

ELS Funding Corp. v Gebreselassie

2007 NY Slip Op 33437(U)

September 28, 2007

Supreme Court, New York County

Docket Number: 0602821/2006

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ELS FUNDING CORP.,
Plaintiff,
- v -
HABTE GEBRESELASSIE, PIERRE FUNDING CORPORATION and ELIAS DEBBAS,
Defendants.

Index No.: 602821/06
Motion Date: 05/01/07
Motion Seq. No.: 01
Motion Cal. No.: 40

The following papers, numbered 1 to 5 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1
2 - 4
5

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant the cross-motion of defendant Els Funding Corporation and Elias Debbas (the PFC defendants) for summary judgment dismissing the complaint against them and shall also grant plaintiff's motion to dismiss the counterclaims asserted by the PFC defendants.

Plaintiff adduces no evidence that the PFC defendants committed any of the acts alleged in the complaint. Only two sentences in the affidavit submitted by plaintiff in opposition to summary judgment motion even mention the PFC defendants and those references merely state that the PFC defendants allegedly

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

knew about plaintiff's interest in the vehicles. In the absence of any evidence of the PFC defendants' liability, the court shall dismiss plaintiff's causes of action against them. The ~~cross-~~^{COUNTER} claims of the PFC defendants' shall also be dismissed because the statements complained of in plaintiff's complaint are subject to the absolute litigation privilege and are therefore not actionable. See Sexter & Warmflash, P.C. v Margrabe, 38 AD3d 163, 171-172 (1st Dept 2007) ("The rule is that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation. . . pertinent statements made in the course of such proceedings are afforded the protection of privilege, irrespective of the motive with which the statements are made").

The court shall deny the cross-motion of defendant Habte Gebreselassie (the debtor) seeking disqualification of plaintiff's counsel, consolidation and leave to amend the Answer. The court shall grant plaintiff's motion to dismiss the debtor's counterclaims.

The counterclaim for civil enterprise corruption (RICO) (Penal Law Article 460) is subject to dismissal because the Answer fails to allege a pattern of racketeering activity in what is merely a contractual dispute between the parties. "In order to sustain a civil RICO claim, a party is required to allege that the multiple predicates constitute a pattern of racketeering

activity. Further, to allege a pattern of racketeering activity, a party must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. Here, defendants' pleading fails to satisfy those requirements." New York Mortg. Servicing Corp. v Dake, 179 AD2d 1007, 1008 (4th Dept 1992).

The counterclaim for fraud shall also be dismissed. "[O]n a motion to dismiss for failure to state a cause of action, a plaintiff need only plead that he relied on misrepresentations made by the defendant." Knight Securities L.P. v Fiduciary Trust Co., 5 AD3d 172, 173 (1st Dept 2004). In this case, the counterclaim fails to meet even this minimal requirement as no reliance upon plaintiff's misrepresentations is pled and therefore the counterclaim must be dismissed. With respect to the cause of action for prima facie tort, "[t]he elements of such a cause of action as stated in prior New York cases are (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful." Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 332 (1983). Plaintiff here has failed to plead with sufficient specificity special damages. As stated in controlling authority from the Court of Appeals, a pleading "is insufficient to state a cause of action for prima facie tort insofar as it fails to plead special

damages . . . New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior civil action." Curiano v Suozzi, 63 NY2d 113, 117 -118 (1984).

The debtor's counterclaim for attorney's fees shall also be dismissed as no statutory or contractual basis for such a claim is pled. Debtor's application to disqualify plaintiff's counsel is also rejected as insufficient evidence is proffered to set forth a prima facie case that plaintiff's counsel was involved in the transactions at issue here. The court also rejects defendants' application to dismiss this suit on the grounds that the plaintiff is a dissolved corporation because plaintiff is entitled to bring this suit under BCL 1006 "as that activity was part of 'winding up its affairs.'" Tedesco v A.P. Green Industries, Inc., 8 NY3d 243, 247 (2007).

The court shall deny as moot the debtor's cross-motion to amend his answer under CPLR 3025 to allege that the debtor paid the plaintiff \$20,000 in cash rather than the \$40,000 set forth in the debtor's second counterclaim in paragraphs 79 and 80 of the debtor's Answer. As the court for the reasons herein stated dismisses the debtor's second counterclaim for fraud, the amendment is a nullity.

Finally, the court shall deny the debtor's cross-motion to consolidate this action with the action entitled S&R Medallion v

Gebrelassie (Index No.: 602353/2006, Sup Ct, NY County). By Order dated August 24, 2007, Justice Shulman directed judgement in the plaintiff's favor in that action and set the matter down for an inquest on damages. Defendant in that case, who is the debtor in this action, has moved to reargue the Order dated August 24, 2007. In any event, the current post-judgment procedural posture of the S&R action is an insurmountable barrier to consolidation.

Accordingly, it is

ORDERED that the cross-motion of defendants Pierre Funding Corporation and Elias Debbas (the PFC defendants) for summary judgment dismissing the complaint is GRANTED and the Clerk is directed to enter judgment DISMISSING the complaint against PIERRE FUNDING CORPORATION and ELIAS DEBBAS; and it is further

ORDERED that the motion of the plaintiff for summary judgment dismissing the counterclaims of all defendants is GRANTED and the Clerk is directed to enter judgment DISMISSING the counterclaims of defendants HABTE GEBRESELASSIE, PIERRE FUNDING CORPORATION, and ELIAS DEBBAS; and it is further

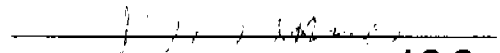
ORDERED that the cross-motion of defendant HABTE GEBRESELASSIE is DENIED in all respects; and it is further

ORDERED that the remaining parties are directed to attend a preliminary conference on October 30, 2007, at 9:30 A.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: September 28, 2007

ENTER:


DEBRA A. JAMES
J.S.C.

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