

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF MONROE

JAMES R. CAPUTO,

*Plaintiff,*

**AFFIDAVIT IN  
SUPPORT OF  
MOTION TO DISMISS**  
Index No.:  
E2024000703

-v-

NATHAN HOLT, OWEN BILLET, PREMIUM MORTGAGE  
CORP., ROBERT T. HOULE as President of Houle Sales  
Consulting, Inc., HOULE SALES CONSULTING, INC.,  
DONALD J. CHENEY ESQ., CHENEY LAW FIRM, PLLC,  
ABAR ABSTRACT CORP., and MONROE COUNTY CLERK'S  
OFFICE,

*Defendants.*

STATE OF NEW YORK                    )  
COUNTY OF ONTARIO                ) ss:

Donald J. Cheney being duly sworn, deposes and says that:

1. I am an attorney licensed to practice law in the State of New York. I am listed personally as a Defendant in this action as well as my law firm Cheney Law Firm, PLLC. I am submitting this Affidavit in support of my Pre-Answer Motion to Dismiss.
2. As a procedural matter, I was served a single set of documents in this matter. As such, service is deficient as either myself or my law firm has not been properly served.
3. At all times relevant to the sale of 4 Chambord Drive, Town of Mendon, County of Monroe, State of New York ("Property"), I acted as attorney for Houle Sales Consulting, Inc. which

entity was the owner of the Property. At no time have I ever been counsel for the Plaintiff in this matter or any other matter.

4. Plaintiff makes various claims related to professional malpractice and violations of the rules of professional conduct. Since I have never represented the Plaintiff, his complaint cannot sustain a cause of action for malpractice. To the extent Plaintiff wishes to complain about violations of the rules of professional conduct, that is not a matter for the courts.
5. Plaintiff claims that I have breached a fiduciary duty but fails to explain what legal duty I had to him. Plaintiff imputes knowledge to me of a decision made by Judge Valleriani regarding a *pro se* matter between Robert Houle and Plaintiff. At no point in the Complaint does Plaintiff explain how I obtained the knowledge of Judge Valleriani's decision. The decision was never served on me. I was not counsel for Robert Houle in the matter before Judge Valleriani.
6. Attached as *Exhibit A* are pages from the abstract of title for the Property. As I tried to explain to Plaintiff as he detailed in his Complaint, not naming the correct property owner is a problem as the abstractor searches on names. Setouts in the abstract that relate to Robert Houle individually are not liens against property owned by Houle Sales Consulting, Inc. Therefore, tax liens against Robert Houle or judgments against Bob Houle shown in the abstract are not clouds on title as it relates to the Property.
7. In an effort to settle potential claims that Plaintiff may have against my client, I emailed Plaintiff on June 2, 2022, see email attached as *Exhibit B*. I advised Plaintiff that he had the wrong property owner on his mechanic's lien paperwork. I even offered to draft the paperwork to correct this defect as trying to bond over a mechanic's lien that is not in the name of the actual property owner creates an issue with the bonding company as it won't issue a bond to a non-owner. Despite my best efforts to remedy Plaintiff's mistake, Plaintiff refused to amend

the lien and demanded payment of the full amount of his lien including amounts added to his mechanic's lien that were clearly fraudulent.

8. In the sale of the Property I represented the Seller. I provided the abstract of title and various forms to the Buyer's attorney. The Buyer's attorney in conjunction with the Buyer's title company reviewed the abstract and other transaction related documents and made the decision as to whether title is clear or not. The bank (Premium Mortgage Corp.) also has an attorney to make sure the lender is protected and receives good title. My opinion as to title as Seller's attorney is certainly not binding on any other party (Buyer or Bank). Even assuming I made the statement that the mechanic's lien is not against the property owner, this is a factually true statement. The Buyer and Bank attorney ultimately decide on what is "good title" to the Property and not me as the Seller's attorney, yet they are both conspicuously absent from this action.
9. Pursuant to Plaintiff's Complaint Exhibits 21 & 22, Plaintiff has attempted to file a notice to extend the Mechanic's Lien.<sup>1</sup> Plaintiff states that the lien extension is "filed against former owner Houle Sales Consulting, Inc." In Plaintiff's original Mechanic's Lien filing he lists the property owner as "Robert T. Houle (President of Houle Sales Consulting, Inc.)." Evidently Plaintiff has come to understand that naming the correct property owner legally makes a difference as I explained to him previously.
10. Plaintiff's final cause of action is to seek contempt of court against me or presumably my law firm. Contempt of court is not a primary action and is only available if there is a violation of

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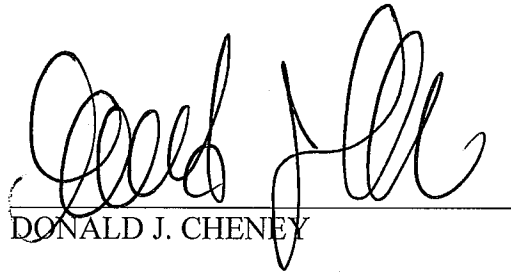
<sup>1</sup> Plaintiff's attempt to extend the lien by filing a Notice of Lien Extension is improper. As the Property is improved with a single family home, Plaintiff had one (1) year to foreclose on the Mechanic's Lien or seek a court order to extend the lien. Given that the claims against me do not relate to attempts to foreclose the lien I am not addressing this in full but felt it important to point out. See Lien Law §17.

a court order where I would have been a party to litigation or an attorney subject to an order from a court. This does not exist in this matter.

11. In an email to Plaintiff dated August 29, 2022 I stated clearly to Plaintiff the following, "I am going to tell you this again so that I am crystal clear, any legal action filed against me because I am the attorney for Bob Houle would be clearly frivolous and without merit for which you will pay attorney fees and likely punitive damages. Attorneys who obtain results for clients that you may disagree with are not subject to legal action. You can sue the party involved, but not the attorney. Just want to make sure you understand this and you act accordingly."
12. The Plaintiff in this matter is not simply a lay person who lacks the requisite sophistication to understand the basic tenants of what is a legal duty and what is frivolous conduct. Plaintiff has a medical degree and has many years of advanced schooling. Plaintiff claims my client owes him money and that his deficient and fraudulent mechanic's lien did not provide him the relief he desired. Plaintiff dislikes Robert Houle, and as a result, he believes it is appropriate to sue me because I represented Houle Sales Consulting, Inc. Plaintiff's complaint against me and my law firm is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. The Court should not allow this to stand and should sanction Plaintiff for this frivolous conduct.
13. Giving the Plaintiff every positive inference, the Complaint fails to state a cause of action against me or my law firm. I owed the Plaintiff no duty and certainly had no fiduciary relationship with Plaintiff where I was obligated to protect his deficient mechanic's lien. Contempt of Court is not a cognizable primary cause of action. I was not the attorney for the Plaintiff where legal malpractice would be a cognizable claim. The decision on accepting title to the Property without requiring a bond or some other resolution to Plaintiff's deficient

mechanic's lien was a decision that rested with Buyer's attorney, Buyer's title company and the bank attorney. I even went so far as to warn Plaintiff of the deficiencies in his mechanic's lien filing and he failed to amend the lien accordingly.

WHEREFORE, for the foregoing reasons, Defendants Donald J. Cheney, Esq. and Cheney Law Firm, PLLC respectfully requests that this Court enter judgment: (i) dismissing the Complaint against the Defendants; (ii) sanctioning the Plaintiff for frivolous conduct including granting Defendants its reasonable attorneys' fees and costs incurred in connection with this action, and such other and further relief as to this Court may deem proper and just.



DONALD J. CHENEY

Sworn to this 31<sup>st</sup> day  
of January, 2024



NOTARY PUBLIC

**BENJAMIN F. NORTHRUP**  
Notary Public, State of New York  
No. 02NO6420355  
Qualified in Ontario County  
Commission Expires 08/09/2025