SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

James R Caputo

Plaintiff

– vs –

Nathan Holt, Owen Billet, Premium Mortgage Corporation, Robert T Houle, Houle Sales Consulting Inc, Donald Cheney Esq, Cheney Law Firm PLLC, ABAR Abstract Corporation, Monroe County Clerk's Office

Defendants

Index Nø.: E2024000703

VERIFIED RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff James R. Caputo replies to the separately numbered paragraphs contained in the Affidavit in Support of a Motion To Dismiss submitted to the Court in this action by Defendant(s) Donald J. Cheney, Esq and Cheney Law Firm, PLLC and asserts the affirmative defenses and relevant claims as follows:

1. This statement is acknowledged.

2. The single set of initiating documents served were addressed to both Donald Cheney, Esq. and to Cheney Law Firm, PLLC, both of whom operate together and at the same address. Therefore, both parties received the service of documents simultaneously as they were handed directly to Mr. Cheney himself. According to the rules of the Court, the ***purpose*** of proper service of documents in a civil action is to "*give notice that a lawsuit has been started and is a mechanism that formally brings the other party before the court*". By Defendant Donald Cheney, Esq. indicating in his sworn Affidavit that he and his law firm received the initiating documents and to the extent that he is writing the Court in opposition to them, proves that service has been completed, (pursuant to NY CVP CHAPTER 8, ARTICLE 3, § 306(e) Admission of service: which states that ***a writing***

admitting service by the person to be served is adequate proof of service. Therefore, Defendant Cheney's claim of improper service must fail.

3. Plaintiff James R. Caputo has never claimed to be represented by Donald Cheney, Esq or Cheney Law Firm, PLLC. He did, however, knowingly and willingly preside over the illicit sale of the subject premises for his client, Houle Sales Consulting, Inc., who is also named as a Defendant in this matter.

4. Firstly, Plaintiff James R. Caputo's claims of Defendant Cheney's professional malpractice and violations of the rules of professional conduct are *not* contained in Plaintiff's pleadings for this defendant to even be making his argument in this numbered item. The point, however, is this. By acting as attorney for Houle Sales Consulting, Inc and presiding over the sale of the subject premises, Mr. Cheney, by virtue of being an admitted attorney to the New York State Bar, has a professional responsibility to adhere to the Laws of New York State and to not engage in activities that are considered acts of misconduct by that same Bar. In this matter, Defendant Cheney not only broke the Lien Law, engaged in fraud and contempt of court, (all of which could be pursued by an affected litigant in a legal malpractice action), but these actions are also certainly commensurate with professional misconduct should it be of interest to the New York State Bar Association. (Emphasis added)

5. It cannot be argued that the fiduciary duty owed by Defendant Cheney (as a licensed real estate attorney) was to (both) the *sale* of the home and the home *itself*, to *not* create or allow an encumbrance or "cloud" upon the property that could potentially cause a pecuniary action because of his failure to do so. Also, it cannot be argued that by virtue of there being a mechanic's lien on the property for work done upon it, the property itself

had a fiduciary duty to the lien holder for payment of services to be fulfilled. Therefore, by the transitive property of equality, (if A=B, and B=C, then A=C) Defendant Cheney most certainly had a fiduciary duty to the mechanic's lien itself and the progenitor thereof. By Plaintiff James R. Caputo having a duly filed and the mechanic's lien which was in-force on the property, he was relying on *whoever* the lawyer was to preside over the sale of that home to do the right thing before the law, which would have been to *not* sanction, empower, be party to or advise the sale of that property until the lien was satisfied. Mr. Cheney did nothing of the sort. In fact, Mr. Cheney's contention that he did not have any duty to the mechanic's lien on that property is indicative of how little he considers the Lien Law and his obligation as a licensed attorney to follow it, as will be further developed below.

Defendant Cheney then treats the Supreme Court Decision by Judge Valleriani [which upheld every single aspect of the Mechanic's Lien, including any issue with owner ***name***] as if he was totally clueless of its existence in and around his lawyering on this property sale such that he was therefore not held to the Decision's contents. Mr. Cheney is also admitting that for him to consider such a Court Decision on a property that he was presiding over the sale of, it would have to be served upon him directly. Otherwise, (according to his sworn statement) he had no knowledge of Judge Valleriani's Decision and therefore he wasn't responsible for knowing what the ruling actually said. For his lack of knowledge or responsibility to Judge Valleriani's Decision to further hold water, he would have this Court believe that his client, Defendant Robert T. Houle, failed to mention it at all to him during the home sale process, and that no one else made him aware of this Court Decision either. Because if Defendant Cheney was, indeed, aware of the

Decision by Judge Valleriani, then by his own admission (inferred from his own statements) as a responsible attorney who respects the law, he would have certainly been bound to what the Decision had to say in order to advise his client properly, and he certainly would not have (contemptuously) pursued fallacious and improper legal avenues over and against the Court's Decision in order to sell the property anyway.

With the sale of the property being listed as June 29, 2022, on ***five*** separate occasions prior to that date, on which Defendant Cheney presided over the sale of the subject premises, (while also claiming to know nothing about a Supreme Court Decision upholding the lien on all issues), Mr. Cheney was sent an email by Plaintiff James R. Caputo where the matter of lien validity by Decision of the Supreme Court was made clear and unambiguous and that he ought to have known of and read it when making these communications. (*see* **Plaintiff Exhibits 45, 46, 47, 48 and 49**) [Emphasis added] Either Defendant Cheney is lying to this Court, or he has a terrible memory, or his email search function is out-of-order to recall these emails, or he practiced law with negligence and contempt when he knowingly and willingly presided over this sale, over and against a known Supreme Court Order which explicitly directed the ***only*** way in which that property could be sold.

In other words, the material proof in evidence shows that Defendant Cheney knew full-well that there was an in-force mechanic's lien on the property, and that it was prohibiting the Title Insurance from being written, (just as the law designed it to do) and that there was a Supreme Court Decision upholding the validity of the lien on all points of contention. Once more, by being a licensed real estate attorney, he is bound by the law and that includes the Lien Law. Instead, Defendant Cheney thumbed his nose to the Lien Law, he thumbed his nose to Judge Valleriani's decision and he misled, (in a fraudulent

fashion), the other parties to believe that he had the jurisdiction to set aside the Lien outside of the provisions provided in NY Lien Law § 19. There is no other possible conclusion that could be made.

6. The document titled **Exhibit A** that Defendant Cheney offers up as "*pages from the abstract of title for the Property*", is a series of numbered items all containing the name "Houle" in some form or another, (be it Houle Sales Consulting, Inc., Robert Houle, Robert T. Houle or Bob Houle), which begins with item number 28 and ends with number 40. Nowhere is there a title on this document to affirm that it is what Mr. Cheney says it is – that being the "***Abstract of Title for the Property***". In fact, this document is more akin to a fiscal report of some sort on the party named "Houle" (with entries 1-27 not provided) and ***not*** that of the Subject Premises itself. Therefore, Mr. Cheney is once again being disingenuous with the Court here, and while under oath. Moreover, Defendant Cheney fails to explain how this document, (which does, in fact, show Plaintiff's Mechanic's Lien as entry #40), supports his argument that the owner named on the lien in this matter thwarts its enforceability, particularly in the face of the Monroe County Supreme Court Decision already having been made on the property owner name issue with the lien, which overrules Mr. Cheney's contention. Furthermore, pursuant to New York Lien Law § 3, an unpaid contractor, laborer, or materialman may file a mechanic's lien against privately owned real ***property.*** The Statute reads as follows: ***A contractor, subcontractor, laborer, materialman,……, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof……, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, …… or materials upon the real property improved….*** Defendant

Cheney, as a licensed real estate attorney, ought to know that a mechanic's lien is filed (and gains its guaranteed value) specifically against the property itself and not the owner. Additionally, it was pointed out in Plaintiff's Complaint that Mr. Cheney also fraudulently represented the law as it applies to any owner name challenge on a mechanic's lien and the difference between "misidentification" vs "misdescription", the latter of which does not invalidate a lien. By virtue of the Statute, the case law and the specific Decision by Judge Valleriani in this matter, Defendants Cheney and Houle have zero argument or justification for their self-authorization to "***avoid***" the mechanic's lien (in Mr. Cheney's own words) in order to sell the subject premises.

7. Defendant Cheney offers up his Exhibit B as his evidence of some sort of "gentlemanly" gesture on his part to resolve what he has declared a "defect" in the lien over the named owner issue. Note how he begins the email with "***Thank you for the email.***" But to what email is he referring and why didn't he include that? The precursor email is **Plaintiff Exhibit 47**, which is crucial to read in relation to Mr. Cheney's contentions in this numbered item, as is **Plaintiff Exhibit 48**. These two emails demonstrate just how much Plaintiff Caputo had already gone through with Defendant Robert T. Houle in trying to amicably resolve the matter, only to see Mr. Houle snub all efforts and take the matter to Court. There can be no clearer layout of the circumstances leading up to Houle's OSC on the lien, the justification for its value, and the fact that Defendant Cheney knew full well that the Court's ruling on Houle's show cause order existed and was in this plaintiff's favor, not to mention how much Plaintiff Caputo was willing to work with them, only to see the property sold illegally.

As can be seen in these emails, both Defendants Cheney and Houle have repeatedly echoed to this Court and in their past communications to Plaintiff James R. Caputo that there was this essential need to correct some defect in the mechanic's lien regarding proper owner so that they could bond it off and proceed with the sale. Yet, these defendants always seem to leave out the parts of the story that completely contradict their every word. Defendant Cheney tried to legally bully a lay person (plaintiff) into thinking that they could bond off the lien for pennies on the dollar, failing to mention that a suitable amount of collateral would have to then be put up. Plaintiff not only called this out, but reiterated once again, (*see again* **Plaintiff Exhibit 48**) that the name issue was already ruled on by the Court and lost. Therefore, Plaintiff James Caputo had no real compulsion to do anything but allow the mechanic's lien to continue doing its thing. If the Bond Company was balking on writing the Bond because of the named owner issue, then all they needed to do is show them the Supreme Court Decision on the matter and such a so-called hurdle would have been overcome. Plaintiff knew that they were locked down by the law. However, nowhere in this equation as of the time of these emails did Plaintiff James R. Caputo think that these two parties would go on to do what they did. And lastly, Defendant Cheney adds in at the very end of his numbered item regarding Plaintiff Caputo, that amounts were "***added to his mechanic's lien that were clearly fraudulent.***" Does anything become "fraudulent" just because someone says so? Is that the legal standard? Or is there an evidentiary requirement somewhere in there? Plaintiff Caputo provided Defendant Houle with a Final Invoice, (*see again* **Plaintiff Exhibit 6**) where all charges are itemized and delineated, and then detailed the entire matter to Mr. Cheney in his June 2, 2022 email (**Plaintiff Exhibit 47**) where he (Cheney) was told about Houle

being repeatedly asked to provide a counter itemization of the final invoice with what he believed the charges ought to have been, only to ignore every request. So, again, saying something is fraudulent, (without having any material argument to substantiate it), proves empty.

8. For the Buyer, the Buyer's Title Company, the Buyer's Attorney, the Bank or the Bank attorney to decide what is "good title", they are reliant upon the information given to them by the seller and the seller's attorney. Surely, Defendant Donald Cheney, Esq. knows this. And if the information given to these parties is corrupt and intentionally incorrect, (i.e. fraudulent), then such an "***opinion as to title as Seller's attorney***" may certainly not be "***binding on any other party (Buyer or Bank)***", but it certainly is culpable. For example, despite Defendant Cheney assuring all parties that he had the jurisdiction to declare the lien defective enough to "***avoid***" it and that the justification to do so was legally correct, (neither of which is true), did he also disclose Judge Valleriani's Decision to them as well? Were all parties given the opportunity to individually thumb their noses to the Court ruling as well? This would be the Court ruling that specifically obliterated Mr. Cheney's contention of the name issue on the lien, (that he was using to justify avoiding it), while also spelling out the only way the house could be sold. According to the Answer documents from other parties, such as the new homeowners, they claim that they knew nothing about any of this, which would include a Supreme Court Ruling. This is also the same ruling that Defendant Cheney has already testified to under oath in his Motion paper to not knowing about, despite five separate emails now in evidence proving this to be a lie. For Defendant Cheney to have ignored this document (which is the only thing he can claim after his knowledge of it has been proven) this would constitute negligence at the

very least. For Defendant Cheney to have purposely withheld this Court ruling from the parties involved with the sale of the property, such negligence has now entered the realm of professional misconduct. For Mr. Cheney to now be splitting hairs with the Court as to why this Plaintiff didn't specifically name the attorneys for the buyer and the bank since it is ***they*** who ought to have caught his fraudulent representation of the facts on the lien and thus are equally culpable themselves is yet another empty attempt at evading having to fully answer the complaint on these very matters.

9. The May 2, 2022 Supreme Court Decision by Judge Sam L. Valleriani states the following: (*see* **Plaintiff Exhibit 11**)

Proper Party

> **Petitioner asserts that the lien must be dismissed since respondent named an improper party as the property is owned by Houle Sales Consulting, Inc. and not Robert Houle individually. The lien lists both Houle Sales Consulting, Inc. (President, Robert T. Houle) and Robert T. Houle. Regardless, Lien Law § 9 provides that the lien shall state:**
>
> **"7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known; whether the property subject to the lien is real property improved or to be improved with a single family dwelling or not. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien…" (See Lien Law § 9 [emphasis added])**

Note how the entry from the Lien Law specifically points out that a "***misdescription of the true owner shall not affect the validity of the lien.***" When Plaintiff James R. Caputo filed the Lien Extension with the County Clerk, the only reason for naming Houle Sales Consulting, Inc as the owner instead of naming both (as done previously) was to ensure that no such (futile) arguments could be made, despite a Supreme Court Decision having

already put that contention to rest. Also, what Defendant Cheney fails to once again mention is that by the time this Plaintiff had to extend the lien, both he and Defendant Houle had long engineered their illicit sale of the property. The lien extension was to safeguard this Plaintiff's opportunity and legal right to (eventually) file the necessary papers in order to compel payment once and for all. It had absolutely nothing to do with any new understanding from an attorney who has proven to this Plaintiff to be bent.

10. By Defendant Cheney and Cheney Law Firm, PLLC being the attorney and firm for Defendant Houle and Houle Sales Consulting Inc. and by presiding over the sale of the subject premises, (a property that was under recent Court Order to be sold in one of two explicitly named ways ***only***, which was in accordance with the lien law), he therefore becomes ***subject to*** that Court Order. To say that he was not subject to the Court's ruling is an admission of his negligence and contempt for both the Lien Law and the Court itself.

11. The full email described by Defendant Cheney in this numbered item is **Plaintiff Exhibit 19**. It is not clear as to what Mr. Cheney is attempting to argue to the Court with his email quote threatening this Plaintiff against daring to file any sort of legal action against him. He claims in this email that ***"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."*** Well, if the attorney involved is also a party involved, and they commit an illegal act that is demonstrable with material evidence, then legal action is not only *not* frivolous, but justifiable, especially when it involves the (literal) theft of payment for six months of a man's work. If Defendant Donald Cheney, Esq. did not want to be named as part of this lawsuit, then he ought to have abided by the Court Decision (which he knew plenty about) and advised his client accordingly.

12. Defendant Donald Cheney, Esq has no problem pointing out how this Plaintiff ought to "***understand the basic tenants of what is a legal duty and what is frivolous conduct***", while he, himself, has wholly deviated from these very same principles by how he handled the matter at the heart of this lawsuit. By now, it ought to be clear that this legal action against all parties is not frivolous in any regard. The justification for each party being named was aptly given in the Complaint. And again, Defendant Cheney uses such terms as "***deficient***" and "***fraudulent***" when writing of the mechanic's lien without any meritorious argument or material proof in support, all while a Court Decision stands in complete opposition to such contentions. What he alleges is more what constitutes "frivolous". And the reason this Plaintiff claims that Robert T. Houle owes him money is because he ***does*** owe him money.

As for Defendant Cheney's claim that Plaintiff James R. Caputo dislikes Robert Houle and as a result is now suing Cheney and his law firm, the following is true. Plaintiff Caputo is suing Defendant Cheney and his law firm because they broke the law and committed the actionable deeds contained in the Causes of Action. Any feelings for Robert T. Houle had nothing to do with it. As for those feelings for Mr. Houle, the following must be established. I first worked for Mr. Houle when paid to assemble some furniture for him. I would then go on to do several projects for him out of his personal residence as well as one of his rentals. These various projects included but not limited to: building a shelving unit; installing a shiplap wood wall in his family room; restoring his kitchen cabinets and doors; installing a custom subway tile backsplash in his kitchen; installing a barn door for the main upstairs bathroom; installing a new toilet drain and flange (major plumbing); rebuilding his front door threshold; installing new water lines,

hot water heater and expansion tank for a modular home rental. So, clearly, there was an extensive work history between the parties. So, when Mr. Houle approached me about working on the subject premises, he received from me the unheard-of prices for the work he needed to have done. That is hardly the behavior of someone who dislikes the man. The discount given, however, was such that the total charge ***had*** to be paid in order for me to justify ever giving such a price, since the monies were essential for being able to properly transition my residence and business to Syracuse from Rochester.

My (admitted) dislike for Robert T. Houle developed over the course of this extensive project on the subject premises. Arguments for why these feelings manifested are contained more thoroughly in reply papers to Mr. Houle's motion paper. However, consistently late or absent interim payments, his habitual bumbling of the project as well as chronic shortcomings with providing materials, the live power line and putrid diaper stunts, his utterly disgusting insults towards me both in person as well as in Supreme Court and in Court papers, on top of stiffing me for over $20K and everything else that has transpired as part of simply trying to get paid are all pretty good reasons to develop a dislike for a person. So as far as this Plaintiff not liking Defendant Robert T. Houle, such is admitted and justified.

As for Defendant Cheney's contention that Plaintiff Caputo's complaint against him and his law firm are completely without merit and not supported by reasonable argument, that claim is simply not sustained by the material proof and argument thus far admitted into evidence in this matter. Therefore, the Court should allow the Complaint to stand and find that such legal action by this plaintiff is not frivolous, nor is it sanctionable.

13. The Causes of Action against Defendant Donald Cheney, Esq. and Cheney Law Firm, PLLC for Breach of Fiduciary Duty, Contempt of Court and Fraud are laid out on pages 24-30 of Plaintiff Caputo's Complaint. He claims no fiduciary duty once again, but this contention was defeated above in numbered item 5. He also continues to repeat that the mechanic's lien was deficient, despite a Court Decision that says otherwise, which cited specifically in the ruling ***why*** the lien was not deficient. Repeating the incorrect description of the mechanic's lien as "deficient" over and over does not make it true through repetition. That might work for Mr. Cheney on his own, but it would be unreasonable to expect that same incongruity from the Court. Defendant Cheney then claims, again, that a contempt of court charge is not applicable to him, but *that* assertion *too* was defeated above. Defendant Cheney then goes on to once again bring up some accusation of legal malpractice by Plaintiff James Caputo, when such a claim was never made by this Plaintiff in my pleadings. Defendant Cheney then attempts to punt the responsibility for accepting title on a property encumbered by a mechanic's lien to rest solely upon the shoulders of Buyer's attorney, Buyer's title company and the bank attorney. He concludes his position by once again repeating the false claim that the mechanic's lien was deficient and that he was kind enough to warn this Plaintiff about amending it all before deciding to (essentially) say to both himself and Defendant Houle in as many words, "*A duly filed and in-force mechanic's lien messing up this sale? Screw that and him. A Supreme Court Decision upholding the lien amount and name issue when formally challenged? Screw that and them. This property is being sold outside of the law and the Court's Decision and that's that. I will then sell this whole lien thing to everyone else by fraudulently stating that the name issue invalidates the lien enough to proceed and*

that I have the jurisdiction to unilaterally make this decision." While it may not necessarily be word for word correct, that progression of actions is the reality of what has occurred here from this Defendant Donald Cheney, Esq and his client, Robert T. Houle.

WHEREFORE, for the foregoing reasons, Plaintiff James R. Caputo respectfully requests that this Court: (i) **deny** the motion by Defendant Donald Cheney, Esq. and Cheney Law Firm, PLLC to dismiss the Complaint against the Defendants; (ii) **deny** any sanctions on Plaintiff James R. Caputo for frivolous conduct; (iii) **deny** the granting of any attorney's fees or costs incurred in connection with this action; (iv) compel Defendant Donald Cheney, Esq. to provide his Answer to the Complaint and the specific Causes of Action currently filed against him; and such other and further relief as this Court may deem proper and just.

VERIFICATION

I, James R. Caputo, being duly sworn, say: I am the Plaintiff in the above-named proceeding and that the foregoing Verified Response and submitted evidence were prepared by me, and are true to my own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters, I believe it to be true.

Sworn to before me this
13th day of February, 2024

Notary Public

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MICHAEL T. DeBOTTIS
Notary Public, State of New York
Qualified in Onondaga County
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My Commission Expires March 25, 2027