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Order on Michael Macke's Motion for Attorney Fees and Expenses of Litigation Pursuant to O.C.G.A. 9-15-14 Against Defendant Zions First National Bank (Macke _ Cadillac Jack Inc. et al.)

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of the indebtedness. On July 6, 2010, Zions foreclosed on the Property. On July 20, 2010, this Court granted Macke's motion to add Zions as a party to this matter, and Macke subsequently asserted various claims against Zions. On August 2, 2010, Macke filed a notice of lis pendens in Gwinnett County.

In response to Macke's claims against Zions, Zions counterclaimed for abusive litigation and for slander to title. Believing that the claims had no merit, Macke requested that Zions dismiss its claims and provided case law to support his position. Zions did not dismiss its claims until after Macke filed a dispositive motion on the counterclaims. Macke now seeks attorneys' fees pursuant to O.C.G.A. § 9-15-14, arguing that Zions' claims were without merit and that Zions should have to cover the attorneys' fees associated with the filing of the dispositive motion.

Under O.C.G.A. § 9-15-14, a court is required to award reasonable and necessary attorneys' fees and expenses of litigation if it finds that a party "has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim" O.C.G.A. § 9-15-14(a). A court may also award such fees and expenses if an attorney or party "brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment." O.C.G.A. § 9-15-14(b).

Macke claims that Zions' pursuit of the abusive litigation claim is improper because it must be based upon a prior completed action (and not the current action). O.C.G.A. § 51-7-84(b) provides that "[a]n action or claim under this article requires the final termination of the

proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination.” Final termination has been interpreted to mean an adjudication on the merits so that the action cannot be recommenced. Land v. Boone, 265 Ga.App. 551 (2004).

Here, Macke argues, Zions’ counterclaim was based upon claims filed by Macke in this action. As a result, Macke contends that its position in asserting an abusive litigation claim lacked substantial justification.

In its counterclaim, Zions focused on Macke’s conduct in filing the notice of lis pendens on the Property, which Zions had foreclosed upon approximately one month before. Zions contends that Macke acted with malice and without substantial justification in filing the lis pendens because he knew or had reason to know that he was in default and that Zions acted pursuant to its legal authority when it foreclosed on Macke’s interest in the Property. In its brief, Zions argues that it associated Macke’s conduct in filing the lis pendens with his earlier efforts to secure a temporary restraining order to prevent the foreclosure, not the pursuit of this action. In this way, Zions attempts to distinguish its abusive litigation claim from the claims advanced by Macke in this action, which was still pending at the time the abusive litigation counterclaim was asserted.

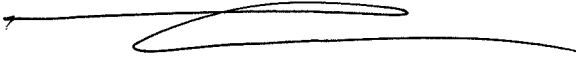
Regardless of whether the lis pendens was tied to Macke’s claims in this action or to motions for a temporary restraining order, the Court finds that there was not a “final termination of a proceeding” that would have supported a claim for abusive litigation. The TRO efforts were unsuccessful either because the forum lacked jurisdiction over the matter or because Macke

voluntarily dismissed the action. Neither of these outcomes amounts to an “adjudication on the merits.” See Land, 265 Ga. App. 551.

Because the abusive litigation claim was not grounded in prior litigation, the Court finds that the claim lacked substantial justification. Further, in waiting until after Macke expended effort in filing a motion for summary judgment on the claim, despite notice of the law, the Court finds that Zions unnecessarily expanded the scope of the proceeding. Accordingly, the Court **GRANTS** Macke’s motion and will hold a hearing to determine the amount of attorney’s fees Macke incurred.

Macke also argues that the counterclaim for slander to title lacks merit because he contends it is premised on the filing of the lis pendens, which is privileged under Georgia law. See Executive Excellence, LLC v. Martin Bros. Investments, 309 Ga. App. 279 (2011). Upon review of Zions’ allegations in the slander to title counterclaim, the Court disagrees with Macke’s characterization. Zions based the claim on Macke’s “false statements that he has a legally cognizable interest in the Property,” and Zions goes on to explain that in Macke’s response to an interrogatory he stated that he was looking for purchasers for the Property. Because Macke’s purported statements would be a legitimate basis for a claim for slander to title, the Court finds no grounds for an award of attorneys’ fees under O.C.G.A. § 9-15-14. Accordingly, Macke’s Motion is **DENIED** as to this issue.

SO ORDERED this 15th day of March, 2013.


ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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