UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In Re

VICTORIA OF NORTHWEST FLORIDA, INC.,
Debtor.

Case No. 00-41572-PNS

MZ VENTURES OF NORTHWEST FLORIDA, LLC.,
Plaintiff,

Adv. Case No. 03-80024

v.

VICTORIA OF NORTHWEST FLORIDA, INC.,
Defendant.

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Scott Remingtion, Attorney for the Plaintiff/Counter-Defendant
Lisa Minshew, Attorney for the Defendant/Counter-Claimaint
Thomas B. Woodward, Attorney for the Defendant
Gregory D. Smith, Attorney for Interested Party, H.L.O.T.

This matter is before the Court on the Plaintiff's motion for partial summary judgment. After due consideration of the pleadings, evidence and briefs of the parties, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

MZ Ventures of Northwest Florida, LLC, (hereinafter "MZV") filed an adversary complaint against Victoria of Northwest Florida, Inc. (hereinafter "Victoria" or "Debtor"). MZV is a Florida LLC with its principal place of business in Okaloosa County, Florida. The defendant, Victoria, is a Florida corporation with its principal place of business in

Okaloosa County, Florida. Victoria was a debtor in possession in the Chapter 11 administrative case, however the administrative case has been closed. For reasons explained herein, the adversary case remained pending.

On or about December 18, 2001, MZV and Victoria entered into a purchase and sale agreement whereby Victoria agreed to sell, and MZV agreed to purchase, certain real property located in Okaloosa County, Florida.

In December, 2001, Victoria, in its capacity as a Debtor in the Chapter 11 administrative case, filed a motion to sell the property free and clear of all liens and encumbrances. The Court entered an order on December 21, 2001 granting the motion to sell. For reasons that are in dispute, the sale was not consummated as anticipated under the contract and order of the Court. On May 14, 2003, MZV filed a complaint against the Debtor alleging that the Debtor had refused to perform its obligations under the contract and was requesting specific performance. A *lis pendens* was filed on March 12, 2004 by MZV. In September, 2004, the parties filed a consent motion to approve a settlement of the adversary proceeding and the Court approved an amended settlement agreement by entry of an order dated October 7, 2004.

Unfortunately, the parties were never able to consummate the settlement and on January 28, 2005, MZV filed a motion to enforce the settlement. This Court entered an order on March 14, 2005, granting the motion to enforce the settlement agreement. After almost a year of continual activity in the case, the parties entered into a consent dismissal of the adversary proceeding on February 14, 2006.

Once again, the parties were unable to comply with the terms of their own settlement agreement and this Court was called upon by MZV to reopen the adversary proceeding on February 23, 2007. On February 18, 2008, MZV filed its first amended complaint which still asserted specific performance under Count One and added Count Two for breach of contract seeking monetary damages and a breach of implied covenant of good faith and fair dealing under Count Three.

On March 10, 2008, Victoria filed an answer to the amended complaint and included a counterclaim for slander of title. The slander of title claim relates to MZV's filing a notice of *lis pendens* on the property subject to the contract and alleges that the filing of the *lis pendens* was done to frustrate conveyance of the property.

MZV filed a motion for partial summary judgment as to the slander of title counterclaim. In its memorandum filed in response to MZV's motion for summary judgment, Victoria maintains that there are genuine issues in dispute with respect to the facts in the counterclaim for slander of title. The brief outlined the facts contesting the validity of Plaintiff's claims for breach of contract, specific performance and any damages claimed by the Plaintiff. In support of those facts set forth in its brief, Victoria references the testimony from various depositions taken in the case.

Conclusions of Law

Under Federal Rule of Civil Procedure 56 (as adopted by Bankruptcy Rule 7056), summary judgment is proper if the moving party shows that no genuine issue of material fact exists, and that the movant is entitled to judgment as a matter of law. In assessing the

movant's argument, the court "must view all evidence in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in its favor." *Information Systems & Network v. City of Atlanta,* 281 F.3d 1220, 1224 (11th Cir. 2002) (citing *Burton v. City of Belle Glade,* 178 F.3d 1175, 1187 (11th Cir. 1999)); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). The responding party must set out "specific facts establishing the existence of a genuine issue of material fact, mere allegations or denials of the movant's pleadings are insufficient." *In re Wolfson,* 139 B.R. 279, 281 (Bankr. S.D.N.Y. 1992), *aff'd* 152 B.R. 830 (S.D.N.Y. 1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324-25 (1986).

MZV has asserted three separate theories upon which it is entitled to summary judgment. The first is that summary judgment is appropriate because of the doctrine of judicial privilege. The argument made by MZV is that if the pleadings were privileged, then the republication of the pleadings through the *lis pendens* should likewise be privileged. *See Procacci v. Zacco* 402 So.2d 425, 427 (Fla. 5th Dist. Ct. App. 1981). Victoria contends that if it is successful defending the breach of contract and specific performance case, and can show that the notice of *lis pendens* was filed wrongfully, that such intentional filing would support an action for slander of title and damages. *Bothman v. Harrington*, 458 So.2d 1163 (Fla.4th Dist. Ct. App. 1984).

Liability for slander of title is imposed on a defendant who (a) communicates to a third person, (b) statements disparaging the plaintiff's title, (c) which are not true in fact,

and (d) which cause the plaintiff actual damage. *Gates v. Utsey*, 177 So.2d 486 (Fla.1st Dist. Ct. App. 1965). Because there are material facts in dispute with respect to the action for breach of contract and specific performance for which the *lis pendens* was filed, it would be inappropriate to grant a summary judgment based on the theory of judicial privilege.

MZV has also claimed that Victoria is judicially estopped from maintaining its claim for slander of title because Victoria had filed inconsistent pleadings with respect to the validity of MZV's *lis pendens*.

> Judicial estoppel is an equitable doctrine that precludes a party from "asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." See *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282, 1284 (11th Cir.2002). The doctrine exists "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* (quoting *New Hampshire v. Maine,* 532 U.S. 742, 749-50, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001))....
> The applicability of judicial estoppel largely turns on two factors. *Id.* First, a party's allegedly inconsistent positions must have been "made under oath in a prior proceeding." *Id.* (quoting *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1308 (11th Cir.2001), cert. granted and judgment vacated, 537 U.S. 1085, 123 S.Ct. 718, 154 L.Ed.2d 629 (2002)). Second, the "inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Id.* (quoting *Salomon Smith Barney, Inc.,* 260 F.3d at 1308). "[T]hese two enumerated factors are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine.*Id.* at 1286.

Barger v. City of Cartersville, Ga., 348 F.3d 1289, 1293-94 (11th Cir. 2003). The purpose of the doctrine is to prevent parties from making a "mockery of justice by inconsistent pleadings." *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282, 1285 (11th Cir.2002) (quoting *American Nat'l Bank of Jacksonville v. Federal Dep. Ins. Corp.,* 710 F2d 1528, 1536 (11th

Cir. 1983)).

The only exhibit submitted by MZV in support of its summary judgment based on the theory of judicial estoppel is the sentence in a memorandum of law which was submitted by counsel for Victoria requesting that the Court extinguish the *lis pendens* filed by a third party, H.L.O.T. . Victoria alleged that MZV's notice of *lis pendens* was "duly and properly filed." This statement was made by counsel in argument in a brief and falls far short of judicial estoppel.

The third legal theory that MZV submits in support of entry of summary judgment on Victoria's claim for slander of title is that the slander of title is barred by the statute of limitations. Victoria admitted in its response to MZV's motion to dismiss the counterclaim, that an independent claim of slander of title by Victoria against MZV after March 18, 2006 would be subject to dismissal pursuant to the statute of limitations. Fla. Stat. Ann.§§95.11(4)(g)(2006). However, Victoria maintains that a timely filed recoupment counterclaim for slander of title against MZV would not be subject to dismissal due to a statute of limitations defense.

The running of the statute of limitations on an independent cause of action does not bar recovery of an affirmative judgment in recoupment on a compulsory counterclaim. *Allie v. Inonata,* 503 So.2d 1237 (Fla. 1987). A counterclaim for recoupment may be maintained although the same claim would be barred by the statute of limitations as an independent cause of action. *Cherney v. Moody,* 413 So.2d 866 (Fla. 1st Dist. Ct. App. 1982). "Recoupment is '[t]he right of a defendant, in the same action, to cut down the plaintiff's

demand either because the plaintiff has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposes on him in the making or performance of that contract.'" *See In re Smith,* 737 F.2d 1549, 1552, fn. 7 (11th Cir.1984) (citation omitted). "The distinguishing feature of a claim for recoupment is the same as a compulsory counterclaim - it must spring from the same transaction or occurrence as the underlying counterclaim." *Maynard v. Household Finance Corp.* III 861 So.2d 1204 (Fla. 2nd Dist. Ct. App. 2003), citing *Cherney v. Moody,* 413 So.2d 866, 868 (Fla. 1st Dist. Ct. App. 1982).

"Slander of title, or as it is sometimes called, disparagement of property, arises out of an injurious falsehood, such as malicious publication of false statements concerning title of one's property." *Procacci v. Zacco,* 402 So.2d 425, 426 (Fla. 4th Dist. Ct. App. 1981). The claim for slander of title in the instant case is based upon the action of MZV filing a *lis pendens* subsequent to its lawsuit seeking specific performance, and later amended to add a claim seeking damages for breach of contract and breach of implied covenant of good faith.

In support of its argument that its claim for slander of title is not barred by the statute of limitations, Victoria cites *Allie v. Inonata,* 503 So.2d 1237, 1239 (Fla. 1987), which held, in part, that "the intent of the Rules of Civil Procedure will be best served by holding that a compulsory counterclaim in recoupment permits the recovery of an affirmative defense even though barred as an independent cause of action by the running of the statute of limitations." Thus, this Court must determine whether Victoria's claim for slander of title is a compulsory counterclaim or a permissive counterclaim. If it is permissive, then it is

barred by the statute of limitations. In *Republic Health Corp. v. Lifemark Hosp. of Florida, Inc.,* 755 F.2d 1453,1455 (11th Cir. 1985), the court stated:

> Rule 13(a) defines a compulsory counterclaim as any claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." This court's predecessor adopted the "logical relationship" test for determining whether a counterclaim was compulsory. *See United States v. Aronson,* 617 F.2d 119, 121 (5th Cir. 1980). Under this test, there is a logical relationship when the "same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant." *Plant v. Blazer Financial Services, Inc.,* 598 F.2d 1357, 1361 (5th Cir. 1979).

In *Callaway Land & Cattle v. Banyon Lakes C. Corp.*, 831 So.2d 204, 207 (Fla. 4th Dist. Ct. App. 2002), the court applied the "logical relationship" test to an amended counterclaim for disparagement (slander) of title, and found that the counterclaim was a permissive rather than compulsory counterclaim. "[T]he operative facts which serve as the basis for Banyon's breach of contract claim do not serve as the basis for Callaway's counterclaims. While Banyon's complaint focuses on the breach of the agreement, Callaway's counterclaim focuses on Banyon's actions after the alleged breach." *Id*. at 207. The court went on to rule that since the counterclaim was permissive, it was barred by the applicable statute of limitations. *Id*.

Similarly, in this case, it is this Court's opinion that Victoria's claim of slander of title does not arise out of the same operative facts as the breach of contract or the implied covenant of good faith and fair dealing claims. The claim for slander of title is based on the separate filing of the notice of *lis pendens* by MZV on March 12, 2004 which was ten months after the filing of the initial complaint. Since the slander of title claim flows from the filing of the *lis pendens,* it does not appear to be based on an alleged violation by MZV of

any duty it had under the contract, nor does the aggregate core of facts activate additional legal rights. Therefore, this Court holds that the counterclaim was not a compulsory counterclaim, but was a permissive counterclaim and thus, subject to the two year statute of limitations. Therefore, a summary judgment is due to be granted in favor of MZV and against Victoria.

NOW THEREFORE, it is hereby ORDERED that the Motion for Partial Summary Judgment as to the claim of Victoria for slander of title against MZV is hereby GRANTED against Victoria and in favor of MZV.

Dated: August 14, 2008

William S. Shulman

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE