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COURT OF APPEALS

STATE OF NEW YORK

SUTTON 58 ASSOCIATES LLC,

Appellant,

-against-

NO. 80

PHILIP PILEVSKY, ET AL.,

Respondents.

20 Eagle Street
Albany, New York
October 15, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 morning's calendar is number 80, Sutton 58 Asso - - -
3 Associates v. Pilevsky.

4 Counsel?

5 MR. GREENBERG: Good morning, Your Honors.
6 Ronald Greenberg from Kramer Levin Naftalis & Frankel.
7 With me is my colleague, Natan Hamerman. We're here for
8 plaintiff-appellant. We respectfully request two minutes
9 for rebuttal.

10 CHIEF JUDGE DIFIORE: You may have two minutes,
11 sir.

12 MR. GREENBERG: Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: You're welcome.

14 MR. GREENBERG: Judge Fahey taught, as an
15 Appellate Division Justice in the Miran case, that where a
16 federal statute is, and I quote, "susceptible of more than
17 one plausible reading, courts ordinarily accept the reading
18 that disfavors preemption."

19 Now, that quote makes a sensible assumption, and
20 the assumption is, that when someone is claiming
21 preemption, they actually have a federal statute in mind
22 that would do the preempting. But in this case, the
23 Appellate Division cited no federal statute, and
24 remarkably, in the thirty-five-page brief to this court,
25 respondents cited no federal statute in favor of



1 preemption.

2 When we pointed out that glaring omission in our
3 reply brief, respondents' solution was to hire a federal
4 bankruptcy court judge - - - a retired judge, obviously - -
5 - to cite a few federal statutes at long last. But what
6 respondents never did is connect the dots between those
7 statutes, which merely provide for relief inside the
8 bankruptcy court for wrongful bankruptcy filings, with our
9 claim, which is for tortious interference with contract,
10 completely outside of the bankruptcy, and any notion of
11 federal preemption.

12 JUDGE STEIN: Are we really talking - - -

13 JUDGE RIVERA: But what was the purpose of the -
14 - - what was the purpose of the tortious interference?
15 What - - - what - - - what was the goal?

16 MR. GREENBERG: The goal of the tortious
17 interference was to make it so that we cannot immediately
18 dismiss the bankruptcy. And it succeeded.

19 JUDGE RIVERA: So - - - so why isn't that, then,
20 what connects - - - when we track back - - - why doesn't
21 that then connect you to the bankruptcy proceedings, so
22 that indeed preemption does apply?

23 MR. GREENBERG: Because Your Honor, it's not
24 sufficient just to say the word "bankruptcy" and that
25 somehow leads to preemption. It's not consistent with the



1 jurisprudence in this are - - - in this area. The cases
2 are clear and the cases are clear on both sides.

3 JUDGE RIVERA: Yeah, but your argument is that
4 the whole point of the alleged tortious interference was
5 indeed to undermine the - - - the way you anticipated you
6 would resolve any default, right?

7 MR. GREENBERG: But - - - but again, Your Honor -
8 - -

9 JUDGE RIVERA: You, being the party.

10 MR. GREENBERG: Again, Your Honor, the cases
11 don't support preemption in those circumstances. So, for
12 example, you have the Davis case and the Barton case.
13 Those are cases for breach of fiduciary duty against
14 directors and officers for the very act of filing the
15 debtors into bankruptcy. No damages could have been
16 suffered in that - - - in those cases outside of the
17 bankruptcy, but that's not sufficient. And the cases say
18 so. And the jurisprudence is clear, and it's the
19 jurisprudence on both sides.

20 JUDGE STEIN: Counsel, can - - - can - - - can we
21 talk about the damages for a minute? If - - - if they'd
22 never filed bankruptcy, would the scheme that you
23 described, that led them there, have resulted in damages to
24 you?

25 MR. GREENBERG: The - - - the - - - the damages



1 were - - - no. The damages were suffered for the length of
2 time that we were deprived of our asset. But again, just
3 because, you know, the damages result from the length of
4 time that an entity happens to be in bankruptcy is not a
5 basis for federal preemption. Their own cases say so. I
6 mean, their big case here is the Astor case.

7 The Astor case was a wrongful - - - what is - - -
8 was based on the allegation, was it - - - it was a tort.
9 The - - - the actual bankruptcy filing was the tort. And
10 Astor laid it down perfectly and it applies here. "Claims
11 requiring a finding that the debtor filed for bankruptcy,
12 or filed certain papers in the bankruptcy proceeding in bad
13 faith or for an improper purpose, as measured by New York
14 Tort Law, are preempted."

15 It's got to be based on the bankruptcy filing or
16 a violation of the Code. Conversely - - -

17 JUDGE STEIN: And it - - - does it have to be
18 against the debtor in bankruptcy?

19 MR. GREENBERG: I'm - - - I'm sorry, Your Honor?

20 JUDGE STEIN: Does it have to be against the
21 debtor in bankruptcy?

22 MR. GREENBERG: Does it - - - well, no, it - - -
23 it - - -

24 JUDGE STEIN: The bad - - - the bad-faith filing
25 claim.



1 MR. GREENBERG: No, I - - - look, there's cases -
2 - - one of their cases, the MSR case, is a - - - is a
3 malicious prosecution based on a wrongful filing of a proof
4 of claim. So that wouldn't have been by the debtor. But
5 it was based - - -

6 JUDGE STEIN: But it's somebody in the bankruptcy
7 process.

8 MR. GREENBERG: But it - - - yes, it's based on a
9 bankruptcy filing. And I think the Dougherty case, which
10 we cited, is a perfect example of why this case is not - -
11 - is not suitable for preemption.

12 The Dougherty case was a case where attorneys'
13 fees - - - excessive attorneys' fees, it was alleged, were
14 charged completely inside of the bankruptcy. No damages
15 ever could have been incurred there outside the bankruptcy.
16 It was based on excessive attorneys' fees, all of which
17 were charged inside of the bankruptcy. The plaintiff
18 alleged that that was - - - that those fees were
19 inappropriate and it was a violation of the unfair trade
20 practices act under Pennsylvania law.

21 The court denied preemption, and the language is
22 perfect here. And - - - and - - - and the quote from - - -
23 from Dougherty is, "Merely because a plaintiff brings a
24 state law claim in the context of a bankruptcy matter does
25 not justify preemption, particularly where the underlying



1 facts of the state law claim are based" - - - are - - -
2 "are not based on a violation of the Code."

3 It's exactly the case here. What these
4 respondents never understood, never got their arms around,
5 was what Justice Kornreich understood instantly when she
6 got this case, that preemption here would upend the way
7 business is done in New York City and around the state,
8 particularly in real estate development. How that business
9 is done is a borrower comes to a lender and the lender
10 wants to lend, but the lender wants to protect its asset in
11 the case of a default, does not want to have lengthy
12 bankruptcy proceedings - - -

13 JUDGE RIVERA: Let - - - let's say we disagreed
14 with you. Is there another way to achieve that goal? Is
15 there a way to - - - to get that outcome?

16 MR. GREENBERG: Not that I'm aware of. If
17 preemption applies here, not only are these loan covenants
18 worthless, can't - - - can't enforce them against the
19 debtor, because the debtor's in bankruptcy, can't enforce
20 them against the tortious interferer, because you've - - -
21 you've adjudicated preemption here. Also, bad board is - -
22 - known as bad-boy guarantees. A cornerstone of real
23 estate development in New York, where a principal of the
24 borrower must sign on for personal liability, but only in
25 the case of certain, what is known as bad-boy acts, one of



1 which is filing the borrower into bankruptcy.

2 Well, if the - - - if this claim is preempted,
3 those claims are preempted. If the standard is merely
4 facilitating a bankruptcy, tied not to any bankruptcy
5 statute, not to any bankruptcy filing, then those claims
6 are also preempted. And by the way - - -

7 JUDGE GARCIA: Counsel? I'm sorry, over here.

8 What is a standalone, you know - - - the same
9 contracts here, but it's just an entity comes in and lends
10 the borrower money to file for bankruptcy, and maybe even
11 has them talk to their own bankruptcy lawyer, and get a
12 recommendation for a lawyer, and then the entity owns - - -
13 loans them - - - knowing the covenants, loans them 200,000
14 dollars so they can hire the lawyer. Would that be
15 tortious interference?

16 MR. GREENBERG: No, Your Honor, because there's
17 no tort involved. There has to be a tort for tortious
18 interference. Let's talk for one second - - -

19 JUDGE GARCIA: But okay, so why is that
20 different?

21 MR. GREENBERG: Because let's talk what this
22 claim is about. This was not hiring a lawyer. First of
23 all, it's to file a petition. The filing of a petition is
24 pre - - - protected under all of the jurisprudence. But
25 let's talk about what - - - what this case is really about.



1 This was a crazy scheme - - - this wasn't about some
2 accepted lending practice. You're not discouraging
3 bankruptcy filings by not holding a preemption here.
4 You're discouraging tortfeasors from committing torts.

5 JUDGE GARCIA: No, but see, by taking it away
6 from those facts, to me, you're arguing something about the
7 bad faith of the bankruptcy proceeding, because otherwise,
8 why isn't my hypothetical also tortious interference? I
9 know about the contract; I know about the provision. I'm
10 loaning you 200,000 dollars and you're using it to file for
11 bankruptcy. I know that you're going to do that. And I
12 let you talk to my bankruptcy lawyer, too, get you a
13 recommendation. Why isn't that a tortious interference
14 claim?

15 MR. GREENBERG: Be - - -

16 JUDGE GARCIA: And the difference, I think, what
17 I'm trying to get at is, because you're measuring the
18 damages, and you're measuring the tort by some bad faith
19 surrounding the filing of the bankruptcy.

20 MR. GREENBERG: But - - - but Your Honor, that's
21 exactly the Barton and Davis case. It's exactly that case.
22 I mean, it's not loaning, but it's the decision to file for
23 bankruptcy. If it's outside of the Bankruptcy Code, if
24 it's outside of the bankruptcy court, it's not so - - -

25 JUDGE GARCIA: Again, I guess what I'm asking you



1 again is, is my hypothetical, under your view, a tortious
2 interference or not?

3 MR. GREENBERG: But if it's - - - if it's - - - I
4 want to divorce it for one moment from bankruptcy and just
5 talk about what the conduct is, because that really is - -
6 - that's really what controls. So if someone knowingly
7 lends to someone who they know has a loan covenant that
8 says they can't take on a loan, but there has to be a bad-
9 faith purpose involved. That's where - - - that's what - -
10 - you know, tortious interference isn't any act.

11 JUDGE STEIN: Well, putting it - - -

12 MR. GREENBERG: There's - - - there's got to be a
13 tort.

14 JUDGE STEIN: Put another way, doesn't - - -
15 doesn't the - - - the law of tortious interference refer to
16 unjustifiably inducing someone to do something?

17 MR. GREENBERG: Yes.

18 JUDGE STEIN: So two things, unjustifiably and
19 inducing, and that - - - and there has to be causation, so
20 the - - - the breaching party wouldn't have breached but
21 for that inducement, right?

22 MR. GREENBERG: Exactly, Your Honor. It is - - -

23 JUDGE STEIN: So - - - so what's missing? What's
24 - - - you know - - -

25 JUDGE GARCIA: So what's missing from my



1 hypothetical? I know the covenant, you know. I - - - I
2 think you should file for bankruptcy. So I loan you
3 200,000 dollars. I gave you my lawyer to talk to you and
4 then recommend another lawyer that you hire with my loan of
5 200,000 dollars. And you file for bankruptcy.

6 MR. GREENBERG: Well, well, Your - - - Your
7 Honor, I think what's missing in that hypothetical is the
8 intent. People just don't - - -

9 JUDGE GARCIA: Intent to what?

10 MR. GREENBERG: Well, the - - - well, here,
11 intent to steal a 200-million-dollar project for half a
12 million dollars by throwing these Lynbrook one-bedroom
13 apartments into one debtor, and loans into another debtor -
14 - -

15 JUDGE RIVERA: Yeah, yeah but what - - - but
16 we're deciding whether or not the action can go forward,
17 not whether or not you can establish the elements of the
18 claim.

19 MR. GREENBERG: No, I - - - I understand, but - -
20 -

21 JUDGE RIVERA: Because the allegation is going to
22 be there's intent. You're just saying, well, some people
23 won't proceed with that tort, because they don't think
24 there's a way that they can establish the intent.

25 JUDGE STEIN: But - - - but isn't - - - isn't the



1 point that, if you - - - if you can't prove the claim, then
2 it's not going to chill - - - if - - - if it doesn't fall
3 within the claim, then it's not going to chill the - - -
4 these activities on the part of people who want to lend
5 money. Isn't - - -

6 MR. GREENBERG: Exactly.

7 JUDGE STEIN: You get my point?

8 MR. GREENBERG: Exactly. And - - - and if I can
9 just make two points very quickly? The - - - the intent
10 and how it would chill and all of that is very important,
11 but it's point two.

12 Point one is the jurisprudence under preemption
13 for tortious interference - - - or not for tortious
14 interference. The jurisprudence under when a claim ought
15 to be preempted. And it's clear. Every case cited by both
16 sides, and there's dozens of them, all of them say, that if
17 it's not something that Congress intended to be decided in
18 the bankruptcy court, it's not preempted. And the cases
19 define what that is. A violation of the Code, a wrongful
20 filing. It's not outside of the bankruptcy.

21 But now I want to get to point two, which what is
22 the public policy? And you - - - and of course - - -

23 JUDGE RIVERA: Well, before you get to that, is -
24 - - is then your point that any of the other remedies that
25 have been pointed out in the briefing would not have



1 addressed this concern to disincentivize this kind of
2 conduct, or at least to compensate - - -

3 MR. GREENBERG: Clearly not. It's - - -

4 JUDGE RIVERA: - - - parties for this conduct?

5 MR. GREENBERG: Clearly not.

6 JUDGE RIVERA: Okay.

7 MR. GREENBERG: It's exactly - - -

8 JUDGE RIVERA: How not, why not?

9 MR. GREENBERG: It's - - - it's exactly the
10 point, because the - - - the remedies that they propose - -
11 - which, by the way, was not until, you know, we pointed
12 out they didn't cite a Bankruptcy Code statute on reply,
13 then they hired a judge, whatever.

14 JUDGE RIVERA: Right.

15 MR. GREENBERG: But - - - but the remedies that
16 they are - - - are suggesting, dismissal of the bankruptcy,
17 where there's a two-party dispute. That doesn't address
18 our damages against a tortfeasor. And by the way, the
19 irony here is exquisite. We tried to dismiss the - - -

20 JUDGE RIVERA: But doesn't that address the stay,
21 you know, of the bankruptcy?

22 MR. GREENBERG: I'm sorry?

23 JUDGE RIVERA: You're trying to lift the stay.
24 Isn't that what would be a remedy?

25 MR. GREENBERG: That's a remedy as against the



1 debtor. It doesn't - - - it doesn't compensate us for our
2 damages that a - - - an outside tortfeasor caused outside
3 of the bankruptcy. And by the way, that they would suggest
4 that, the irony of it is unbelievable. We did move to
5 dismiss this as a two-party dispute as it was supposed to
6 be under the statute. We couldn't dismiss it because our
7 loan covenants were ruined by their tortious acts.

8 And - - - and by the way, the - - - the other
9 irony here is that the - - - that - - - excuse me - - -
10 that these statutes that we complied with in structuring
11 our loans, they were meant to discourage bankruptcies. The
12 two-party dispute statute, the single-asset real estate
13 entity statute. And don't take my word for it; that was
14 their amicus, Judge Cyganowski's testimony in the Joshua
15 Patz (ph.) case.

16 So we tried to comply with these loan covenants.
17 They destroy them. We now can't enforce them against the
18 debtor. They say, not against them, and in service to
19 what, some normal accepted business practice?

20 JUDGE FAHEY: Judge, I see his red light is on.
21 Can I just ask a question?

22 CHIEF JUDGE DIFIORE: Yes, please.

23 JUDGE FAHEY: I - - - I just don't want to miss
24 this point, Counselor. Your proposed rule would allow
25 creditors to sue - - - it's argued that your proposed rule



1 would allow creditors to sue lawyers or credit counsels who
2 help facilitate bankruptcy filings. And it's a public
3 policy argument that's been raised to us, so I just wanted
4 to hear your position on it.

5 MR. GREENBERG: No, not at all, because for - - -
6 for two reasons. One, lawyers who file bankruptcy
7 petitions don't commit torts, number one. Number two, the
8 act of filing a petition is protected under all the
9 jurisprudence. Nobody says otherwise. The filing of the
10 petition, that's - - - the quote from the Astor case, their
11 big case that I gave back to the court moments ago - - -
12 the act of filing a petition, nobody's suing lawyers here.
13 We suing tortfeasors who took a flier. They said, we'll
14 throw in a few hundred thousand dollars, and maybe, just
15 maybe, we'll wreck all of this, wreck the bankruptcy, and
16 come out with a forty-nine percent interest in a 200-
17 million-dollar project.

18 Nobody does that. That's not done in a normal
19 bankruptcy. We're not chilling any normal business
20 practice, and certainly not a business practice that we
21 don't want chilled.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 MR. GREENBERG: Thank you, Your Honors.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MR. SMITH: Thank you, Your Honor. I guess I - - -



1 - I guess I want to begin by dealing with the - - - the
2 fiction that they - - - you can somehow divorce the tort
3 claim from the bankruptcy. You - - - you - - - you just
4 can't do it. The bankruptcy is all over Mr. Greenberg's
5 complaint. He - - - in one of his briefs, he says, well,
6 we - - - I admit the damages are from - - - from the
7 bankruptcy, but the claim isn't.

8 Well, first of all, that - - - that distinction
9 doesn't work. National Hockey League and a number of other
10 cases say clearly it doesn't work. If the damages flow
11 from the bankruptcy, that's enough for the preemption and
12 it's admitted that that's true here.

13 JUDGE STEIN: Counselor, didn't - - - didn't the
14 - - - haven't the courts made a distinction really between
15 pre-petition conduct and conduct in the bankruptcy
16 proceeding itself?

17 MR. SMITH: In - - - in a way, Judge, but in - -
18 - and that's really the Davis case that - - - that Mr.
19 Greenberg is - - - it's one of the two that he likes to - -
20 - to talk about. In the Davis case, I think you could make
21 the claim that that was really pre-petition, because that
22 was a case where the - - - the defendants had turned down a
23 more lucrative deal and chosen instead to file in
24 bankruptcy.

25 And if I understand the Davis case, and if I



1 understand the distinction the Appellate Division made
2 here, they said, yeah - - - yeah, that real - - - that's a
3 ca - - - claim that could've been brought if no bankruptcy
4 had ever been filed, because you'd still turn down the more
5 lucrative deal. In that sense, there is that distinction.

6 But where you have a pre-petition activity that
7 is directed at bankruptcy, and causes a bankruptcy, and
8 he's complaining about the bankruptcy, no, that dis - - -
9 no, that's not a valid distinction. The - - -

10 JUDGE STEIN: But - - - but - - - but aren't - -
11 - aren't your concerns about all this really about whether
12 they can prove tortious interference, not whether there's
13 preemption here, because they're not trying to do anything
14 in the bankruptcy proceeding. They - - -

15 MR. SMITH: Well - - -

16 JUDGE STEIN: - - - they can't stop the
17 bankruptcy proceeding.

18 MR. SMITH: They could.

19 JUDGE STEIN: They can't. They're trying to - -
20 - to take an action against a third party, who's not the
21 debtor, not a creditor, and not - - - not in any way
22 involved in the bankruptcy proceeding. It - - - it seems
23 to me totally separate, and you may have - - - very well
24 have a very strong argument that they haven't done anything
25 tortious. But - - - but isn't that something to be



1 resolved in the state court in the action that they bring?

2 MR. SMITH: No, Your Honor. It's something that
3 can and should be resolved in the bankruptcy. The - - -
4 the - - - the whole gist of their claim is that this was a
5 scheme to - - - to create a spurious bankruptcy. To - - -
6 they - - - they said the bankruptcy was in bad faith. He
7 said they couldn't get the case dismissed. They didn't
8 try. They withdrew their motion. Maybe the judge wasn't
9 receptive, but that was their remedy. And he says, well,
10 that's not a good remedy, because I can't recover my
11 damages from a third party.

12 If he had - - - if he had obtained that remedy,
13 the dismissal of that - - - of the - - - of the claim, at
14 the outset of the bankruptcy, he wouldn't have any damages.

15 JUDGE STEIN: Well, but maybe there were no
16 grounds for dismissal of the claim. And I - - - and maybe
17 that's the sense that he - - - that they were getting from
18 the bankruptcy court, and - - - and so they - - - they're -
19 - - they're seeking to hold someone else responsible for
20 their own conduct in leading up to that, which again, you -
21 - - you may have a very strong defense against, but - - -

22 MR. SMITH: Well, I - - -

23 JUDGE STEIN: - - - why can't - - - I - - - I - -
24 - I'm having a hard time understanding why that is a part
25 of the bankruptcy case - - -



1 MR. SMITH: Well, he - - -

2 JUDGE STEIN: - - - that isn't preempted.

3 MR. SMITH: Because the - - - the offense, what
4 my clients allegedly did was to - - - to facilitate,
5 promote, encourage, whatever you want, the bankruptcy,
6 exactly the same as the Astor case. That's what Roski was
7 supposed to have done. And so the Roski case is - - - is
8 Judge - - - is Judge Garcia's hypothetical. In fact, this
9 case is Judge Garcia's hypothetical. Some - - - they - - -
10 somebody comes along, and for his own reasons says, hey,
11 I've got a great idea; why don't you file in bankruptcy,
12 and I'll - - - and I'll loan the money for the lawyer? In
13 Roski, they loaned the money for the lawyer.

14 JUDGE WILSON: But even - - - even in the Astor
15 case, the judge refused to dismiss the tortious
16 interference with the venture agreement claim, right. He
17 only dismissed three of the twelve as preempted.

18 I want to - - - I want to, though, ask you
19 something a little bit different. The - - - the Welch - -
20 - Nelson v. Welch, the Repository Techs case, distinguishes
21 - - - distinguishes Miles on the ground that the Bankruptcy
22 Code for involuntary bankruptcies provides a remedy in
23 303(1) and that's limited to involuntary bankruptcies, so
24 that the preemptive effect, to the extent there is some, in
25 the bank - - - of the bankruptcy laws is limited to



1 involuntary filings. There's an earlier - - - and Miles
2 actually has language that supports that, that's quoted by
3 Repository Techs. And there's an earlier Third Circuit
4 case called Paradise Hotel that - - - sort of to the same
5 effect.

6 So how would you respond to the proposition that
7 there is no bankruptcy preemptive effect for voluntary
8 proceedings, only involuntary?

9 MR. SMITH: Well, I would say that's contrary to
10 a lot of the other cases, and what about - - - and one is
11 them is National Hockey League. In National Hockey League,
12 they had a long pre-petition history, in which the Moyes
13 parties, the owners of the Coyotes, were doing something
14 that seems quite outrageous. They had a deal with the NHL
15 not to move them - - - move them to Canada and they
16 negotiated to do exactly that, to move them to Canada, and
17 they put in the agreement that way - - - that - - - that
18 this is going to have to be done through a bankruptcy
19 court. And then they filed a bankruptcy. And they - - -
20 and they get the approval. And the court says that's
21 preempted. It's for the bankruptcy court to decide whether
22 that's legitimate.

23 JUDGE FAHEY: But - - - but let me ask this,
24 Counselor. It - - - that's a contractual remedy, right,
25 that came out of - - - out of the NHL case. And I'm



1 wondering - - - I don't know the answer to this, but I
2 wonder if there's a distinction to be drawn here between
3 the contractual agreement that has a particular remedy that
4 may be resolved in bankruptcy court, and if a contractual
5 argument - - - the same contractual argument could be made
6 here, but that wouldn't apply to a tort remedy for a tort
7 allegation.

8 MR. SMITH: But the only tort here - - - the only
9 alleged tort - - - or maybe it's two torts, or a tort with
10 two parts. One is loaning money to file a bankruptcy. If
11 filing a bankruptcy is protected - - -

12 JUDGE FAHEY: Well, the - - - the - - - the way I
13 see it, is you've got two. You got the attorneys' fees and
14 you got the three apartments. So let's say those are
15 tortious acts, just for the sake of argument.

16 MR. SMITH: If - - -

17 JUDGE FAHEY: That being the case, then you have
18 an allegation of a tort. It's not proof of a tort, but.

19 My question is the forum; that's why I'm asking
20 this. And so can the bankruptcy court, as in the NHL case,
21 deal with the contractual - - - a contractual remedy,
22 contractual damages, as a result of the allegations against
23 you purely based on, say, the bad-boy guarantees and things
24 like that, that were in the contract.

25 MR. SMITH: Well, the - - - the bankruptcy court



1 certainly can deal with and protect the - - - the - - -
 2 these - - - this plaintiff from the alleged injury. They
 3 can dismiss the bankruptcy. If the bankruptcy - - - and
 4 the - - - that's the only tort. If it's a tort, then you -
 5 - - you - - - Your Honor, you're assuming that the - - -
 6 let's just assume it's a tort. The only way you can assume
 7 it's a tort is to assume it's a tort to loan someone money
 8 to file for a bankruptcy or it's a tort to - - - to - - -
 9 to put in three apartments into a - - - into a single-asset
 10 real estate entity in order to make it no longer a single-
 11 asset real estate entity. Those are both directed squarely
 12 at the bankruptcy.

13 If there's - - - if those are torts, then the
 14 tort law of New York is in conflict with the Bankruptcy
 15 Code. And that's what we're saying, because the - - -
 16 because that is a question that is preempted by the
 17 Bankruptcy Code. The - - - the - - - the MSR case, and
 18 quite a few others, say it's for the federal courts to
 19 decide whether this sort of thing is wrong or right.
 20 There's a detailed, reticulated code on what we allow and
 21 what we don't.

22 And they - - - and - - - and it's not for the
 23 state courts to decide that this is a tort, this isn't a
 24 tort.

25 JUDGE RIVERA: So - - - so then to be clear, what



1 - - - what do you view as the remedy, because he says
2 there's no remedy that will compensate him for this tort.

3 MR. SMITH: Well - - -

4 JUDGE RIVERA: Alleged tort.

5 MR. SMITH: The - - - yeah, right. If there's a
6 wrong that goes uncompensated, it's not - - - not unusual
7 in preemption. That's - - - that's the way - - - that's
8 what preemption is. A lot of people going uncompensated
9 because of preemption. But here, it's an even simpler
10 answer. The remedy is to go to bankruptcy court, get the
11 bankruptcy dismissed, and then he doesn't - - - he wouldn't
12 have a dime of damages, if the bankruptcy had been
13 dismissed on day one. He might have a few dimes, if it was
14 dismissed on day two, but he - - - but they - - - but the
15 remedy is in the bankruptcy court. It isn't the same - - -
16 the same remedy he wants. He wants a nice multi-million-
17 dollar judgment because the market went the wrong way.

18 JUDGE RIVERA: Because it's a bad-faith filing?

19 MR. SMITH: Yes, it's a bad-faith filing or to be
20 a little more subtle, it's - - - it's a scheme to dodge the
21 bankruptcy laws, which is what his complaint says. That's
22 - - - that's all over his complaint, that this whole thing
23 was a thought-up scheme to deprive him of the important
24 protections that the bankruptcy law gives him. It's - - -
25 no, nothing stopped him from saying that to the bankruptcy



1 judge and saying dismiss this case and sanction these
2 people for - - - for - - - for dodging and scheming and
3 doing all those other things. And the sanctions can be
4 equal to all the damages I've suffered because of their
5 schemings and dodgings.

6 He didn't want to say that to a bankruptcy judge.
7 He wants to say it to a New York jury. All the cases say,
8 and there are a lot - - - yeah, and the only - - - he's - -
9 - he's got one. I'll give him the - - - FDIC case in
10 Louisiana, but I think all the other cases are perfectly
11 clear that you can't do that, that this is for the
12 bankruptcy court to decide.

13 JUDGE GARCIA: Counsel, perhaps - - -

14 CHIEF JUDGE DIFIORE: Counsel, I have a more
15 global question for you. So - - - so tort law historically
16 is common law, and as the state's high court, that's our
17 arena. Why would we restrict our own authority in this
18 area without, to your colleague's point, a clear statement
19 from Congress indicating to us that claims that don't
20 involve the debtor, that don't involve the bankruptcy
21 estate are precluded. Why would we do that?

22 MR. SMITH: Well, Your Honor, I - - - I don't
23 think it's fair - - - it's - - - I'm - - - I'm not
24 suggesting that you should do it. I'm suggesting that the
25 Bankruptcy Code, for the reasons stated in - - - those



1 initials from Montana, it's MJR or something like that, is
2 a comprehensive, reticulated code that simply doesn't allow
3 that sort of thing. That's what Judge Lynch said in - - -
4 in Astor. That's what Judge - - - I believe that's what
5 the California court said in Choy. That's what the federal
6 court said in National Hockey League.

7 The - - - the - - - I - - - the - - - the idea -
8 - - I mean, Mr. - - - Mr. Greenberg's theory that you've
9 got to point to - - - to a particular section of the Code
10 that was violated, that - - - that - - - that makes all the
11 case law completely wrong, because all the cases are based
12 on the - - - on the generalized proposition that this is a
13 - - - that this is an area that federal courts operate.
14 It's field preemption. It's also conflict preemption, but
15 it's field preemption. And you don't have to have a
16 specific statute for field preemption.

17 JUDGE GARCIA: Chief, may I ask him a question?

18 CHIEF JUDGE DIFIORE: Yes, please.

19 JUDGE GARCIA: How - - - Counsel, would you just
20 address the idea that your rule would make it impossible to
21 bring these bad-boy cases against guarantors?

22 MR. SMITH: Oh, that's - - - that - - - yeah,
23 that's completely wrong, Your Honor. No one is ever saying
24 you can't sue a guarantor. A guarantor who has - - - who's
25 undertaking to guarantee a debt, of course, he's liable in



1 the state court. No one has ever suggested he's not. And
 2 there's no - - - no case that my adversary cites that ever
 3 cast any doubt on that. The state court tort claims are
 4 the ones are all the preemption cases worry about, because
 5 that is where you can get the kind of chilling effect that
 6 is talked about in the amicus briefs, the - - - and
 7 particularly the amicus briefs of the pro bono lawyers.

8 And by the way, I don't think Mr. Greenberg gave
 9 me much comfort about the pro bono lawyers. He said, they
 10 have no problem, because they would never - - - they would
 11 never induce anyone to breach of contract. Yeah, a lot of
 12 poor people have very - - - have signed contracts with a
 13 lot of fine print. And if any - - - any - - - if any pro
 14 bono lawyer ever tells his client, well, don't worry about
 15 the 38(b), that pro bono lawyer has to worry about a
 16 lawsuit from - - -

17 JUDGE GARCIA: But on - - - on the guarantees - -
 18 - on the bad-boys guarantees, it's triggered by the filing,
 19 right?

20 MR. SMITH: Yes.

21 JUDGE GARCIA: So why wouldn't the argument be,
 22 well, that's related to the filing. You're breaching the
 23 guarantee because of a filing, and public policy, we don't
 24 want to - - - you know, inhibit a filing for bankruptcies.
 25 That's kind of the argument, right?



1 MR. SMITH: I think the - - - I think there's
2 just a fundamental difference between the tort and the
3 contract. A bad-boy guarantee, you agree - - - you
4 voluntarily agree that a claim against you would be
5 triggered by a file - - - a bankruptcy filing. There's no,
6 you know - - - they - - - there's no chilling problem
7 there. What's to be chilled? That people won't guarantee
8 their company's debts? They'll guarantee them because
9 they're getting money. I think - - - I think it's really
10 completely different. The - - - the tort and contract are
11 different, and that's - - - that's clear, among other
12 things, from the good old Extended Stay case, which is Mr.
13 Greenberg's favorite.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.
15 Counsel?

16 MR. GREENBERG: Briefly, Your Honor. I'll just
17 make two - - - two quick points. One is Judge Smith and I
18 have a fundamental disagreement on the law that I don't
19 think we're going to settle at counsel table. So I - - - I
20 would just commend the court to the briefs on what the
21 standard is on ramif - - - on preemption.

22 Each and every case, MSR, whichever one he wants
23 to cite, is based on a - - - Moyes, every single one, is
24 based on - - - that preempts - - - based on a bad-faith
25 filing, conduct within the bankruptcy court, in violation



1 of the Bankruptcy Code.

2 There's a bright line here. There's thirty cases
3 in the brief and they fall on one side or the other. So
4 Davis and Barton, the decision to file bankruptcy,
5 obviously, facilitates a bankruptcy, the decision to file
6 by a director and officer. It's a tort claim. It's not
7 based on a filing. It's not based on a violation of the
8 Code. There's no preemption. And so that's just point
9 one.

10 Point two, and it swept up in the guarantees
11 point. I would just ask the court to consider the
12 ramifications of the decision here, which - - - forgive me
13 for saying that; obviously, the court does that in every
14 case - - - but I think they're broad here. Justice
15 Kornreich was terrified of them. This is the - - - as a
16 commercial judge and a fine one that I've been privileged
17 to be before many times, she was concerned that we're
18 throwing out loan covenants, which is how buildings are
19 built in New York City and around the state.

20 And with respect to the guarantees, and it's the
21 last thing I'll say. It's a distinction without a
22 difference to say one is a contract and one is a tort
23 claim. Okay, so what? In each case, the action is
24 facilitating a bankruptcy. And yes, there's no case yet
25 that - - - that throws out these bad-boy guarantees based



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on facilitating a bankruptcy. But this will be the case.
Don't - - - the - - - the - - - the real estate development
world is watching what happens here, and this could very
much change how business is done in New York, and not in a
good way.

Thank you, Your Honor.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Sutton 58 Associates LLC v. Philip Pilevsky, et al., No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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