

Weisberger v Rubinstein

2008 NY Slip Op 33513(U)

December 24, 2008

Supreme Court, New York County

Docket Number: 115458/07

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN

PART 7

Index Number : 115458/2007
WEISBERGER, CARI
VS.
GARY A. RUBENSTEIN
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 115458/07
MOTION DATE 10/29/08
MOTION SEQ. NO. 003
MOTION CAL. NO. 120

The following papers, numbered 1 to 4 were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits A-H
Answering Affidavits – Exhibits A-L
Replying Affidavits – Exhibit A

PAPERS NUMBERED
1-2
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion "is determined in accordance with the annexed memorandum decision and order."

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

FILED

JAN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

Dated: 12/14/08

[Signature]
J.S.C.

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 7

-----x

CARI WEISBERGER,

Plaintiff,

Index No.: 115458/07

-against-

GARY A. RUBINSTEIN,

Defendant.

-----x

GARY A. RUBINSTEIN,

Third-Party Plaintiff,

FILED
JAN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Third-Party Index No.:

530358/08

-against-

AARON C. DEPASS, ESQ. and SANTORIELLA,
DITOMASO, P.C.,

DECISION AND ORDER

Third-Party Defendants.

-----x

HON. MICHAEL D. STALLMAN, J.:

Third-Party defendants (hereinafter, movants) move to dismiss the third-party action against them, pursuant to CPLR 3211 (a) (7).

BACKGROUND

Movants were the attorneys representing plaintiff in her attempted purchase of the co-operative apartment owned by defendant/third-party plaintiff (hereinafter, defendant). Pursuant to the contract of sale, plaintiff gave defendant \$52,000 as a

deposit for the sale of the co-op. The contract included the statement: "Security: Pledge of the Shares and Lease." (§ 1.16). The contract also stated that the purchaser may have a pet in the unit (§ 1.17.2). Furthermore, the agreement provided, in pertinent part, that if the purchaser were rejected by the co-operative board, the purchaser would be entitled to the return of the security deposit, unless the rejection was caused by the purchaser's bad faith conduct (§ 6.3).

On August 9, 2007, the co-operative board denied the sale of the unit to plaintiff. When the board was questioned as to the reason for the rejection, the board stated, in a letter of August 14, 2007, that plaintiff would be welcomed as a shareholder if she would not bring her dog, a great Dane, to live at the premises. The board felt that the great Dane did not "constitute a traditional or suitable house pet in a residential high-rise apartment building" As a consequence, plaintiff cancelled the contract and requested the return of her security deposit, pursuant to the provisions of the contract of sale (§ 6.3).

Defendant refused to return the security deposit, alleging that plaintiff cancelled the contract in bad faith, causing plaintiff to institute the present action to obtain the return of her money.

After the instant action was filed, movants, acting on behalf of their client, filed a UCC-1 Financing Statement with Cooperative

[*4] .

Addendum, designating plaintiff as the creditor and defendant as the debtor, in order to record plaintiff's asserted rights to the co-operative shares as security for the \$52,000 deposit defendant had not returned. As a result of this UCC-1 Financing Statement filing, defendant commenced the third-party claim against movants, alleging three causes of action: tortious interference with business relations; conspiracy to commit fraud; and abuse of process.

DISCUSSION

CPLR 3211 (a), Motion to dismiss cause of action, states that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action"

Defendant's first cause of action, based on tortious interference with business relations, is dismissed.

"[C]onduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship. [U]nder New York law, in order for a party to make out a claim for tortious interference with prospective economic advantage, the defendant must ... direct some activities towards the third party ... [internal quotation marks and citations omitted]."

Carvel Corp. v Noonan, 3 NY3d 182, 192 (2004).

Further, to maintain a claim for tortious interference with business relations, movants must establish that the persons alleged to have interfered used dishonest, unfair or improper means to

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interfere with plaintiffs' business relationship, and that movants suffered damages thereby. See *M.J. & K. Co., Inc. v Matthew Bender & Co., Inc.*, 220 AD2d 488 (2d Dept 1995). In the instant matter, defendant claims that movants' act of filing the UCC-1 Financing Statement made it impossible for him to sell his unit, but he does not even indicate that there was a prospective purchaser for the property, or that movants had any contact with such prospective purchaser. These allegations fail to meet the requirements for a claim of tortious interference with business relations.

Defendant's second cause of action, for conspiracy to commit fraud, is similarly dismissed.

"New York does not recognize a substantive tort of conspiracy" *Jebran v LaSalle Business Credit, LLC*, 33 AD3d 424, 425 (1st Dept 2006); *Crispino v Greenpoint Mortgage Corp.*, 2 AD3d 478 (2d Dept 2003). Further, a "mere conspiracy to commit a fraud is never itself a cause of action, particularly where, as here, [defendant] failed to establish, other than by conclusory allegations, any common scheme or plan to defraud ... [internal quotation marks and citations omitted]." *Agostini v Sobol*, 304 AD2d 395, 395 (1st Dept 2003).

Defendant argues that, although the third-party complaint lists only three causes of action, he has also claimed a fraud as well, which acts to incorporate the conspiracy to commit fraud cause of action. However, the only allegation of fraud is that

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movants "fraudulently" filed the UCC statement. This is insufficient to maintain a cause of action for fraud, even if one had been specifically delineated.

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

"A mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 199]). Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged deception.

In the instant matter, defendant's allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b). See generally *Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248 (1st Dept 1997).

Lastly, defendant's third cause of action, for abuse of process, is similarly dismissed.

"There are three essential elements of the tort of abuse of process: first, there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act; second, the person activating the process must be moved by a purpose to harm without that which has been traditionally described

[*7]

as economic or social excuse or justification; and third, the defendant must be seeking some collateral advantage or corresponding detriment to [the] plaintiff which is outside the legitimate ends of process [internal quotation marks and citations omitted]."

Berisic v Winckleman, 40 AD3d 561, 562 (2d Dept 2007).

Defendant has failed to allege or show any of the three requisite elements to maintain a claim of abuse of process. Pursuant to Article 9 of the Uniform Commercial Code (UCC), filing a UCC-1 statement is not a civil process that compels any performance, and such filing fulfills a traditional economic purpose of protecting assets to satisfy a potential judgment. Further, the filing of a UCC-1 Financing Statement merely puts third parties on notice that there is a potential claim against the specified asset, which is within the legitimate ends for which the concept of filing was created. UCC § 9:504; *See generally Badillo v Tower Insurance Company of New York*, 92 NY2d 790 (1999).

Furthermore, under New York law, "[a]bsent a showing of fraud or collusion or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client [internal quotation marks and citations omitted]." *Burger v Brookhaven Medical Arts Building, Inc.*, 131 AD2d 622, 624 (2d Dept 1987); *see Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345 (1st Dept 1986). Because defendant has failed to establish the elements of fraud, movants cannot be held liable to him for any

legal acts they performed on behalf of their client.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion to dismiss the third-party complaint is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

**Dated: December 24, 2008
New York, New York**

ENTER:



J.S.C.

FILED
JAN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK