

Goodstein v Jones

2007 NY Slip Op 34195(U)

December 10, 2007

Supreme Court, New York County

Docket Number: 0114335/2006

Judge: Rolando T. Acosta

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

HON. ROLANDO T. ACOSTA

PRESENT:

PART 61

Justice

Index Number : 114335/2006

GOODSTEIN, STEVEN

vs

JONES, CHARLES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2 (A-M)

3

Cross-Motion: Yes No

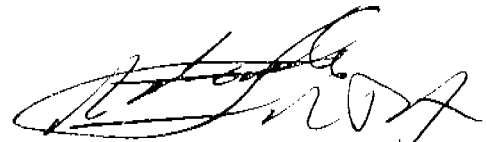
Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
DEC 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/19/07



HON. ROLANDO T. ACOSTA

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Steven Goodstein, Taft Partners, LTD., and
Goodstein Development Cooperation,

Plaintiffs,

– against –

Charles Jones,

Defendants.

DECISION/JUDGMENT

Index No. 114335/06

Seq. No. 1

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant's motion for an order granting summary judgment dismissing the complaint:

Papers	Numbered
Notice of Motion, Affidavit & Memorandum of Law	1-2 (Exhibits A-M)
Affirmation in Opposition	3

Background

In 2003, defendant Charles Jones commenced an action against plaintiffs herein and others (see New York County Index No. 116782/03), seeking monetary damages on the basis of fraud involving the renovation of a former hotel located at 150 West 51st Street into condominiums. Defendant had purchased unit 802 in the premises and alleged that there were certain structural problems with the building. That action was discontinued against the instant plaintiffs on May 11, 2006. See Decision on Motion Seq. 14 in Supreme Court File. Jones and the remaining defendants in the prior litigation settled the action on July 27, 2006, and the action was discontinued "with prejudice." See Decision on Motion Seq. 13 in Supreme Court File.

The discontinuance against the instant plaintiffs did not indicate that it was "with prejudice." Accordingly, plaintiffs commenced the instant action against Jones asserting one cause of action for abuse of process for commencing the 2003 action against them. According to plaintiffs, Jones' 2003 fraud claim would have been barred by the statute of

limitations and in any event had no merit. They also asserted that Jones commenced the 2003 action “to obtain ‘leverage’ against another party to the prior action,” and “demanded unsubstantiated dollar amounts from Plaintiffs herein to ‘settle’ the matter without justification, reason or calculation as to how any settlement figure was determined. Accordingly, the action was also commenced to force Plaintiffs herein to give money to . . . Jones. See Complaint at ¶ ¶ 56-57. Although the complaint failed to allege actual or specific damages, in the “wherefore clause” plaintiffs sought an amount not less than \$55,000. It is unclear from any of the motion papers and exhibits how the \$55,000 was determined. Defendant now moves to dismiss the complaint pursuant to CPLR 3212(d) and for sanctions, or in the alternative for dismissal pursuant to CPLR 3126 for plaintiffs failure to comply with discovery.

Analysis

It is well settled that the proponent of a motion for summary judgment must establish that “the cause of action . . . has no merit,” (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion “tender[] sufficient evidence to eliminate any material issues of fact from the case,” *id.*, “by evidentiary proof in admissible form.” Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions.” C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, *supra*, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. *Id.* at 562.

Viewing the facts in the light most favorable to plaintiff, the non-moving party, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d 96, 106 (2006), defendant has established its prima facie entitlement to summary judgment dismissing the sole cause of action for abuse of process. The gist of abuse of process is the improper use of process *after* it is regularly issued. Thus, the institution of a civil action by summons and

complaint is not legally considered process capable of being abused. Curiano v Suozzi, 63 NY2d 113, 116 (1984). Since it is the improper use of process *after* it is issued, “[t]he mere allegation that defendants acted maliciously in bringing an action is insufficient for an abuse of process.” Id at 116-17; see also Roberts v 112 Duane Street Associates, 32 A.D.3d 366, 368 (1st Dept. 2006)(citing Curiano, Court held that “that the filing of the third-party complaint could not serve as a basis for an abuse-of-process claim, since the institution of an action is not process capable of being abused, regardless of third-party plaintiffs’ motives”); cf. Parkin v Cornell University, 78 N.Y.2d 523, 230 (1991)(“nothing in this Court’s holdings would seem to preclude an abuse of process claim based on the issuance of the process itself[,] [however, we] leave the question open for the present” inasmuch as it is not properly before the Court.).

The four elements of abuse of process are (1) regularly issued legal process, civil or criminal, compelling performance or forbearance of some act, (2) the person activating the process was moved by an ulterior purpose to do harm, without economic or social excuse or justification, (3) the person activating the process sought some collateral advantage or corresponding detriment to the plaintiff that is outside the legitimate ends of the process, and (4) actual or special damage. Board of Education of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Ass’n, Inc. 38 N.Y.2d 397 (1975). “[A]buse of process requires ‘the deliberate premeditated infliction of economic injury without economic or social excuse or justification’ (Board of Educ. v Farmingdale Classroom Teachers Assn., 38 N.Y.2d 397, 405) and, therefore, the expense arising from the defense of a lawsuit is an insufficient injury to sustain the cause of action.” Strook & Strook & Lavan v. Beltramini, 157 A.D.2d 590, 591 (1st Dept. 1990).

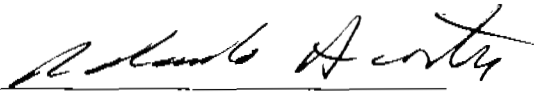
Here, plaintiffs claim that Jones instituted the prior action to obtain ‘leverage’ against another party to the prior action, and then sought an unsubstantiated settlement against plaintiffs. Although such allegations may be sufficient to defeat a motion to dismiss pursuant to CPLR 3211(a)(7), in the context of a summary judgment motion these unsubstantiated allegations do not raise triable issues of fact. In addition to failing to raise triable issues of fact as to how Jones abused the prior action, there is no indication in the record as to how plaintiffs were economically damaged. It is unclear to this Court whether the \$55,000 sought in the “wherefore clause” were to recoup legal fees, which is an insufficient injury to sustain an abuse of process claim, Strook & Strook & Lavan v. Beltramini, *supra*, 157 A.D.2d at 591, or some other legitimate claim. Accordingly, based on the foregoing, it is

ORDERED that defendant’s motion for an order granting him summary judgment pursuant to CPLR 3212(d) dismissing the complaint is granted; and it is further

ORDERED that that portion of the motion seeking sanctions is denied.

This constitutes the Decision and Order of the Court.

Dated: December 10, 2007


 Rolando T. Acosta, J.S.C.
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