

R. J. Painting Inc. v Stollo

2008 NY Slip Op 30235(U)

January 16, 2008

Supreme Court, Nassau County

Docket Number: 6033-06/

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

mod,mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

R.J. PAINTING INC.,

Plaintiff(s),

MOTION DATE: 11/21/07
INDEX No.:16033/06
MOTION SEQUENCE NO:

-against-

CAL. NO.:5,6

DONNA STROLLO, BRUCE A. BARKET
and KEVIN C. PALMERI,

Defendant(s).

KEVIN C. PALMERI,

Third-Party Plaintiff,

-against-

ALEXANDER STROLLO, EDNA STROLLO and RAND STROLLO,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
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Answering Affidavits.....	7
Replying Affidavits.....	
Briefs:	8-10a

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 3211(a)(7) dismissing the first and second counterclaims interposed by defendant Palmeri, costs, reasonable attorney's fees and/or sanctions pursuant to CPLR 8303-a and/or 22 NYCRR 130.1-1 and motion by third party defendants for an order pursuant to CPLR 3211(a)(7) dismissing all claims against them are determined as hereinafter set forth.

This is an action to recover monies paid by Donna Strollo (Donna) to Kevin Palmeri, Esq. (Palmeri) through Bruce A Barket's Esq. (Barket) merchant account for legal representation in connection with a matrimonial action commenced in Supreme Court, Suffolk County. "In 1999, plaintiff was issued an American Express

credit card. The plaintiff operates a commercial and residential paint business in Copaigue, New York. Donna, who is now the estranged wife of plaintiff's President Rand Strollo (Rand) was also issued a credit card. Alexander Strollo is Rand's father and a guarantor on the American Express account. In June 2005, marital difficulties arose between Rand and Donna. Thereafter, Rand allegedly notified Donna that she was no longer authorized to use the business credit card. On August 15, 2006, Donna retained the law offices of Kevin C. Palmeri, LLC to represent her 'in connection with negotiation and litigation efforts in response to [her] matrimonial difficulties.' The retainer agreement provided that Donna agreed to pay the law offices of Kevin C. Palmeri, LLC an advance retainer in the amount of \$15,000.00. On or about August 25, 2006, Rand commenced a matrimonial action in Supreme Court, Suffolk County.

During the month of August, 2006, Donna ran through the credit card's limit, making personal expenditures of approximately \$26,000.00. In particular, Donna utilized the American Express card to pay Palmeri for legal fees in connection with the matrimonial proceeding pending in Supreme Court, County of Suffolk. Payments were made to Palmeri on August 15, 2006 and August 26, 2006 in the amounts of \$6,508.00 and \$15,000.00, respectively. Palmeri used Barket's merchant account to charge Donna's legal fees. Plaintiff asserts, *inter alia*, that since Donna had no authority to utilize the American Express card to purchase personal items or to prepay attorney's fees related to her pending divorce case, Barket and Palmeri are liable for the return of the monies as the American Express card was used in bad faith. Conversely, Barket and Palmeri contend that Donna was authorized to use the American Express card 'for any purpose whatsoever.' They further argue that Donna's authorization to use the American Express card was conducted in good faith and was obtained directly from Donna and the American Express Credit Card Company." (Short Form Order Justice Lally, July 19, 2007).

The original complaint was filed on September 29, 2006 by plaintiff R.J. Painting Inc. (Painting) against defendants Donna and Barket. The complaint was amended on November 16, 2006 (First Amended Complaint) and again on April 4, 2007 (Second Amended Complaint) at which time Palmeri was added as a defendant. Barket and Palmeri each made motions to dismiss the claims against them. Both motions were decided by this court in a decision and order dated July 19, 2007 ("7/19/07 Order"). This court denied Palmeri's motion to dismiss the fourth cause of action, stating that "[t]he allegations set forth in this cause of action state a valid claim for violation of Judiciary Law § 487," but granted Palmeri's motion to dismiss the fraud claim because it was not pled with sufficient specificity. In said order this court also denied Barket's motion

to dismiss the conversion claim against him.

On August 24, 2007, in response to the Second Amended Complaint, Palmeri interposed Defendant's Verified Answer, Counter-Claims, Cross-Claim and Interposed Claims against the plaintiffs, Alexander Strollo, Edna Strollo, Rand Strollo and Michael A. Haskel, Esq. The within motions seek to dismiss all claims against the plaintiff and third party defendants pursuant to CPLR 3211(a)(7).

Palmeri filed and served "Defendant's **Second** Amended Verified Answer, Counter-Claims, Cross-Claims and Interposed Claims" dated October 12, 2007 (Second Amended Answer), simultaneously with his Memorandum of Law, dated October 12, 2007, in opposition to the within motions. In the interests of judicial economy the Court will accept the **Second** Amended Answer as served and treat the within motions as one to dismiss the Second Amended Verified Answer, Counter-Claims, Cross-Claim and Interposed Claim (**Second** Amended Answer). The attorney for the plaintiff does not refute Palmeri's claim that since the plaintiff had not yet served Palmeri with a copy of a Notice of Entry of this Court's June 19, 2007 short form order ruling on the CPLR 3211(a) motions to dismiss, pursuant to CPLR 3211(f), Palmeri's time to answer as a matter of course did not run and the service of the **Second** Amended Answer is timely.

The **Second** Amended Answer includes a counterclaim against the plaintiff R.J. Painting Inc. and third-party claims against Donna Strollo, Rand Strollo, his mother Edna Strollo (Edna) and his father, Alexander Strollo (Alexander). Rand, Alexander and Edna will also be referred to collectively as the "Strollos." Defendant Palmeri also brought a third-party claim against Michael A. Haskel, Esq. (Haskel), the attorney representing the plaintiff and the Strollos. The claims against the plaintiff, the Strollos, and Haskel allege abuse of process and malicious prosecution. The claims allege Rand is a principal of R.J. Painting and his parents Alexander and Edna are also principals and owners. The claims allege the Strollos use Painting as their alter ego, operating it for their own personal use and benefit and disregarding the corporate form. It is alleged that "[t]he Strollos exercise such control and dominion over Painting so as to be responsible for its acts, omissions and failures, intentional, negligent or otherwise. Painting was an alter ego of the Strollos. The Strollos knew or should have known about the wrongful conduct of Painting. Rand, Edna and Alexander Strollo had a motive and incentive to use Painting as a vehicle for a malicious and abusive purpose and to otherwise commit wrongs against Palmeri" (¶ 15 of the **Second** Amended Answer). The claims further allege that the ulterior purpose of commencing the underlying action and naming Palmeri as a defendant was:

18. The retribution by Painting and the Stollo against defendant Donna's attorney, Palmeri, for representing Donna in the matrimonial action. Painting and the Stollo, with the help of Haskel, sought to damage the attorney client relationship between Donna and Palmeri in order to be in a position to control Donna, and use this instant suit to harass and "bully" not only Palmeri, but Donna also.

19. At the time when Rand Stollo withdrew his divorce action against Donna from the Suffolk County Supreme Court, Palmeri was immediately terminated by Donna. Because of the Stollo's interferences, and aided by Haskel, defendant Donna's attorney-client relationship with Palmeri was maligned, destroyed and abruptly ended.

21. The process in this instant action sought to compel Palmeri to disgorge himself of a legal fee rightfully earned and paid for by his client, Donna, blatantly interfering with Donna's and Palmeri's attorney-client relationship. Haskel's, the Stollo's and Painting's allegations in the complaint disrupted the attorney-client relationship, Palmeri's ability to practice law and earn a livelihood. Haskel, Painting and the Stollo were fully aware of Donna's ability to use the American Express card. Painting and the Stollo issued the American Express credit card to Donna in the first place. Process was solely being used to intimidate Donna and punish her and punish Palmeri for advocating for the marital rights to which Donna was entitled to in the divorce case which was active simultaneously with the instant case.

22. This abuse of process has resulted in the termination of Palmeri's employment as counsel, prohibiting Donna Stollo from obtaining the divorce she desperately wanted and the court ordered protection of her son RJ. Haskel's, the Stollo's and Painting's actions have caused harm and damage to Palmeri, defendant herein, by causing him professional reputation damage and economic

loss to his earnings and livelihood.

Public policy mandates free access to the courts for the redress of wrongs. Our adversarial system cannot function without zealous advocacy. However, the tort of abuse of process will be available to an injured party and may be maintained where the process is manipulated to achieve some collateral advantage, whether it be characterized as extortion, blackmail or retribution. When parties abuse process their tortious conduct injures not only the intended target but offends the spirit of the legal process itself. "Insofar as it relates to the harm inflicted on the individual, abuse of process finds its origin in the writ of conspiracy. The earliest meaning . . . refers to improper meddling in a legal dispute." *Board of Education v Farmingdale Classroom Teachers Assoc., Inc.*, 38 NY2d 397, 400-403.

Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective. *Curiano v Suozzi*, 63 NY2d 113. A cause of action for abuse of process strikes at the misuse or perversion of regularly issued legal process for which a purpose is not justified by the nature of the process. The mere institution of a civil action by summons and complaint is not legally considered such process as is capable of being abuse. The pleading must allege oppression and harassment by legal procedure, or intentional infliction of economic damage without excuse or justification. *Hoppenstein v Zemek*, 62 AD2d 979.

Accepting the facts alleged as true, affording the pleadings and memorandum submitted the benefit of every favorable inference and applying the above principles to the within motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), the court finds that Palmeri has set forth the essential elements of the tort of abuse of process against R.J. Painting and the Strollos. *Sokoloff v Harriman Estate Development Corp.*, 96 NY2d 409. The gravamen of Palmeri's claim is that the Strollos individually and as principals and owners of Painting, brought the within action against attorney Palmeri as retribution for his representing Donna in a hotly contested matrimonial action that could very well have a negative effect on the pecuniary interests of the Strollos.

The elements of a cause of action for *prima facie* tort are "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (citations omitted)." *Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143; see also *Cardo v Board of Managers, Jefferson Village Condo 3*, 29 AD3d 930; and *Del Vecchio v Nelson*, 300 AD2d 277. Recovery cannot be had in an action

for *prima facie* tort" . . . unless malevolence is the sole motive for the defendant's otherwise lawful act." *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333; see also *Beardsley v Kilmer*, 236 NY 80; and *Lynch v McQueen*, 309 AD2d 790. Plaintiff must plead and prove the existence of malice and ill will. *Lynch v McQueen*, *supra*. Palmeri alleges that undermining the attorney-client relationship was the sole reason for the joining of Palmeri as a party defendant. The special damages is the alleged loss of a client and the legal fee associated with same. The corporate veil may not be pierced to reach shareholders since the corporate form is a legitimate means of avoiding personal liability. *Ventresca Realty Corp. v Houlihan*, 28 AD3d 537. However, when a corporation has been so dominated by the Strollos and its separate entity so ignored as alleged herein that it transacts the Strollos' business and objectives instead of its own, and can be called the other's alter ego, the corporate entity may be disregarded to achieve equitable results. *Austin Powder Co. v McCullough*, 216 AD2d 825.

Palmeri must await the outcome of the within proceeding before he can maintain an action for malicious prosecution against the plaintiff and the Strollos. Palmeri must allege the termination of a prior proceeding in his favor. He may not assert a counterclaim for malicious prosecution in the same action that was allegedly instituted wrongfully. See *Weichert v Kimber*, 249 AD2d 996.

The application to dismiss the counterclaims against the plaintiff and the claims against the Strollos sounding in abuse of process is denied. The application to dismiss the counterclaims against the plaintiff and the Strollos sounding in malicious prosecution is granted. Joining Michael Haskel, Esq., the attorney for the plaintiff and the Strollos, as an adverse party in this action is misplaced. All claims against Haskel are dismissed without prejudice with leave for Palmeri and/or Barket to proceed by motion in compliance with CPLR 2214 or CPLR 2215 pursuant to 22 NYCRR 130-1.1-130-1.5 at the conclusion of this action.

Notwithstanding anything to the contrary, all depositions of the following parties, if not yet held, shall be concluded no later than February 8, 2008: Alexander Strollo, Edna Strollo, Rand Strollo and Donna Strollo. In the event counsel cannot agree on a mutual date, the first deposition shall commence on January 31, 2008 at 9:00 AM in the basement of the Supreme Court Building, 100 Supreme Court Drive, Mineola, New York, and continue daily until concluded.

The caption of the within action shall be as follows:

RJ Painting v Strollo

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Index No.16033/06

R.J. PAINTING, INC.

Plaintiff,

-against-

DONNA STROLLO, BRUCE A. BARKET
and KEVIN C. PALMERI,

Defendants.

KEVIN C. PALMERI,

Third-Party Plaintiff,

-against-

ALEXANDER STROLLO, EDNA STROLLO
and RAND STROLLO,

Third-Party Defendants.

Dated: JAN 16 2008

W. J. S. C. J.S.C.

ENTERED
JAN 23 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE