SUPREME COURT: STATE OF NEW YORK
COUNTY OF MONROE

THE ESTATE OF EUGENE JASON
d/b/a CREATIVE FUNDING

Plaintiff

INDEX NO.
5729/2009

-against-

CR GROUP; BELAIR FUNDING CORPORATION; NORTHSTAR HOLDING, LLC; ACR GROUP, LLC; WSR, LLC; M&T MORTGAGE CORPORATION; PHILLIPS LYTLE, LLP; MONROE DEVELOPMENT, LLC; AL SPAZIANO, TOWN OF SWEDEN; JOHN DOE / JANE DOE; ABC CORP.,

Defendants

Assigned Justice:
Hon.

MEMORANDUM OF LAW ON BEHALF OF THE TOWN OF SWEDEN

FIX SPINDELMAN BROVITZ & GOLDMAN P.C.

By: _____
Reuben Ortenberg, Esq., of counsel
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PRELIMINARY STATEMENT

The Town of Sweden has been named as a defendant in a mortgage foreclosure action brought by the estate of a deceased member of a limited liability company which owns property on which the Town Planning Board has approved a residential subdivision and a site plan. This Memorandum of Law is submitted in support of the motion of the Town of Sweden for an order and judgment dismissing the within action, as to the Town of Sweden. The Town, which has no interest or right with respect to the real property subject to the mortgage, has been made a party defendant solely by reason of its holding funds drawn down on a letter of credit issued to assure the installation and completion of public improvements required by the subdivision and site plan.

FACTS

The defendant Town of Sweden ("Town"), by its Planning Board, approved a subdivision and site plan for a residential development know as "*The Woods at Sable Ridge."* The real property on which the subdivision is to be developed is, upon information and belief, owned by WSR, LLC, a New York limited liability company, of which Eugene Jason, the plaintiff's decedent, was a member. The complaint alleges that the plaintiff (the Estate of Eugene Jason, doing business as Creative Funding) holds a mortgage secured by the *Woods at Sable Ridge* property.

The complaint names the Town of Sweden as a party defendant, alleging that the Town is a

> ***"Municipality possibly claiming an interest in the property being foreclosed and holding certain funds payable under the above Mortgage to M&T Mortgage***

Corporation, in order to improve the property." **(**See Exhibit A, the Complaint, par. 7 and Schedule A)

Pursuant to the Town of Sweden Subdivision Regulations (§A177-16), a developer of a residential subdivision is required to post a letter of credit in an amount established by the planning board, naming the Town as beneficiary, in order to assure the existence of funds to install or complete installation of public improvements in the subdivision which are required by the approved site plan to be installed (See affidavits of Supervisor John H. Milner and. of Reuben Ortenberg, Esq., submitted herewith).

ARGUMENT

POINT I

THE TOWN OF SWEDEN IS NOT A PROPER PARTY TO A MORTGAGE FORECLOSURE ACTION UNDER RPAPL §§1311 OR 1313

The Real Property Actions and Proceedings Law (RPAPL) sets forth the necessary defendants to a mortgage foreclosure action (RPAPL §1311), and permissible defendants in such an action (RPAPL 1313).

a. The Town of Sweden Is Not a Necessary Party Under RPAPL §1311

RPAPL §1311 provides that:

> *"Each of the following persons, whose interest is claimed to be subject and subordinate to the plaintiff's lien, shall be made a party defendant to the action:*
>
> *1. Every person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein.*

2. Every person having a right of dower or an inchoate right of dower in the real property or any part or share thereof.

3. Every person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff.
4. Where the mortgage is upon any of the public utilities regulated by the public service law, the public service commission."

The Town of Sweden neither holds, nor claims any interest in the mortgaged property under any of the categories listed in RPAPL §1311. The Town has no estate or interest in possession of the property as tenant in fee, for life or by curtesy or for years, and similarly, is not entitled to the reversion, remainder or inheritance of the property, or of any interest therein. Nor does the Town have a right of dower or an inchoate right of dower. The Town has no interest in the property. The Town is merely the holder of funds to be used to improve the property pursuant to Town of Sweden Subdivision Regulations §A177-16, and to the written Development Agreement between the Town of Sweden and the Developer (See Exhibit B annexed).

b. Nor is the Town of Sweden a permissible party under RPAPL §1313

RPAPL §1313 provides that:

Permissible defendants

Any person who is liable to the plaintiff for payment of the debt secured by the mortgage may be made a defendant in the action. The state may be made a party defendant to an action for the foreclosure of a mortgage on real property, where it has an interest in or a lien on the property subsequent to the lien of the mortgage sought to be foreclosed in said action, in the same manner as a private person.

Just as the Town of Sweden did not fall into the category of "necessary" party, as shown in the previous sub-point, so it does not fall into the category described by RPAPL

§1313. The Town of Sweden is neither a person liable to the plaintiff for payment of the debt secured by the mortgage, nor is it the State, or even a subdivision of the State which has an interest or lien on the property subsequent to the lien of the mortgage sought to be foreclosed.

c. The Complaint, on its face, Fails to Allege Facts Sufficient to Establish that the Town of Sweden is either a Necessary Party or a Permissible Party

The complaint alleges, as to the Town of Sweden, only a conjecture that the Town "possibly" is claiming an interest in the property being foreclosed, and ***"…holding certain funds payable under the above Mortgage to M&T Mortgage Corporation…."***

RPAPL 1311 and 1313 do not include "holding funds" as a circumstance which makes a party either necessary or permissible for purposes of inclusion as a party defendant tin a mortgage foreclosure action, even if the funds came from a mortgage, as alleged. When considering that the funds being held by the Town have nothing to do with any mortgage, but rather are the proceeds of a letter of credit, the allegation graduates from being merely inadequate to being inadequate and inaccurate.

Nor does "possibly claiming an interest" have any efficacy in casting the Town of Sweden as a necessary or permissible party. "Possibly" is too vague and too conjectural. The court in *In re Taylor's Will*, 6 Misc.2d 60, said in relation to the intention of a testator,

> "Possibly this testatrix did intend her investment provision to be permissive, or possibly she did intend the words 'interest bearing securities' to mean something else, but that remains pure conjecture. These other words and phrases upon which the petitioner relies do not say so; it is only if we speculate as to their meaning, and then adopt the least plausible of two possible interpretations, that any element of conflict enters. It is never incumbent upon a court to speculate, for 'intention is not

matter of speculation or arbitrary conjecture' (Matter of Krooss, supra, 302 N.Y. 429, 99 N.E.2d 225)

The allegation that the Town of Sweden "possibly" has an interest is simply insufficient to establish that it has an interest which satisfies the requirements of RPAPL §1311 or 1313 for the purposes of being a necessary or permissible party to a mortgage foreclosure action.

POINT II

PLAINTIFF'S CONDUCT IS FRIVOLOUS WITHIN THE MEANING OF 22 NYCRR §130-1.1(C)(1) SUCH THAT THE COURT SHOULD AWARD COUNSEL FEES TO THE TOWN OF SWEDEN

The authority of the court, with certain limitations not applicable here, to award costs in the form of counsel fees, and the basis upon which such awards may be made are found in 22 NYCRR §130-1.1, as follows:

> **Section 130-1.1. Costs; sanctions**
>
> (a) 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. ….
>
> (c) For purposes of this Part, conduct is 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.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct

> undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal 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.

In the instant case, definitions (1) and (3) apply. It is completely without merit to include the Town of Sweden as a defendant in a mortgage foreclosure action based upon the fact that the Town holds funds drawn on a Letter of Credit pursuant to a procedure required by the Town's subdivision regulations.

It is factually inaccurate to allege, as the complaint herein alleges at paragraph 7, with reference to Schedule A, that the funds held are related or were derived from a mortgage of M&T Bank, when the plaintiff, or its counsel well knew that the funds have nothing whatever to do with any M&T mortgage.

Most importantly, when counsel for the Town of Sweden advised plaintiff's counsel by letter (See Exhibit D) that the Town does not fit any category under RPAPL §1311 or 1313, counsel's response was that the plaintiff has the right to include the Town ***"…in order to determine the Town's right to administer the funds for the benefit of the property."*** (Exhibit E, second paragraph). Then, in the third paragraph of Exhibit E, plaintiff's counsel attempts to use the Town's request to be dropped from the case to strike a bargain. He states "[w]e would agree to dismiss our claims against the Town if you enter into a Stipulation that the funds would not be disbursed absent a Court Order, or further agreement with the Plaintiff." In other words, plaintiff's counsel will dismiss against the Town if the Town agrees to abdicate its responsibility under its subdivision regulations and under the agreement it reached with the developer. We respectfully

suggest that to offer to discontinue an action against a party against whom one has no cause of action, in exchange for that party's engaging in conduct which violates its legal responsibility, is inappropriate, to say the least, and certainly indicative of bad faith.

In a case involving a claim for costs based on frivolous claims under CPLR §8303-a, in a libel case, the Appellate Division, third department, said in *Mitchell v. Herald Company*, 137 A.D.2d 213 (3rd Dep't, 1988):

> "The bad faith of plaintiff and his counsel is further illustrated by the inclusion in the complaint of the allegation that plaintiff was libeled by the headline, "Woman Raped," relating to an entirely separate story. No reader could reasonably conclude that the headline concerned plaintiff and no reasonable attorney could conclude other than that such allegation was frivolous. The bad faith of plaintiff and his counsel was compounded by their failure to discontinue the action after being specifically advised by defendant's attorney that the claim was baseless. The statute imposes a duty on the party and his attorney to act in good faith to investigate the claim and promptly discontinue it where inquiry would reveal that the claim lacks a reasonable basis." Mitchell v. Herald Co. 137 A.D.2d 213, 219 (3rd Dep't 1988); *appeal dismissed* 72 N.Y.2d 952 (1988).

In the instant case, 22 NYCRR §130-1.1(c)(1) imposes a similar duty. No reader of RPAPL §§1311 and 1313 could conclude that a municipality holding the proceeds of a letter of credit draw-down could be considered either a necessary or permissible party in a mortgage foreclosure action. And having been advised of those sections and the improper inclusion of the Town (Exhibit D), counsel for plaintiff failed to discontinue the action and instead used the revelation as an opportunity to bargain for a benefit that would require the Town to abdicate its statutory and contractual obligations (Exhibit E). Costs, in the form of legal fees, should be awarded in the case at bar.

CONCLUSION

Based upon the foregoing, this court is requested to issue its order and judgment dismissing the within mortgage foreclosure action as to the Town of Sweden, and to award counsel fees to defendant Town of Sweden for frivolous conduct, together with costs, disbursements and such other and further relief as to the court may seem proper.

FIX SPINDELMAN BROVITZ & GOLDMAN P.C.

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