunct hospital’s Mortgage Debt in 2012 through a Bankruptcy proceeding at a steep discount for the sum of $6.5MM.

Prior to Auberge’s purchase of the Mortgage Debt, a foreclosure proceeding had already been commenced in the Queens County Supreme Court (Index No. 489/2011). Auberge was substituted in as the plaintiff in the foreclosure proceeding. A Judgement of Foreclosure was entered in the foreclosure proceeding on or about May 8, 2013, reflecting a sum due to Auberge, as plaintiff in the amount of $14,862,239.38.

A foreclosure sale was held on January 10, 2014 by the Referee, at which plaintiff bid $22-million to acquire the Property. Plaintiff’s manager, Samuel Sprei was invited to the foreclosure sale by Auberge’s then-principal, Pyotr Yadgarov (“Yadgarov”) and encouraged to bid. A memorandum of sale was executed and Plaintiff immediately remitted a down payment of $2.2MM.

Pursuant to the Terms of Sale, a closing was originally scheduled for February 10, 2014. The closing was first delayed by legitimate title issues raised by Plaintiff’s title companies. These title issues are well-documented. There were five adjournments of the closing date between January 10, 2014 and May 29, 2014.

In order to secure the aforementioned adjournments/postponements of the closing, and to satisfy Auberge, plaintiff was caused to remit to Auberge additional two additional deposits

($1MM and $500k) totaling $1.5MM. In all, plaintiff paid to Auberge $3.7MM in deposit monies. In addition to deposit monies, plaintiff was also caused to pay to Auberge two extension fees – one fee in the sum of $300,000 and a second fee in the sum of $500,000. These two extension fees totaled $800,000. When the deposit monies and extension fees are added, plaintiff eventually paid $4.5 million in down payments and extension fees to Auberge between January 10, 2014 (the date of the foreclosure sale) and May 29, 2014 (the date Auberge attempted to default the plaintiff). The entirety of the $4.5MM went directly to defendant, Auberge. None of these monies have been returned. This is undisputed by Auberge.

Notably every one of the five adjourned dates between January 10, 2014 and May 29, 2014 were declared to be "time of the essence", however, none of these dates were treated as such. Every closing prior to May 29, 2014 was declared "time of the essence", yet every date was adjourned without any consequence to either party. Neither party acted as if time was of the essence.

Title did not close on May 29, 2014 because Auberge's then-principal, Yadgarov reneged on a promise to provide $3MM in bridge funding to plaintiff at this closing. Auberge would wrongfully lay blame on the plaintiff for this closing not taking place. That said, the reason why title did not close on May 29, 2014 is inconsequential. Plaintiff submits that whatever the reason why title did not close on May 29, 2014, and whoever was at fault, it matters not. Regardless of why title did not close on May 29, 2014, what is important is that the parties revived the transaction and kept up negotiations for quite some time afterward. The defendant, Auberge continued to treat the plaintiff as the successful bidder well past the May 29, 2014 "default".

On May 29, 2014, Auberge, through the Foreclosure Referee, attempted to wrongfully

"default" the plaintiff. The "default" declaration was made by Auberge's counsel as well as the Referee. There was no judicial declaration or finding of a default, just a self-serving letter drafted by Auberge's counsel and signed by Referee.

Immediately following the May 29, 2014 "default", **Auberge continued to engage in significant negotiations with the plaintiff over the next weeks and months, discussing finance options and future proposed closing dates, etc**. **These negotiations are evidenced by dozens of emails and draft loan documents. The parties even scheduled a further closing date on June 12, 2014.**

Despite extensive further negotiations between the parties following the May 29, 2014 "default", and the scheduling of a further closing date, no further "defaults" were ever declared by Auberge and/or the Referee. Instead, Auberge simply walked away from the plaintiff's successful bid and coordinated a new foreclosure sale through the Referee. Auberge, in contravention of plaintiff's rights as the successful bidder, arranged for a second foreclosure auction on August 8, 2014 where Auberge acquired title to the Property in its own name for $1MM. Auberge even used plaintiff's lender, Madison Capital, to help finance the acquisition. Auberge now holds title to the Property is its own name, pursuant to a Referee's Deed recorded on July 18, 2016. The Property has a current approximate value in excess of $30MM. Upon information and belief, the defendant is currently under contract to sell the property for approximately $32MM.

Of prominence in this litigation is the question of whether the May 2014 "default" was properly declared by Auberge, and whether the continued negotiations by the parties after the May 2014 "default" served to revive the transaction. In accordance with this line of reasoning, the instant action involves a claim for reformation of contract. Plaintiff seeks to have the Court

reform the Terms of Sale to reflect the parties' actions and conduct.

The parties litigated a prior action (Index No: 707503/2015) (the "Prior Action") which was eventually tried before Justice Leonard Livote in February of 2020, without a jury. In the Prior Action, plaintiff made claims only for specific performance and breach of contract. Plaintiff sought to compel Auberge to perform pursuant to the Terms of Sale and convey the Property to the plaintiff.

Plaintiff, 70-53 113 Holdings LLC, is a single purpose entity formed in June 2014. Its sole purpose was to take title to this very valuable commercial Property following plaintiff's successful foreclosure bid. Samuel Sprei was plaintiff's manager and authorized representative. The two (2) sole members of plaintiff are Chaim Miller and Chaim Babad, who each hold a 50% membership interest in plaintiff. An individual by the name of Wing Fung Chau, who is not a party to this litigation, was supposed to become a proposed, putative 35% minority membership interest holder in plaintiff, but never did – the deal with Mr. Chau never materialized.

Shortly ***after*** the plaintiff commenced the Prior Action, and unbeknownst to plaintiff at the time, and without any authority, authorization or approval from plaintiff to do so, on December 30, 2015, non-party Wing Fung Chau (who never was a member of the plaintiff LLC) commenced his own personal action against Auberge (the "Chau Action"), by filing a summons and complaint, by which Wing Fung Chau sought to recover from Auberge the $1-million that he had contributed to the original $2.2-million down payment that was paid to the Referee on January 10, 2014, and which was eventually paid over to Auberge.

Although Wing Fung Chau's complaint was filed by Wing Fung Chau in his individual capacity, by counsel separately retained by Wing Fung Chau, to recover from Auberge Wing Fung Chau's personal $1-million contribution to the initial $2.2-million down payment that

Plaintiff paid at the January 10, 2014 auction, the caption of Wing Fung Chau's filings added that his filings were purportedly also "on behalf of" plaintiff, even though no authority had ever been granted to Wing Fung Chau to do so.

Neither plaintiff, nor its actual members or managers, ever participated in, supported or had any control as to how or why the Chau Action was litigated, and neither plaintiff nor its members or managers ever participated in any court proceedings related to the Chau Action or sought or received any benefit from it. The Chau Action was completely unauthorized, as concerns the plaintiff LLC.

Counsel for Auberge sought, by virtue of a pre-answer motion, a dismissal of the Prior Action on the basis of "another action pending" pursuant to 3211(a)(4). That motion was *twice denied* by Justice Velasquez (2/15/2017 and 11/21/2017), who noted in her decisions that the Chau Action was "commenced after this action" and involved "a different plaintiff".[1] [NYSCEF Doc. Nos. 22 and 57, Index No: 707503/2015].

On July 21, 2017, Justice Purificacion issued a decision dismissing the Chau Action. Auberge's counsel moved to dismiss the Prior Action, on the basis of the Chau Action (involving a different plaintiff) having been dismissed. This Court (Justice Velasquez) denied that motion as well. [NYSCEF Doc. No. 148, Index No: 707503/2015].

From February 20, 2020 through March 11, 2020, this Court held a bench trial in the Prior Action, and on December 1, 2020 issued a decision after trial rejecting Plaintiff's claims for specific performance and breach of contract. The Court directed that "Judgment be entered accordingly." [NYSCEF Doc. No. 173, Index No: 707503/2015].

[1] In his motion papers, counsel for Auberge repeatedly attempts to associate the Chau Action with the plaintiff herein. Clearly, this is a transparent effort to make it seem that the instant action is the third action commenced by plaintiff, when it is actually only the second action. Surely, the Court will see through this transparent charade.

In January of 2021 plaintiff commenced the instant action seeking, *inter alia*, reformation of the Terms of Sale based upon the fact that the parties wholly disregarded the "time of the essence" provision in the Terms of Sale. Plaintiff submits that the parties conducted themselves as if the Terms of Sale did not contain a "time of the essence" provision. The parties disregarded the provision in the Terms of Sale which prohibited an adjournment of the closing for more than ten (10) days beyond February 10, 2014. The parties conducted themselves as if the Terms of Sale did not contain a prohibition against adjournments of more than ten (10) days beyond February 10, 2014. The parties disregarded the fact that the Terms of Sale called or an all cash transaction, with no finance contingencies. The parties conducted themselves as it the Terms of Sale provided for partial financing to be provided by Auberge.

This action seeks to have the Terms of Sale reformed to reflect the clear, manifest intent of the parties. This action also presents new causes of action sounding in equity and *quasi* contract – claims which were not presented and therefore not decided in the Prior Action.

Argument

I. The *Ex-Parte* Interim Stay/TRO Should Be Vacated

When the Court (J. Ventura) signed defendant's order to show cause on February 23, 2021 (the very same day the application was submitted), it also granted defendant's request for an interim stay/TRO pending a determination of the order to show cause. However, the plaintiff was not given an opportunity to be heard on the emergency application before the interim stay/TRO was issued. The reason the plaintiff was denied the right to be heard was because defendant's counsel failed to provide adequate notice of his application as required by Uniform Rule 202.7(f) and 202.8(e).

Defendant's counsel, Richard Freeman sent an e-mail notification of his "emergency" filing at 9:42PM on the night of Monday, February 22, 2021 (see, NYSCEF Doc. 8). Mr. Freeman's late-night notification advised that his emergency order to show cause would be filed the next morning "prior to or at the opening of business" at 9:00AM. It would appear that the late-night notification, coupled with the early-morning filing, was designed by counsel to ensure that the plaintiff would have no time to see and react to the notification before the Court entertained the application for interim relief. This is precisely what happened. Mr. Freeman's late-night email was not seen until after 9:00AM on the morning of the 23rd – the Court apparently signed the order to show cause that morning, without the plaintiff having an opportunity to be heard.

Uniform Rule 202.7(f) provides in relevant part as follows:

> (f) Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made ***in a manner sufficient to permit the party an opportunity to appear in response to the application***. [Emphasis added]

Uniform Rule 202.8(e) provides in relevant part:

> Unless the moving party can demonstrate significant prejudice by reason of giving notice, or that notice could not be given despite a good faith effort to provide notice, ***a temporary restraining order should not be issued ex parte***. Unless excused by the court, ***the applicant must give notice of the time, date and place that the application will be made in a manner, and provide copies of all supporting papers, to the opposing parties sufficiently in advance to permit them an opportunity to appear and contest the application.*** Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information

> required by this section, an affirmation demonstrating either that: (a) notice has been given; or (b) notice could not be given despite a good faith effort to provide it or (c) there will be significant prejudice to the party seeking the restraining order by giving of notice. [Emphasis added].

Mr. Freeman clearly designed his notification (sent after 9PM in the evening of the 22nd) such that plaintiff would not see the notification until the next morning after it was submitted. Mr. Freeman certainly did not provide notification "*in a manner sufficient to permit the party an opportunity to appear in response to the application"* (202.7(f)), nor did he *"provide copies of all supporting papers to the opposing parties sufficiently in advance to permit them an opportunity to appear and contest the application"* (202.8(e)). In this regard, Mr. Freeman disregarded the mandates of Uniform Rule 202.7(f) and 202.8(e). His efforts were successful in that he secured an *ex-parte* stay without his adversary having an opportunity to be heard on the application.

The practical effect of Mr. Freeman's disregard for the notification requirements of Uniform Rule 202.7(f) and 202.8(e) is that the stay issued by the Court is academic. The stay provision of the order to show cause reads as follows:

> IT IS HEREBY FURTHER ORDERED, that sufficient cause being shown, and during the pendency and hearing of the instant application: (a) Restraining and enjoining Plaintiff, whether suing as 70-35 113th St Holdings LLC or 70-35 113th Street Holdings LLC, its agents and representatives, including but not limited to Sam Sprei, Chaim Miller and Chaim Babad, from filing a notice of pendency on the subject premises in any action or proceeding pending the hearing and determination of Defendant's application herein;

When the Court issued the stay on February 23, 20121, the plaintiff had already filed a notice of pendency in this action (NYSCEF Document No. 1). The notice of pendency was filed

on January 19, 2021, more than a month before Mr. Freeman even submitted his order to show cause. The Court's stay – issued on February 23, 2021 – by its very language, operates prospectively, and not retroactively. Thus, the February 23, 2021 stay has no effect on the notice of pendency filed thirty-five days earlier on January 19, 2021. The stay provision is therefore academic and should not have been issued. However, for as long as the stay remains in effect, it creates confusion.

For all of the foregoing reasons, the *ex-parte* interim stay/TRO issued on February 23, 2021 should be vacated by the Court.

II. Defendant's Motion Papers Violate The Word-Count Limit Of Uniform Rule 202.8-b(a)

Defendant's supporting papers run afoul of the newly adopted Uniform Rule 202.8-b(a) which limits the length of papers to 7,000 words. Defendant's *Memorandum of Law in Support of Defendant's Order to Show Cause to Dismiss* (NYSCEF Doc. No. 5) is 10,309 words in length. Excluding the caption, the document is still well over 10,000 words, in clear violation of 202.8-b(a).

As far as plaintiff is aware, when defendant's counsel filed his order to show cause, he did not seek permission from the Court to submit a 10,000 page memorandum nor did he attach the required word-count certification as mandated by 202.8-b(c).

Because defendant's order to show cause was submitted on an emergency basis (without requisite notice as required by UR 202.7(f)) and signed by the Court within 24 hours of its submission (without the opportunity to have oral argument on the TRO), there was no opportunity to object to counsel's procedurally defective submission before the Court signed the OSC.

Respectfully, if the Court were to accept defendant's unauthorized motion papers, it would be disregarding the newly adopted Uniform Rule 202.8-b(a). It is respectfully submitted that defendant's motion papers should be rejected. As a consequence thereof, the defendant's order to show cause should be denied.

III. This Action Was Timely Commenced Within The Applicable Statute of Limitations

The parties are in agreement that the claims asserted in the instant action are subject to a six year statute of limitations. CPLR §213(6). Where the parties appear to disagree is calculating the date when that statute of limitations expires.

Assuming, for the purposes of this argument, that the accrual date offered by defendant's counsel – May 29, 2014 – is correct, the six year statute of limitations would have expired on May 29, 2020, but for the COVID-19 global pandemic. However, the applicable statute of limitations was tolled for eight months during the pandemic. The statute of limitations was initially tolled by Executive Order No. 202.8 through April 19, 2020. Executive Order No. 202.8 reads in relevant part as follows:

> In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby **tolled** from the date of this executive order until April 19, 2020. [Emphasis added].

The Governor's SOL toll was later extended by issuance of subsequent Executive Orders, through and including Executive Order No. 202.67, which carried the toll through

November 3, 2020.

In all, there was a 241 day toll period. During this 241 day period, the statute of limitations for this action (and every other civil action in the State of New York) was tolled. When this toll is considered, and tacked onto the six-year statute of limitations, it is clear that this action was indeed timely commenced.

IV. Defendants Counsel Agreed to Accept Service of the Notice of Pendency; Appeared in This Action; and Filed Two Motions to Cancel the Notice of Pendency

On January 20, 2021, just one day after the instant action was filed and commenced, defendant's counsel brought an order to show cause under the index number and caption of the Prior Action, seeking the very same relief counsel now seeks pursuant to the instant order to show cause, i.e., a dismissal of this action, a cancellation of the notice of pendency, an injunction, costs and sanctions. [NYSCEF Doc. Nos. 191 through 199, Index No: 707503/2015]. On January 20, 2021, after hearing argument from all parties, Justice Leonard Livote declined to sign defendant's order to show cause. [NYSCEF Doc. No. 200, Index No: 707503/2015].

As evidenced by the presentment of defendant's order to show cause within 24 hours of commencement of the instant action, defendant and defendant's counsel were fully aware of the fact that a notice of pendency had been filed against the Property. Had the defendant and its counsel not been aware of the fact that a notice of pendency was filed, they certainly would not have been capable of e-filing an elaborate order to show cause seeking cancellation of the notice of pendency.

Moreover, in the course of communications between counsel, defendant's counsel acknowledged the filing of the instant complaint and notice of pendency and orally agreed to

accept service thereof through NYSCEF, dispensing with the need to have a process server physically deliver the documents to the defendant's office during the pandemic.

There can be no question that defendant's counsel accepted service of the notice of pendency in this action via NYSCEF and further acknowledged its filing by virtue of appearing in this action as well as making two applications (one under Index No. 707503/2015 as well as the instant motion) to dismiss the complaint and vacate the notice of pendency. It is disingenuous for defendant's counsel to now argue that the notice of pendency must be vacated because it was not physically served upon his client during an ongoing global pandemic.

It is also disingenuous for defendant's counsel to argue that plaintiff "has not taken any actual steps to prosecute or otherwise advance this action." (Defendant's Memorandum of Law, NYSCEF Doc. No. 5 at page 22). An action was commenced and the defendant has made a pre-answer motion to dismiss. Defendant's counsel knows (or should know) full well that there are no further steps plaintiff can take to prosecute the action unless and until the pending motion to dismiss is heard and decided. It is only after the motion to dismiss is decided that the defendant will be required to answer the complaint and discovery proceedings may commence.

V. The Doctrines of Collateral Estoppel and Res Judicata are Inapplicable

The defendant's arguments for dismissal of this action based upon the doctrines of *res judicata* and collateral estoppel are misplaced and demonstrate a misapprehension of CPLR §3002 and its application.

Defendant argues that the issuance of a final judgment in the prior action represents a bar to the instant action. This argument is entirely inconsistent with CPLR §3002, which explicitly authorizes a subsequent action for reformation of contract, despite the issuance of a final

judgment in a prior action.

CPLR § 3002 (d) provides in relevant part as follows: "A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed." N.Y. C.P.L.R. 3002 (McKinney). Under the law of reformation of contract, where the words used in a contract do not reflect the parties' actual intent thereunder, as manifested by their conduct, the Court may change the language of the contract to reflect the parties' actual intent.

It was the clear, manifest intention of the parties to the Terms of Sale that: (i) with respect to the closing of the foreclosure sale, time was not of the essence; (ii) adjournments and postponements of the closing date were liberally available without consequence to any party; and (iii) Auberge would be providing some level of financing to assist plaintiff with the purchase of the Property. Accordingly, the Court should reform the Terms of Sale to reflect the clear, manifest intent of the parties.

Upon reforming the Terms of Sale to reflect the clear, manifest intent of the parties, the Court should then award plaintiff specific performance, and direct a sale of the Property to plaintiff in accordance with the reformed Terms of Sale.

If defendant's *res judicata* and collateral estoppel analysis were accurate, it would render CPLR §3002 utterly meaningless. If defendant's issue and claim preclusion arguments were accepted by the Court, then no action commenced under CPLR §3002 could ever survive a motion to dismiss. That would make no sense. Clearly, the New York State Legislature, by enacting CPLR §3002, paved the way for a new action to be commenced, seeking reformation of the underlying agreement, even after the issuance of a judgment in a prior action. This Court cannot take a position which would render a provision of the CPLR utterly meaningless.

The Official Practice Commentaries to CPLR §3002 provide the following insight, which is very instructive:

> If plaintiff sues on a contract and fails in the action, plaintiff is not precluded from later bringing suit to reform the contract and then attempting to enforce it as reformed. That is what CPLR 3002(d) provides; the subdivision is identical to its predecessor in section 112-d of the old Civil Practice Act. But any issue decided between the parties in the first suit for breach of the written contract may, of course, be entitled to collateral estoppel in the reformation action if it should prove relevant there. **The assumption of the statute is that the question of reformation was not before the court in the first action, so that it is unlikely that any issue decided there will bind the parties when the later suit goes into the question of whether or not the contract should be reformed.** [Emphasis added]

C3002:23 Action on Contract and to Reform Same.

The Court of Appeals has held that two requirements must be satisfied before the doctrines of collateral estoppel and *res judicata* may be invoked: (1) the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and (2) the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination. *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455 (1985). The party seeking the benefit of collateral estoppel or *res judicata* has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. *Schwartz v. Public Administrator,* 24 N.Y.2d 65, 73 (1969).

Because the parties to the instant action are identical to the parties in the prior action, the only issue relevant to the Court's analysis here should be the first requirement -- whether the defendant can establish that the issue to be decided in the instant action is identical to the issue or

issues decided in prior action. Clearly, the defendant cannot make such a showing. By definition, a reformation of contract claim cannot be identical to the claims made in a prior action. In this regard, reference is made once again to the Official Practice Commentaries to CPLR §3002: "…reformation was not before the court in the first action, so … it is unlikely that any issue decided there will bind the parties when the later suit goes into the question of whether or not the contract should be reformed." C3002:23 Action on Contract and to Reform Same.

Defendant argues that " '[T]he doctrine of collateral estoppel, a narrow species of res judicata, precludes a party from relitigating in a subsequent action or proceeding *an issue clearly raised in a prior action or proceeding and decided against that party or those in privity*, whether or not the tribunals or causes of action are the same.' *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500 (1984) (*emphasis added*)." (Defendant's Memorandum of Law, NYSCEF Doc. No. 5 at page 19). The point of law is correct; however, defendant's application is misplaced. Since plaintiff never made a contract reformation claim in the Prior Action, that claim could not have been decided. The Court could not have "decided" a claim that was never raised. The same logic applies to the plaintiff's quasi-contract claims, which were not presented in the Prior Action, and therefore, not decided. This obliterates the defendant's collateral estoppel argument.

It is well established that, only where causes of action are inconsistent and alternate remedies are mutually exclusive will an action be barred by the doctrine of election of remedies. See, *Petchanuk v. Mohisick*, 130 N.Y.S.2d 537, (S. Ct., 1954). Moreover, it has been held that the doctrine is a harsh rule, which must not be extended. See, *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 291, 130 N.E. 295 (1921). Under the facts herein, it is clear that the claims made by the plaintiff in the Prior Action and those made in the instant action are not inconsistent.

Defendant relies heavily upon *Falkowski v Metro. Life Ins. Co*., 175 Misc. 878, 881, a lower court (Erie County) decision from 1941 for the proposition that the CivilPractice Act § 112-d, which was the predecessor statute to CPLR §3002(d), "was not made to allow litigants another chance at a case by just changing their cause of action and that the doctrine of res judicata would bar re- litigation on allegations that, *much like in the instant case at bar*, were already fully litigated in a prior proceeding." (Defendant's Memorandum of Law, NYSCEF Doc. No. 5 at page 16). However, several more recent decisions, some of which come from the Appellate Division, cast doubt on the reasoning in the *Falkowski* decision from 80 years ago.

In *Scheer v. Nething*, 282 A.D. 737, 738, 122 N.Y.S.2d 270, 272 (1953), decided by the Appellate Division some twelve years after *Falkowski*, the Second Department held that "[s]ince the case of *Steinbach v. Relief Fire Ins. Co*., 77 N.Y. 498, was decided and, in a measure because of that decision, section 112–d of the Civil Practice Act has been enacted whereby it is provided that an adverse judgment in an action on a contract is not a bar to an action to reform the contract. Therefore, the motion to dismiss the complaint should not have been granted on the ground that the determination in bankruptcy was res judicata." (Internal citations omitted).

In a 1967 case (twenty six years after *Falkowski*) the Third Department held as follows: "Appellants assert that the present action is barred by Res judicata (CPLR 3211, subd. (a), par. 5). It is clear, however, as Special Term properly noted that the present action for reformation of certain shareholders' agreements, certificates of incorporations and by-laws on the grounds of mutual mistake, mistake of the scrivener or mistake of the respondent and fraud of the appellants is a different cause of action from that previously asserted in which respondent sought to assert certain rights pursuant to such documents as then constituted. Accordingly, the prior judgment is not a bar to the present action (CPLR 3002, subd. (d); e.g., Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209; 3 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3002.09, vol. 5, par. 5011.14)."

Weissman v. Friend, 29 A.D.2d 599, 599, 285 N.Y.S.2d 906, 906–07 (3rd Dept., 1967)

Finally, in another Third Department decision from 1977, the Appellate Division held that "[a] final judgment in one action, however, will be given res judicata effect in a subsequent action only where the causes of action are the same (*Stoner v. Culligan, Inc*., 32 A.D.2d 170, 300 N.Y.S.2d 966; *Weissman v. Friend*, 29 A.D.2d 599, 285 N.Y.S.2d 906)" *Weisz v. Levitt*, 59 A.D.2d 1002, 1002, 399 N.Y.S.2d 720, 721 (1977).

It is abundantly clear that the holding in the 1941 lower court *Falkowski* decision, upon which the defendant relies so heavily, is of little to no value given the more recent decisions handed down by the Appellate Divisions of the Second and Third Departments.

VI. Costs and Sanctions are Not Warranted

The imposition of costs and sanctions (two distinct concepts)[2] is governed by 22 NYCRR §130-1.1, *et seq*. Section 130-1.1(a) provides as follows:

> The court, in its discretion, may award to any party or attorney 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. *In addition to or in lieu of awarding costs*, the court, in its discretion *may* impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. [Emphasis added]

Section 130-1.1(c) further provides:

> For purposes of this Part, conduct is frivolous if:

[2] Defendant erroneously argues in its memorandum in support of its order to show cause that "sanctions may come in two forms…" This is incorrect. Sanctions and costs are separate and distinct concepts.

> (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.

Although the defendant generally characterizes the filing of the instant complaint as frivolous, defendant fails to specifically identify the particular subsection(s) of 130-1.1(c) under which it makes this request for costs and sanctions. We are all left to guess.

Defendant does not seem to allege that there has been an assertion of false material facts. Accordingly, we can eliminate subsection (3) of 130-1.1(c). That leaves only subsections (1) and (2) to deal with. Both subsections will be addressed.

Under subsection (1) of 130-1.1(c), conduct during litigation is frivolous and may be subject to the imposition of a sanction when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the 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; or it asserts material factual statements that are false. *Perna v. Reality Roofing, Inc.*, 122 A.D.3d 821, 822, 996 N.Y.S.2d 692, 693 (2nd Dept., 2014); *Keyspan Generation, LLC v. Nassau County*, 118 A.D.3d at 954, 991 N.Y.S.2d 46 (2nd Dept., 2014).

Here, it cannot be said that the commencement of a new action (and the accompanying notice of pendency) was frivolous. Simply stated, the new action was specifically commenced pursuant to CPLR §3002, which statutorily authorizes such an action. It simply cannot be argued that an action which is explicitly authorized by the CPLR is without merit.

The same reasoning and logic applies when considering subsection (2) of 130-1.1(c). A statutorily sanctioned action, commenced under the authority of a statute cannot be said to be

"undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." The plaintiff exercised its statutory right to bring this new action pursuant to CPLR §3002(d).

Moreover, the imposition of monetary sanctions is a drastic remedy, reserved for the most egregious conduct. Consider, for example *T & S Med. Supply Corp. v. Omni Indem. Co.,* 62 Misc. 3d 131(A), 112 N.Y.S.3d 429 (N.Y. App. Term. 2018), where the Appellate Term, on its own motion, directed counsel for the respective parties to show cause why an order should not be made imposing sanctions and costs, if any, against plaintiff's counsel pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (c) for conduct which the court noted, "appears to be frivolous". The Appellate Term in *T & S Med. Supply Corp.* based its action on the following observation:

> Since 2013, plaintiff and/or other providers represented by plaintiff's counsel have been before this court more than 20 times in similar actions wherein these providers, while represented by plaintiff's counsel, have made the same or essentially the same arguments which plaintiff raises in the instant appeal (citations omitted). Although defendant has prevailed in each appeal, plaintiff's counsel continues to advance essentially the same arguments notwithstanding the fact that defendant's appellate brief expressly notes that this court has previously considered and rejected the arguments put forth by plaintiff's counsel and cites every such prior appeal. As plaintiff's counsel has persisted and raised the same arguments in the instant appeal, we direct counsel for the respective parties to show cause why sanctions should or should not be imposed against plaintiff's counsel (*see Flushing Expo, Inc.*, 116 AD3d 826; *Ram v Torto*, 111 AD3d 814).

T & S Med. Supply Corp. illustrates the extreme nature of the conduct that it should take to trigger a court to consider the imposition of sanctions. The Appellate Term, clearly aware of the pattern of conduct exhibited by counsel in that case, did not act after one, three, five,

ten or even fifteen instances. It took twenty instances of making the very same baseless legal argument before the Court acted and directed a hearing on the imposition of sanctions.

Here, by sharp contrast, counsel for the defendant requests that the Court consider the imposition of both costs and sanctions based upon the actions of plaintiff in commencing an action specifically authorized pursuant to CPLR §3002. There is simply no basis or merit to defendant's request.

Conclusion

In light of the foregoing, defendant's motion should be denied in its entirety.

Dated: Brooklyn, New York
April 7, 2021

Respectfully submitted,

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CERTIFICATION PURSUANT TO UNIFORM RULE 202.8-b

I hereby certify that this Memorandum of Law, which contains 6,687 words, excluding the caption, counsel's signature block, and this certification, complies with Uniform Rule 202.8-b.

Dated: Brooklyn, New York
April 7, 2021

Respectfully submitted,

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