

East VII. Dental Group, LLP v Saber

2008 NY Slip Op 32218(U)

August 5, 2008

Supreme Court, New York County

Docket Number: 0113291/2007

Judge: Barbara R. Kapnick

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

BARBARA R. KAPNICK

PRESENT: _____

PART 12

Justice

Index Number : 113291/2007

EAST VILLAGE DENTAL GROUP

VS.

SABER, BRUCE

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 113291/07

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

AUG - 7 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/5/08


BARBARA R. KAPNICK *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
EAST VILLAGE DENTAL GROUP, LLP,

Plaintiff,

- against -

BRUCE SABER, ADAM SABER,
15 AVENUE A PROPERTIES, INC.,
STEVEN B. SPERBER and
SPERBER DENENBERG & KAHAN, P.C.,

Defendants.
-----X

BARBARA R. KAPNICK, J.:

This action arises out of a commercial lease entered into by defendant Bruce Saber, as owner, and plaintiff East Village Dental Group, LLP, as tenant, on January 7, 2003 for store space and the basement at the building located at 15 Avenue A, New York, New York.

Plaintiff claims that defendant Bruce Saber transferred title to the property to defendant 15 Avenue A Properties, Inc. (the "corporate defendant") on March 10, 2004. Bruce Saber and his son, co-defendant Adam Saber, are allegedly the sole officers, directors and shareholders of the corporate defendant. (Bruce Saber, Adam Saber and the corporate defendant shall collectively be referred to herein as the "Saber defendants").

FILED

AUG - 7 2008

NEW YORK
COUNTY CLERKS OFFICE

Plaintiff contends that the Saber defendants falsely and fraudulently represented to plaintiff that the leasehold premises 'never had a water problem' prior to plaintiff's tenancy, even though they allegedly knew that the premises had repeated, serious and substantial leak issues during the previous tenant's occupancy, and said condition had never been corrected or resolved.

Plaintiff claims to have suffered substantial damages and losses as a result of the ongoing water problem.

Defendants Steven B. Sperber and Sperber Denenberg & Kahan, P.C. (the "Sperber defendants") represented Bruce Saber in connection with the lease, and have allegedly guided, advised, instructed and counseled the Saber defendants throughout the relevant time period.

Plaintiff's Amended Verified Complaint in this action seeks to recover compensatory and punitive damages against the Saber defendants for breach of contract (first cause of action), fraudulent conveyances in violation of the Debtor & Creditor Law (second cause of action), breach of the implied covenant of good faith and fair dealing (third cause of action), fraud (fourth cause of action), negligent misrepresentations (fifth cause of action), nuisance (sixth cause of action), conversion (seventh cause of

action), restitution for unjust enrichment (eighth cause of action), breach of fiduciary duty (ninth cause of action), trespass (tenth cause of action), waste (eleventh cause of action), an accounting (twelfth cause of action), to pierce the veils of the corporate defendant (thirteenth cause of action), the imposition of a constructive trust (fourteenth cause of action), legal fees (fifteenth cause of action), retaliatory eviction (sixteenth cause of action), and failure to allow heating units proper and timely operation and maintenance (seventeenth cause of action).

In addition, plaintiff seeks to recover compensatory and punitive damages against the Sperber defendants for 'aiding and abetting' the Saber defendants in their alleged tortious actions and in their violations of their contractual and legal obligations to plaintiff (eighteenth cause of action).

Defendants now move for an order:

(1) dismissing the Complaint as against the Sperber defendants pursuant to CPLR § 3211(a)(1) and (7) on the ground that it fails to state a cause of action and that a defense is founded upon documentary evidence;

(2) vacating the notice of pendency dated August 24, 2007 as against the property known as and located at 15 Avenue A, New York, New York (Block 429, Lot 37); and

[* 5]

(3) sanctioning plaintiff and its attorney, pursuant to 22 NYCRR 130.1, for commencing the within proceeding against defendants herein.

Specifically, defendants argue that there is no basis to hold the Sperber defendants personally liable to plaintiff for actions they undertook, including commencing a non-payment proceeding, on behalf of their clients.

Plaintiff argues in opposition that the Sperber defendants were so intertwined with the Saber defendants' decisions, actions and omissions that the Sperber defendants were at the heart of the scheme to wrongfully damage plaintiff.

"Generally, an action against an attorney by a nonclient third party will not lie' (citation omitted), although '[a]n attorney may be held liable to third parties for fraud or collusion or for a malicious or tortious act' (citations omitted)." *Ginther v Jones*, 35 AD3d 1224 (4th Dep't 2006), lv to app denied 8 NY3d 810 (2007).

Here, the facts alleged by plaintiff do not support such liability against the Sperber defendants.

Moreover,

[t]o state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty, that defendant knowingly induced or participated in the breach, and damage resulting from the breach. (citation omitted). "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." (citation omitted). Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty. (citations omitted). Furthermore, "the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." (citation omitted).

Global Mins. and Metals Corp v Holme, 35 AD3d 93, 101-102 (1st Dep't 2006), *lv to app denied* 8 NY3d 804 (2007).

Plaintiff's Amended Verified Complaint is supported solely by conclusory and sparse allegations that the Sperber defendants gave the Saber defendants "substantial assistance and encouragement to engage in their violative and tortious conduct." Moreover, the Sperber defendants owe no fiduciary duty directly to plaintiff.

While the Amended Verified Complaint also alleges that the Sperber defendants initiated, filed and prosecuted "improper" eviction proceedings, the record is clear that one of the summary proceedings was dismissed by Decision and Order of Hon. Arthur

[*7]
Engoron dated December 14, 2007 only after plaintiff satisfied the claim for rent brought against it.¹

Accordingly, based on the papers submitted and the oral argument held on the record on May 7, 2008, this Court finds that plaintiff has failed to state a claim against the Sperber defendants, and thus that portion of the motion seeking to dismiss the Verified Amended Complaint against defendants Steven B. Sperber and Sperber Denenberg & Kahan, P.C. is granted. The Clerk may enter judgment dismissing plaintiff's claims against said defendants only with prejudice and without costs or disbursements.

Defendants next argue that the notice of pendency should be vacated because this action does not seek a judgment which "would affect the title to, or the possession, use or enjoyment of, real property,..." as required by CPLR § 6501.

Plaintiff opposes this branch of the motion on the ground that the second cause of action based upon Debtor and Creditor Law § 278(1)(a), which concerns the Saber defendants' disbursal and dissipation of substantial monthly rental proceeds paid by plaintiff without their making the necessary repairs and maintenance (and seeks the placement of said funds in escrow for

¹ A subsequent dispute over plaintiff's obligation with regard to the payment of real estate taxes was also apparently resolved.

proper usage) clearly deals with plaintiff's usage and possession of its leasehold premises.

Plaintiff further argues that its tenth cause of action resulting from defendants' alleged trespass, twelfth cause of action for an accounting of all rental receipts and their usage, and seventeenth cause of action for failure to allow plaintiff access to rooftop heating units to perform proper and timely operation and maintenance also deal with plaintiff's usage and possession of its leasehold premises.

In determining whether or not a notice of pendency was properly filed, the Court is mandated to employ

a narrow interpretation in reviewing whether an action is one affecting "the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). Thus, a court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501. Instead, in accordance with historical practice, the court's analysis is to be limited to the pleading's face.

5303 Realty Corp. v O&Y Equity Corp., 64 NY2d 313, 321 (1984).

In this case, plaintiff's Amended Complaint does not seek a judgment which would affect the title to, or the possession, use or enjoyment of real property (see *Piccirillo v Ravenal*, 161 AD2d 253 [1st Dep't 1990]).

Although the filing of a notice of pendency has been held under certain circumstances to be proper in actions involving a tenant's right to the use and possession of leased premises (see *Nadeau v Tuley*, 160 AD2d 1130, 1132 [3rd Dept. 1990]; app dismissed 76 NY2d 846, rearg den. 76 NY2d 890), this action does not seek a declaration regarding plaintiff's use and possession of the premises, but rather seeks to recover monetary damages.

Accordingly, the notice of pendency filed in this action is vacated. Upon service of a copy of this order with notice of entry, the Clerk shall mark his records accordingly.

That portion of the motion seeking to impose sanctions is denied in the discretion of the Court.

This constitutes the decision and Order of this Court.

Dated: August 5, 2008



BARBARA R. KAPNICK
J.S.C.



FILED
AUG -7 2008
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