

Lam v Spallone

2008 NY Slip Op 30381(U)

January 30, 2008

Supreme Court, Nassau County

Docket Number: 1366-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

HING LAM and DEREN CHEN individually
and as derivative shareholders/members of
Suburban Development LLC, Suburban
Development, LLC,

Plaintiffs,

-against-

SILVIO SPALLONE, individually and acting
as owner/agent/successor in interest of 52ND
DEVELOPMENT, INC. and 52ND DEVELOPMENT,
INC.,

Defendants.

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No.11366/07

MOTION DATE: Nov. 28, 2007
Motion Sequence # 001

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X

This motion, by defendants, for an order:

- A. Pursuant to CPLR 3211(a)(1), CPLR 3211(a)(5) and CPLR 3211(a)(7), dismissing the within action based on documentary evidence, payment and release, statute of limitations; res judicata; collateral estoppel and/or for failure to state a valid cause of action, and;

- B. Pursuant to CPLR 3016 (a) dismissing the seventh cause of action; and
- C. For such other and further relief as the Court deems necessary and proper, including costs and fees herein,

is determined as hereinafter set forth.

FACTUAL BACKGROUND

Plaintiffs Lam and Chen, with non party Kuan, formed Suburban Development, L.L.C. (hereinafter "Suburban"), with Kuan as managing member. On or about October 1, 2002, Suburban entered into contracts to sell two properties to defendant 52nd Development Inc. (hereinafter "52nd") and the defendant Spallone was the principal. As part of this transaction, 52nd executed a note to Kuan and Suburban in the amount of \$500,000.00. On or about July 1, 2004, Kuan provided defendants 52nd and Spallone with a general release, purportedly on behalf of Suburban. On August 21, 2002, plaintiffs Lam and Chen commenced an action against defendant Spallone in Supreme Court, Queens County. This complaint was dismissed on motion of defendant, pursuant to CPLR §3211(a)(1), (a)(5) and (a)(7). Plaintiffs Lam and Chen, with plaintiff Suburban, then brought the instant action.

DEFENDANTS' CONTENTIONS

Defendants seek dismissal of the complaint, arguing that, pursuant to CPLR §3211(a)(1), documentary evidence justifies dismissal. Defendants present the contracts entered into by 52nd and Suburban, as well as the general release granted by Kuan, as evidence that defendants never had any agreements or contractual relationship with plaintiffs. Defendants argue that since neither Lam nor Chen is party to the contracts, neither has standing to bring an action to enforce it. Alternatively, defendants argue that the release is, in itself, sufficient documentary evidence to establish that defendants have no further obligations to plaintiffs.

Defendants further argue that, pursuant to CPLR §3211 (a)(5), plaintiffs' cause of action cannot be maintained due to payment and release, collateral estoppel, and/or res judicata. Defendants assert that full payment was made and a release granted, barring the instant action. Defendants further assert that plaintiffs had ample opportunity to litigate their claims in the prior action in Queens County, and are consequently barred from

proceeding due to collateral estoppel. Furthermore, defendants reason that plaintiffs' claims are barred by res judicata, arguing that the prior dismissal of plaintiffs Lam and Chen's action was a decision on the merits.

Lastly, defendants argue that plaintiffs' cause of action for oral defamation fails to meet the requirements of CPLR 3016 (a), and is time-barred. Specifically, defendants claim that plaintiffs have failed to set forth with sufficient particularity the specific defamatory words, the time and place of their utterance, and the specific person to whom they were uttered.

PLAINTIFFS' CONTENTIONS

Plaintiffs contend that the complaint should not be dismissed. In counsel's affirmation in opposition, plaintiffs argue that the action is not barred by res judicata because the prior dismissal was not on the merits. They further contend that any decisions made on the merits were made only against Lam and Chen individually, and not against Suburban, and that since this action is brought in the name of Suburban, no dismissal is warranted.

Plaintiffs assert that the cause of action for defamation has been properly pled because the complaint alleges that defamatory statements were made to a specific individual, namely Roger Kuan. Furthermore, plaintiffs argue that the action for defamation is not time-barred because the defamation was most recently alleged to have been made in 2007.

Plaintiffs argue that defendants' claim, that documentary evidence merits dismissal of the complaint, in that Suburban is party to the contracts at issue, and as two-thirds owners of Suburban, Lam and Chen are beneficiaries of Suburban's transactions and have standing to sue on Suburban's behalf.

Plaintiffs contend that the action for tortious interference is not time-barred, claiming that defendants' misapplied the three-year statute of limitations on the action to recover for harms against property. Plaintiffs assert that the cause of action properly accrued upon the execution of the general release by Kuan and 52nd on July 1, 2004, and that the initial claim was interposed in a timely manner on August 9, 2006, with the service of the summons and complaint on defendants in the Queens County action. Plaintiffs argue that the initiation of this action in Queens County stops the statute of limitations from running. Once the action was disposed of, the SOL would begin running again. (Plaintiffs' Affirmation in Opposition, par. 20). Since the instant action was commenced July 25, 2007, plaintiffs claim that it is

within the statute of limitations.

Plaintiffs contend that the action cannot be dismissed based on payment and release, arguing that the release that defendants rely on is fraudulent, and that the “ veracity of this release is a question of fact.” (Plaintiffs’ Affirmation in Opposition, par. 23).

Plaintiffs conclude by stating that their decision to bring this action in Nassau County was not an attempt to mislead the court. Rather, the action was brought in Nassau County out of convenience, since defendants are located in Nassau County and plaintiffs’ primary attorney resides there as well, “in close proximity to the Courthouse.” (Plaintiffs’ Affirmation in Opposition, par. 27).

DEFENDANTS’ REPLY

In their reply, defendants contend that plaintiffs have not submitted any documentary evidence in opposition to the motion, and that the motion should therefore be granted; that the plaintiffs submit only an attorney’s affidavit, which defendants’ counsel asserts is insufficient to defeat a motion supported by documentary evidence.

Defendants further contend that plaintiffs Lam and Chen, as members of Suburban, are not proper parties to the action by Suburban according to LLCL § 610; that this statute precludes members of an LLC from being a party to proceedings by or against a LLC, unless suing to enforce a right or liability to the LLC. Defendants argue that since Lam and Chen are not suing for this purpose, they are not proper parties to an action by Suburban.

Defendants repeat their assertion that plaintiffs’ did not properly plead their cause of action for oral defamation in accordance with CPLR 3016(a); particularly, that the complaint did not identify with the proper specificity either the specific defamatory words or the person to whom they were spoken.

Finally, defendants reassert the contention that the action for tortious interference against 52nd Development is time-barred. Defendants argue that plaintiffs have not adequately supported their assertions that (i) the statute of limitations begins to run on execution of the release, and (ii) that plaintiffs’ time to commence the instant action was tolled during the resolution of the claim filed in Queens County. Although they have not established these two claims, plaintiffs have admitted the date of the closing (February 13, 2003) and the date of commencement of the instant action (June 29, 2007). Since more than

four years have passed between these dates, defendants argue that the claim is time-barred.

DECISION

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(7), the court must accept the factual allegations of the complaint as true and accord the plaintiff all favorable inferences which may be drawn therefrom.” (Hayes v. Wilson, 25 A.D.3d 586, 807 N.Y.S.2d 567, 2d Dept, 2006).

Plaintiffs’ action is not barred by res judicata. Plaintiffs Lam and Chen have brought an action in Queens County which was dismissed. However, in that order, the Court dismissed all claims arising out of the contract and release based on the fact that neither Lam nor Chen were parties to either document, and so had no standing to bring suit for its enforcement. The order did not reach the issue of whether the July 1, 2004 release discharged the defendant’s obligations, nor any accusations of fraud or bad faith. As such, that dismissal did not reach the merits of the case, and does not bind this court. (See Kokoletsos v. Semon, 176 A.D.2d 786, 575 N.Y.S.2d 116, 2d Dept., 1991).

Documentary evidence, namely the contracts of sale and the general release, preclude plaintiffs Lam and Chen from prosecuting an action against defendant. Plaintiff Suburban, however, is a proper party and may proceed in an action for breach of the contract, and fraud in the release. Lam and Chen are not parties to the contract nor the release, and as such do not have standing to sue over these documents. Moreover, neither Lam nor Chen may sue in their individual capacities as members of Suburban. “A member of a LLC is not a proper party to proceedings by or against a LLC, except where the object is to enforce a member’s right against or liability to the LLC.” (Limited Liability Company Law (LLCL) § 610; see Hoffman v. Unterberg, 9 A.D.3d 386, 780 N.Y.S.2d 617, 2d Dept, 2004).

Plaintiffs’ cause of action for tortious interference with a business relationship is misdirected. “Tortious interference with business relations ‘applies to those situations where the third party would have entered into or extended a contractual relationship with the plaintiff but for the intentional and wrongful acts of the defendant.’” (Newsday, Inc. v. The Fantastic Mind, Inc., 237 A.D.2d 497, 655 N.Y.S.2d 583, 2d Dept, 1997; see M.J. & K. Co. v. Matthew Bender & Co., 220 A.D.2d 488, 490, 2d Dept, 1995; WFB Telecommunications v. NYNex Corp., 188 A.D.2d 257, 1st Dept, 1992). “In such an action [t]he motive for the interference must be solely malicious, and the plaintiff has the burden

of proving this fact.” (Newsday, supra; John R. Loftus, Inc. v. White, 150 A.D.2d 857, 860, 540 N.Y.S.2d 610, 3rd Dept, 1989). In the case at bar, even viewing their allegations in the most favorable light, plaintiffs have not demonstrated that they would have entered into or continued a business relationship but for defendants’ intentional and wrongful acts, nor have they shown that defendants were motivated solely by malice. At most, the plaintiffs have alleged that defendants’ actions were financially motivated, which is not sufficient. (Newsday, supra, at 498; Creative Foods Corp. v. Chef Francisco, 92 A.D.2d 462, 458 N.Y.S. 2d 917, 1st Dept, 1983). It is also noted that the case at bar does not present the circumstances contemplated by the tort of interference. In order to establish a claim for tortious interference with business relations, a plaintiff must allege that the “defendants engaged in the use of wrongful or unlawful means to secure a competitive advantage over plaintiffs, or that defendants acted for the sole purpose of inflicting intentional harm on plaintiffs.” (Butler v. Delaware Otsego Corp., 218 A.D.2d 357, 638 N.Y.S.2d 805, 3rd Dept, 1996). In the case at hand, it has not been alleged, nor does it appear to be the case upon review of the available facts, that defendants were in competition with plaintiffs. On the contrary, at issue is a contractual relationship between plaintiffs and defendants. Furthermore, plaintiffs allege that defendants were motivated by their own pecuniary interests, and did not, therefore, act for the sole purpose of inflicting intentional harm on the plaintiffs.

Given the above, this court need not address whether plaintiff’s claim for tortious interference was time-barred.

Plaintiffs avoid dismissal on their claim for defamation. “In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.” CPLR § 3016(a). In the case at bar, plaintiff has complied with the statute by alleging with specificity the defamatory statements. Plaintiff also alleges publication, noting that the statements were made to Roger Kuan. Plaintiff also alleges that the statements were made as recently as 2007. As such, plaintiffs’ cause of action for defamation has been timely commenced.

Defendants’ motion to dismiss plaintiffs’ first cause of action, for tortious interference in a business relationship, is **granted**; that part of the motion to dismiss the second, third, fourth, fifth, and eighth causes of action is **granted** as to plaintiffs Lam and Chen, and **denied** as to plaintiff Suburban; defendants’ motion to dismiss plaintiffs’ sixth cause of action is **granted** pursuant to CPLR §3211(a)(1); and defendants’ motion to dismiss plaintiffs’ seventh cause of action for defamation is **denied**.

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A Preliminary Conference has been scheduled for February 27, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JAN 30 2008


J.S.C.

ENTERED

FEB 01 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**