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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION—CIVIL

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R INVESTMENT SIXTEEN, LP	:	October Term, 2016
	:	
<i>Plaintiff</i>	:	Case No. 01637
	:	
<b>v.</b>	:	
	:	Commerce Program
SOUTH PHILLY PLAZA, LLC	:	
	:	Control Nos. 17013048,
<i>Defendant</i>	:	16121590

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SOUTH PHILLY PLAZA, LLC	:	November Term, 2016
	:	
<i>Plaintiff</i>	:	Case No. 01838
	:	
<b>v.</b>	:	
	:	Commerce Program
R INVESTMENT SIXTEEN, LP	:	
	:	Control No. 16121273
<i>Defendant</i>	:	

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**ORDER OVERRULING PRELIMINARY OBJECTIONS**  
**AND MEMORANDUM OPINION**

AND NOW, this 26<sup>th</sup> day of May 2017, upon consideration of the preliminary objections of plaintiff R Investment Sixteen, LP to the counterclaim of defendant South Philly Plaza, LLC, and the preliminary objections of defendant R Investment Sixteen, LP to the complaint of plaintiff South Philly Plaza, LLC, it is **ORDERED** as follows:

- I. the preliminary objections of plaintiff R Investment Sixteen, LP to the counterclaim of defendant South Philly Plaza, LLC are **OVERRULED**;
- II. the preliminary objections of defendant R Investment Sixteen, LP to the complaint of plaintiff South Philly Plaza, LLC are likewise **OVERRULED**.

**DOCKETED**

MAY 30 2017

R. POSTELL  
COMMERCE PROGRAM

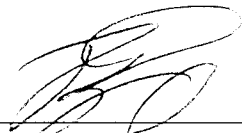
R Investment Sixteen Lp-ORDOP



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III. It is further **ORDERED** that the motion to amend complaint filed by plaintiff R Investment Sixteen, LP, which motion was granted by the Court, is **DENIED AS MOOT**.

**BY THE COURT,**



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**RAMY I. DJERASSI, J.**

**MEMORANDUM OPINION**

Before the Court are two sets of preliminary objections filed by R Investment Sixteen, LP (“Buyer”) in each of these two tightly related, consolidated actions. In the first action, # 161001637 (First Action”), the filing party is plaintiff Buyer whose preliminary objections challenge the counterclaims of South Philly Plaza, LLC (Seller). In the second action, #161101838 (“Second Action”), the filing party is again Buyer who this time is challenging Seller’s complaint through preliminary objection.

Both sets of Buyer’s preliminary objections are overruled for reasons explained here.

**Background**

Second Action plaintiff is Seller, a limited liability company that owns real property in Philadelphia, Pennsylvania. Second Action defendant is Buyer, a limited partnership based in Philadelphia, Pennsylvania.

On February 1, 2016, Seller and Buyer entered into a PURCHASE AND SALE AGREEMENT (the “Agreement”), whereby Buyer agreed to purchase from Seller real property located at 2715 South Front Street, in Philadelphia, Pennsylvania (the

“Property”).<sup>1</sup> The Agreement contained a provision titled “Due Diligence Period.” Article 7(a) of the due diligence provision empowered Buyer to conduct due diligence for a period of 180 days prior to consummation of the Agreement.<sup>2</sup> Pursuant to the Agreement, Buyer could extend the Due Diligence Period “for three additional thirty (30) day periods” by providing Seller with an extension notice for each additional period. To obtain the first extension, Buyer was required to give notice to Seller before the end of the 180 days period; to obtain the second extension, Buyer was required to give notice to Seller before the end of the first extension period; finally to obtain the third and last extension, Buyer was required to give notice to Seller before the end of the second extension period.<sup>3</sup>

#### THE FIRST ACTION

On October 13, 2016, Buyer commenced civil proceedings against Seller (the “First Action”). Buyer commenced the proceedings in the First Action by filing simultaneously a praecipe to issue writ of summons against Seller, and a praecipe for *lis pendens* against the Property.<sup>4</sup>

On December 23, 2016, Buyer filed an amended complaint in the First Action. The amended complaint contains a claim asserting breach of contract and a claim seeking declaratory relief.<sup>5</sup> On January 5, 2017, Seller filed an answer with new matter and a counterclaim to the amended complaint of Buyer. Through the counterclaim, Seller seeks judgment with compensatory and punitive damages against Buyer for its “willful, intentional malicious, and ... bad faith” filing of the *lis pendens* in the First

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<sup>1</sup> PURCHASE AND SALE AGREEMENT, Exhibit A to the complaint.

<sup>2</sup> *Id.* at article 7(a).

<sup>3</sup> *Id.* at 7(a)(i).

<sup>4</sup> R Investment Sixteen, LP v. South Philly Plaza, LLC, case No. 1610—01637.

<sup>5</sup> Amended complaint, counts I—II.

Action.<sup>6</sup> On January 25, 2017, Buyer filed preliminary objections to the counterclaim of Seller. Buyer seeks an Order dismissing the counterclaim of Seller and striking Sellers' claim for compensatory and punitive damages.<sup>7</sup> On February 14, 2017, Seller filed its response in opposition to Buyer's preliminary objections to the counterclaim of Seller. On February 17, 2017, Buyer filed a reply memorandum in support of its preliminary objections to Seller's counterclaim. These fully-briefed preliminary objections in the First Action are ripe for a resolution.

Also in the First Action, Seller asserted opposition to the *lis pendens* by filing papers captioned "emergency motion to strike *lis pendens*."<sup>8</sup> This emergency motion was filed on February 1, 2017 and was extensively briefed. On March 2, 2017, the Emergency Motion was denied.<sup>9</sup>

#### THE SECOND ACTION

On November 21, 2016, Seller commenced separate civil proceedings against Buyer by filing the Second Action complaint.<sup>10</sup> Count I of this complaint asserts a declaratory judgment claim. We are asked to agree that the Agreement with Buyer effectively ended when Buyer failed to timely provide Seller with notice to extend the due diligence period. In Count II of the complaint, Seller asks us to find that Buyer defamed Seller's title to the Property by filing the *lis pendens*. On December 9, 2016, Buyer filed preliminary objections to Seller's complaint. Buyer seeks dismissal of both the declaratory judgment claim and the defamation-of-title claim asserted in Seller's complaint at count I and II respectively. In addition, the preliminary objections ask us

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<sup>6</sup> Answer with new matter and counterclaim to Buyer's amended complaint, ¶¶ 46–47.

<sup>7</sup> Preliminary objections, control No. 17013048.

<sup>8</sup> Motion control No. 17020124.

<sup>9</sup> Order dated March 2, 2017.

<sup>10</sup> South Philly Plaza, LLC v. R Investment Sixteen, LP, case No. 1611–01838.

to strike Seller's claims for attorney's fees and punitive damages. On December 29, 2017, Seller filed its response. The parties have briefed their positions.

On March 28, 2017, this Court issued an Order consolidating the two cases.

### **Discussion**

The standards of preliminary objections are well-settled:

[p]reliminary objections ... test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.<sup>11</sup>

In the First Action, defendant Seller counterclaimed against Buyer by asserting that Buyer had filed the *lis pendens* in bad faith and with malicious intent. Seller argues Buyer's purpose was to prevent them from refinancing the Property and selling it to third parties. Seller's counterclaim avers that Buyer's filing of the *lis pendens* is tortious conduct known as defamation-of-title.<sup>12</sup>

In the Second Action, plaintiff Seller's complaint claims, the same causes of action against Buyer, namely defamation-of-title. In both the First Action and Second Action, Buyer filed preliminary objections against the defamation-of-title actions.

Buyer's preliminary objections in both cases argue that Buyer is absolutely

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<sup>11</sup> Albert v. Erie Ins. Exch., 2013 Pa. Super 59, 65 A.3d 923, 927--28 (Pa. Super. 2013) (emphasis supplied).

<sup>12</sup> Answer, new matter and counterclaim of Seller, R Investment Sixteen, LP v. South Philly Plaza, LLC, case No. 1610-01637.

privileged to file and maintain a *lis pendens* upon the disputed Property.<sup>13</sup> Specifically, Buyer argues that, in the institution and course of judicial proceedings, a party such as Buyer is absolutely privileged under Pennsylvania law to publish defamatory matter if related to the judicial proceedings under way or about to begin.<sup>14</sup> Buyer cites, Triester v. 191 Tenants Ass'n, ("Triester").<sup>15</sup>

In Triester, the defendants, a tenant association, (*hereinafter* "Tenants") filed a complaint against the Owners of the apartment building in which they lived. Tenants hoped to prevent the Owners from converting the apartments into condominiums. Upon Owner's motion for judgment on the pleadings filed, the trial court dismissed the Tenant's case.<sup>16</sup>

Subsequently, Owners filed a separate suit against Tenants. In this complaint, the Owners alleged that before the *Triester* action had begun, Tenants had published defamatory statements whose purpose was to stop conversion of the building into condominiums. In addition, Owners claimed that the filing of the underlying lawsuit, which had been dismissed on judgment on the pleadings, had made their building uninsurable and more difficult to market. Their claim was fashioned as defamation-of-title.<sup>17</sup> Tenants filed preliminary objections against the claim of defamation-of-title, and the trial court sustained the objections, dismissing the complaint. The Owners appealed.

Affirming, the trial court, the Superior Court cited a section of the Restatement

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<sup>13</sup> Preliminary objections to the counterclaim of Seller, case No. 1610—01637, motion control No. 17013048; preliminary objections to count II of Seller's complaint, case No. 1611-01838, motion control No. 16121273.

<sup>14</sup> *Memorandum* of law in support of the preliminary objections, motion control 17013048, at IV—A.

<sup>15</sup> Triester v. 191 Tenants Association, 415 A.2d 698 (Pa. Super. 1979).

<sup>16</sup> Id. at 701.

<sup>17</sup> Tenants Association v. Triester, 98 Mont. Co. L.R. 206 (1974) *aff per curiam*, 463 Pa. 143 (1975).

(Second) of Torts which states in pertinent part that—

a party to a private litigation ... is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.<sup>18</sup>

The Superior Court explained that the absolute privileges enjoyed by a defendant in a “pure defamation” case are also available to a defendant in a case based on a claim of defamation-of-title.<sup>19</sup> In addition, the Superior Court explained that this absolute privilege applies in defamation-of-title actions even when it is also alleged that the statement were made maliciously.<sup>20</sup>

Turning to these consolidated cases, we conclude that any alleged defamatory statements by Buyer before these cases began are absolutely privileged, if they are related to these legal proceedings, and this includes the *lis pendens* filing.

The analysis, however, does not end here. This is because Buyer incorrectly claims that Seller’s defamation-of title-claims and counterclaims should be dismissed entirely.<sup>21</sup> This is rejected because factual questions still remain.<sup>22</sup> There are at least two questions in play. First, there is the issue whether Buyer allowed the Agreement to expire by failing to provide Seller with timely notice to extend the due diligence period. Second, the question remains whether Seller breached the Agreement by failing to

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<sup>18</sup> Triester v. Tenants Association, supra. at 701-702 citing Restatement (Second) of Torts § 587 (1977).

<sup>19</sup> Id. at 702.

<sup>20</sup> Id.

<sup>21</sup> *Memorandum* of law in support of preliminary objections to Seller’s counterclaim, case No. 1610—01637, motion control No. 17013048 at p. 4; *memorandum* of law in support of preliminary objections to count II of Seller’s complaint, case No. 1611-01838, motion control No. 16121273 at p. 4.

<sup>22</sup> Under Pennsylvania Rule of Civil Procedure 1028 ( c ) (2) (2017), [i]f an issue of fact is raised, the court shall consider evidence by deposition or **otherwise. (Emphasis added )**

provide Buyer with information necessary to the completion of its due diligence efforts.

Buyer's preliminary objections are therefore not "clear and free from doubt", the court does not know whether Seller "will be unable to prove its allegations."<sup>23</sup> Buyer's preliminary objections to Seller's Count II claim are overruled, and Buyer's preliminary objections to Count 1 of Seller's counterclaim are overruled too.

In the Second Action, Buyer's preliminary objections assert a number of other distinct challenges to Seller's complaint. First, Buyer challenges Seller's claim for declaratory judgment that the Agreement is null and void. Buyer asserts this claim should be dismissed because it is a mirror image of Seller's claims as plaintiff in the First Action. These preliminary objections are overruled as they are unripe now that the two cases have been consolidated. Resolution of "mirror image issues" are better resolved at a later stage.

Second, Buyer alternatively asks that the two related actions be consolidated. These preliminary objections are moot and denied because the cases are indeed already consolidated.

Third, Buyer's preliminary objections to Seller's claims for attorney's fees. These preliminary objections are overruled because attorney's fees demanded by Seller involve resolution of whether the Agreement was breached, and if so, at whose fault. Because these are factual questions that must be decided first, dismissing attorney's fees is premature.

Finally, Buyer preliminarily objects to Seller's claim for punitive damages. This is

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<sup>23</sup> **Albert v. Erie Ins. Exch.**, 65 A.3d 923, 927–28 (Pa. Super. 2013).



overruled too because Seller has properly averred that Buyer filed the *lis pendens* “maliciously and in bad faith.”<sup>24</sup> As malice may be an element of a punitive damage claim, it is too early to dismiss punitives.

**BY THE COURT,**

  
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**RAMY I. DJERASSI, J.**

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<sup>24</sup> See complaint, case No. 1611-01838, ¶ 26 (emphasis supplied); see also, counterclaim to Buyer’s amended complaint, case No. 1610-01637, ¶¶ 40–47. See *Walder v. Lobel*, 488 A.2d 622, 626 (Pa. Super. 1985) (actual malice gives rise to potential punitive damages).