Ideal Steel Supply Corp . v Anza
2008 NY Slip Op 33737(U)
January 16, 2008
Supreme Court, Queens County
Docket Number: 4167/2007
Judge: Marguerite A. Grays
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Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA PART 4
Justice

IDEAL STEEL SUPPLY CORP.,

Plaintiff,

-against-

JOSEPH V. ANZA and BERDON, LLP,

Defendants.

Index Number 4167 2007

Motion Date November 20, 2007

Motion Cal. Number 15

Motion Seq. No. 3

QUEENS COUNTY CLERK FILED 2008 FEB -4 AM 9:16

The following papers numbered 1 to 8 read on this motion by defendant Joseph V. Anza for an order dismissing the complaint on the grounds of statute of limitations, and failure to state a cause of action pursuant to CPLR 3211(a)(5) and (7), and awarding attorneys' fees and costs pursuant to 22 NYCRR 130.1-1.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits (A-D) ...	1-4
Opposing Affirmation - Exhibits (1-2)	5-8
Memorandum of Law	
Reply Memorandum of Law	

Upon the foregoing papers this motion is determined as follows:

The background to this action is reported in Ideal Steel Supply Corp. v Beil (2007 NY Misc LEXIS 5160; 238 NYLJ 13 [July 3, 2007]) as follows:

In June 2002, plaintiff Ideal Steel Supply Corp. commenced an action against National Steel Supply, Inc., a competitor, and its owners Joseph Anza and Vincent Anza in the United States District Court for the Southern District of New York in which it asserted claims for breach of a previous settlement agreement and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). (18 USC §§ 1961 et seq.; see Ideal Steel Supply Corp. v Anza,

254 F Supp 2d 464, [2003]). Ideal alleged that National did not charge the combined 8.25% New York State and New York City sales taxes to customers who paid cash, thereby gaining an unfair competitive advantage and, through mail and wire fraud, engaged in racketeering activity. Ideal sought to recover damages for, inter alia, injury to its business caused by the competitor's alleged practice of unlawfully selling products free of the 8.25% sales tax and submitting fraudulent sales tax returns in violation of mail fraud or wire fraud statutes, both forms of "racketeering activity" under RICO.

The Federal District Court granted National's motion to dismiss the RICO cause of action for failure to adequately plead "transaction causation," finding that "[a]lthough Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (AC P30), Ideal has not alleged-indeed, can not allege-that Plaintiff relied on the sales tax returns Defendants mailed or wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail" (Ideal Steel Supply Corp. v Anza, supra, 468). The district court also dismissed the state law breach of contract claim without prejudice, declining to exercise supplemental jurisdiction over it.

On appeal, the United States Court of Appeals for the Second Circuit reversed the order dismissing the complaint and held, inter alia, that (1) Ideal had standing to assert a civil RICO claim against National based upon the alleged predicate acts of mail and wire fraud, (2) Ideal had standing to assert an illegal investment claim under RICO against National and (3) the purported problems of proof relating to causation were not a proper basis for dismissal for failure to state claim under RICO (see Ideal Steel Supply Corp. v Anza, 373 F3d 251, [2004]). The court upheld the RICO claim based on predicate acts of mail and wire fraud "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff" and returned the case to the district court, where the parties engaged in discovery (Anza v Ideal Steel Supply Corp., id. at 263).

On November 28, 2005, the United States Supreme Court granted a petition for certiorari (Anza v Ideal Steel Supply Corp., 546 US 1029 [2005]). On June 5, 2006, the Supreme Court, reversing in part and vacating in part, held that National's alleged acts of defrauding the New York State tax authority, using the proceeds from the fraud to lower prices designed to attract more customers, and submitting fraudulent state tax returns to conceal the illegal conduct were not the proximate cause of Ideal's lost sales. The Court wrote "The cause of Ideal's asserted harms,...," is a set of

actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State) (Anza v Ideal Steel Supply Corp., 126 S Ct 1991, 1997 [2006]). It was further held that the element of proximate cause was required for National to bring a civil RICO claim for injury to its business or property based upon alleged acts of mail fraud and wire fraud. The Supreme Court reasoned that New York State, not Ideal, was the direct victim of National's alleged fraud, that National could have lowered its prices for any number of reasons, and that Ideal's lost sales could have resulted from factors other than National's alleged acts of fraud.

The Supreme Court also declined to consider Ideal's illegal investment claim asserted under RICO since the Court of Appeals had not addressed proximate causation involved in that claim, and the Supreme Court remanded that claim to the Second Circuit Court of Appeals to determine whether National's alleged illegal investment proximately caused Ideal's lost sales (Anza v Ideal Steel Supply Corp., 547 US 451 [2006]).

Ideal Steel Supply Corp. commenced the within action on February 16, 2007, against Joseph V. Anza, and Berdon, LLP, and alleges claims for abuse of process, intentional interference with contractual relations, tortious interference with prospective business advantage, fraud, negligent misrepresentation, negligence, prima facie tort, and injunctive relief. Defendant Anza now moves pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint on the grounds of statute of limitations and failure to state a cause of action. Defendant Anza states in his affirmation that he has been employed by National Steel since May 2003, that he became its Assistant Secretary, on February 7, 2005, that has never been an actual or beneficial owner of National Steel and was not a party to the Federal action.

That branch of defendant's motion which seeks to dismiss the complaint on the grounds of statute of limitations and failure to state a cause of action is decided as follows:

Abuse of process:

In the first cause of action for abuse of process, plaintiff alleges that defendant Joseph V. Anza knowingly signed false New York State tax returns for the years 1998 through 2003, which were prepared by defendant Berdon, LLP, and that these documents were provided to the plaintiff during the course of discovery in the Federal action. It is undisputed that all of these amended tax documents were furnished to the plaintiff in February 2005. It is

unnecessary to determine whether the allegations of the complaint state a cause of action for abuse of process, as this claim is barred by the one-year statute of limitations. Although CPLR 215(3) does not specifically refer to abuse of process, all appellate courts considering this statute have recognized that a claim for damages for an intentional tort such as abuse of process is subject to the one-year limitations period of CPLR 215 (Bittner v Cummings, 188 AD2d 504 [1992]; Gallagher v Directors Guild of Am., 144 AD2d 261, 533 [1988]; Hansen v Petrone, 124 AD2d 782 [1986]; see also Jimenez v Shippy Realty Corp., 163 Misc 2d 121, 125 [1994]; Heinfling v Colapinto, 946 F Supp 260, 266 [1996]; Riddell Sports v Brooks, 872 F Supp 73, 76 [1995]; Cuillo v Shupnick, 815 F Supp 133, 135-36 [1993]). Plaintiff's reliance upon Levine v Sherman (86 Misc 2d 997 [1976]), therefore, is misplaced. Therefore, that branch of defendant's motion which seeks to dismiss the first cause of action for abuse of process is granted.

Tortious interference with contract:

The second cause of action for tortious interference with contract, alleges that the defendants allegedly created and produced in the Federal action allegedly false financial and tax documents, that the defendants had knowledge of a 1997 contract between the plaintiff and National Steel, that the defendants sought to breach the contract, without justification, and caused a breach, resulting in extensive litigation expenses, and additional breaches by National Steel, resulting in damages in excess of $1,000,000 and entitling plaintiff to treble damages of $3,000,000.

The statute of limitations for this intentional tort is three years from the date the injury was sustained (Spinap Corp., Inc. v Cafagno, 302 AD2d 588 [2003]). In the Federal action, Ideal asserted in its pleadings that the stipulation of settlement was breached as early as 1998. In its opposing papers, Ideal asserts that the acts of tortious interference occurred when Anza signed, filed and served the financial documents on the plaintiff in February 2005. The court need not decide whether the three-year period commenced in 1998 or in 2005, as the complaint is insufficient to state a cause of action for intentional interference with contractual relations. The elements of such a cause of action are the existence of a valid contract, defendant's knowledge of that contract, defendant's intentional procuring of the breach, actual breach of the contract and damages (Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413, 424 [1996]). Here, the only contract alleged in the pleading is the stipulation of settlement entered into in 1997 between Ideal and National Steel, and their

principals, which provides that "both parties agree to stay away from and otherwise not interfere with each others [sic] business activities, other than legitimate and proper competition." The pleadings fail to explain how Mr. Anza's preparation or execution of the allegedly false documents which were then produced in the Federal action intentionally procured the breach of the stipulation of settlement between National and Ideal, or actually breached said stipulation of settlement. In addition, it is settled law that a corporate officer cannot be held individually liable for the alleged tortious interference of his or her corporate employer (Robbins v Panitz, 61 NY2d 967, 969 [1984]; Murtha v Yonkers Child Care Assoc., Inc., 45 NY2d 913, 915 [1978]); BGW Dev. Corp. v Mount Kisco Lodge No. 1552 of the Benevolent & Protective Order of Elks of the United States, 247 AD2d 565, 567 [1998]; Hoag v Chancellor, Inc., 246 AD2d 224, 228 [1998]; Citicorp Retail Services, Inc. v Wellington Mercantile Services, Inc., 90 AD2d 532, 532 [1982]; Grappo v Alitalia Linee Aeree Italiane, S.p.A., 56 F3d 427, 434 [1995]; Puma Indus. Consulting, Inc. v Daal Assocs., Inc., 808 F2d 982, 986 [1987]). While individual tort liability may lie where corporate officers have acted outside their capacities or against the interests of the corporation (see Citicorp Retail Services, Inc. v Wellington Mercantile Services, Inc., supra; Riddell Sports, Inc. v Brooks, 872 F Supp 73 [1995]), these situations are not alleged here. Consequently, as plaintiff has failed to state a claim of tortious interference against defendant Anza, that branch of the motion which seeks to dismiss the second cause of action is granted.

Tortious interference with prospective business advantage:

The elements of the tort of interference with prospective advantage are (1) defendant knew of a proposed contract between plaintiff and another, (2) defendant acted intentionally to interfere with plaintiff's prospective contractual relation, and but for defendants' interference a contract would have been entered into and (3) defendant's conduct involved wrongful means, significantly higher culpable conduct than necessary for interference with existing contracts, damaging plaintiff (see White Plains Coat & Apron Co., Inc. v Cintas Corp., 8 NY3d 422 [2007]; NBT Bancorp, Inc. v Fleet/Norstar Finance Group, 87 NY2d 614 [1996]; Guard-Life Corp. v S. Parker Hardware Manufacturing Corp., 50 NY2d 183 [1980]). In view of the fact that the only contract referred to in the complaint is the 1997 stipulation of settlement, plaintiff cannot maintain this claim, as no proposed contract exists between plaintiff and another. Therefore, that branch of the motion which seeks to dismiss the third cause of action is granted.

Fraud:

The elements of claim of fraud are "(1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations" (Giurdanella v Giurdanella, 226 AD2d 342 [1996]). Here, plaintiff's allegations of fraud are not pleaded with the particularity mandated by CPLR 3016(b), since, inter alia, plaintiff has failed to specify how it was injured as a result of defendant's preparation, execution and production of allegedly false income tax returns in the Federal action. In addition, plaintiff fails to allege how it reasonably relied upon these documents and fails to allege that it sustained damages as a result of such reliance. The fact that plaintiff incurred expenses as a result of the ongoing Federal litigation, including expenses allegedly incurred in examining said documents is insufficient to set forth an injury based on the alleged fraud (see New York Univ. v Continental Ins. Co., 87 NY2d 308, 318 [1995]; 1711 LLC v 231 W. 54th Corp., 7 AD3d 261, 262 [2004]; Channel Master Corp. v Aluminum Ltd. Sales, 4 NY2d 403, 407 [1958]). Therefore, that branch of defendant's motion which seeks to dismiss the cause of action for fraud is granted.

Negligent misrepresentation:

A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information (see J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144 [2007]; Parrott v Coopers & Lybrand, 95 NY2d 479 [2000]; Murphy v Kuhn, 90 NY2d 266, 270 [1997]). Plaintiff has not and cannot allege that there was actual privity of contract between the parties, or a relationship so close as to approach that of privity. Plaintiff's contention that Anza's preparation or execution of the documents on behalf of National Steel created a privity-like relationship with the plaintiff is rejected. Plaintiff and National are competitors and adversaries in the Federal action, and plaintiff has no relationship whatsoever with Anza. Therefore, that branch of the motion which seeks to dismiss the claim for negligent misrepresentation is granted.

Negligence:

In order to state a claim for negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (Pulka v Edelman, 40 NY2d 781 [1976]; Rubin v Staten Is. Univ. Hosp., 39 AD3d 618 [2007]; Coral v State of New York, 29 AD3d 851, 851 [2006]). In the absence of a duty, there is no breach and no liability (see Pulka v Edelman, supra; Fernandez v Elemam, 25 AD3d 752 [2006]). Here, plaintiff alleges that the defendants had a duty to provide plaintiff with honest and true documents and statements of fact concerning National Steel's financial statements and tax returns. However, it is undisputed that during the course of the Federal action, Mr. Anza executed the subject documents on behalf of his employer, National Steel, whose counsel in turn made them available to plaintiff during the course of discovery. Plaintiff's claim that Anza owed it any duty, thus, has no basis in fact and must be rejected. Therefore, that branch of the motion which seeks to dismiss the claim for negligence is granted.

Prima Facie Tort:

Plaintiff's claim of prima facie tort is based upon the production of allegedly false financial statements and tax statements during discovery proceedings in the Federal action in February 2005. A claim for damages for an intentional tort, including a tort not specifically listed in CPLR 215(3), is subject to a one-year limitation period (see Gallagher v Directors Guild of Am., 144 AD2d 261, 262-263 [1988]). Where, as here, a reading of the factual allegations discloses that the essence of the cause of action is an intentional tort, plaintiff cannot avoid a statute of limitations bar by labeling the action as one to recover damages for a prima facie tort (see Angel v Bank of Tokyo-Mitsubishi, Ltd., 39 AD3d 368 [2007]; Yong Wen Mo v Ming Chan, 17 AD3d 356, 359 [2005]; Havell v Islam, 292 AD2d 210 [2002]). Since the alleged events took place in February 2005, this claim is barred by the one-year statute of limitations. Furthermore, the requisite 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 (Curiano v Suozzi, 63 NY2d 113, 117 [1984]; Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 332 [1983]; ATI, Inc. v Ruder & Finn, 42 NY2d 454, 458 [1977]). A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages (see Freihofer v

Hearst Corp., 65 NY2d 135, 143 [1985]; Curiano v Suozzi, supra at 117; ATI, Inc. v Ruder & Finn, supra, at 458). Here, no special damages are alleged, and the fact that the Federal action commenced by Ideal has proven to be time consuming or vexatious does not, without more, spell out prima facie tort, and attorneys' fees and expert's fees incurred therein do not spell out special damages (Howard v Block, 90 AD2d 455 [1982]; Ginsberg v Ginsberg, 84 AD2d 573, 574 [1981]).

Injunctive relief:

It is well settled that "[i]n order to state a cause of action, a complaint seeking a permanent injunction must show: (1) the violation of a right presently occurring, or threatened and imminent; (2) that the plaintiff has no adequate remedy at law; (3) that serious and irreparable injury will result if the injunction is not granted; and (4) that the equities are balanced in the plaintiff's favor" (67A NY Jur 2d, Injunctions, § 153; see Nicowski v Nicoski, 50 Misc 2d 167 [1966]; Realty Enter. LLC v Hyde Park Owners Corp., 2005 NY Misc LEXIS 3527 [2005]; Ohio Players, Inc. v Polygram Records, Inc., 2000 US Dist LEXIS 15710, 2000 WL 1616999 [SDNY] [n.o.r.]). Even reading the complaint in a light most favorable to the claimant, plaintiff has not alleged any of the elements required for an injunction. Therefore, that branch of defendant's motion which seeks to dismiss the cause of action for a permanent injunction is granted.

In view of the foregoing, defendant Anza's motion to dismiss the complaint is granted in its entirety. Defendant's request for attorneys' fees and costs pursuant to 22 NYCRR 130.1-1, is denied.

Dated: JAN 16 2008

J.S.C.

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