

Sharf v PRL Equity Group, Inc.

2009 NY Slip Op 32264(U)

September 16, 2009

Supreme Court, Nassau County

Docket Number: 23076/08

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

BARRY SHARF,

Plaintiff,

-against-

**PRL EQUITY GROUP, INC., JONATHAN
LYONS, PHILLIP LYONS and EISEMAN
LEVINE LEHRHAUPT & KAKOYIANNIS,
P.C. individually, jointly and severally,**

Defendants.

**Motion Sequence #1
Submitted June 11, 2009
XXX**

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The following papers were read on these motions:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3
“Corrected” Affirmation in Opposition with Complaint.....	4
Letter from Movant, dated June 22, 2009.....	5

Pro se defendant, EISEMAN LEVINE LEHRHAUPT & KAKOYIANNIS, P.C. (hereinafter referred to as “ELLK”), moves for an order dismissing plaintiff’s action in its entirety for failure to serve a complaint within the time allowed by CPLR §3012(b). Counsel for plaintiff, BARRY SHARF, opposes the motion, which is determined as follows:

In essence, this action seeks to recover for damages allegedly sustained by plaintiff because of the defendants, PRL EQUITY GROUP, INC., JONATHAN LYONS, PHILLIP

LYONS and ELLK's attempts to collect on a promissory note upon which plaintiff's corporation, the Lifestyles Group (hereinafter referred to as "LIFESTYLES"), had defaulted and because of defendants attempt to pierce the corporate veil and recover against SHARF, individually. ELLK states that SHARF is suing ELLK solely because it served as counsel for PRL Equity Group, Inc. (hereinafter referred to as "PRL") in the prior New York County Supreme Court Commercial Division lawsuit, under Index No. 101948/06, in which PRL obtained a default judgment against LIFESTYLES in the sum of \$100,000.00, representing a loan made to LIFESTYLES at its inception in 2004, and thereafter sought to obtain a judgment against SHARF in the same amount by piercing the corporate veil or, in the alternative, to enforce its judgment against the insolvent LIFESTYLES, by setting aside allegedly fraudulent conveyances made to SHARF, LIFESTYLES President. Moving counsel relates that, after trial in the New York action, the Trial Court (Freedman, J.) found that LIFESTYLES had made transfers and conveyances in violation of the Debtor and Creditor Law and directed SHARF and his partner to reconvey \$136,000.00 to LIFESTYLES and, in the event of non-compliance, to enter judgment against SHARF in the sum of \$75,000.00. However, the order reflects that the Court found insufficient evidence to pierce the corporate veil, and counsel for SHARF states that, upon reargument, the Court reversed its finding and dismissed the action against SHARF individually. The Court has not been provided with a copy of the second order in the New York County action.

On the instant motion, ELLK asserts that the instant action was commenced with the filing of a summons with notice, on December 31, 2008, which seeks damages for abuse of process, fraud and for a frivolous lawsuit against plaintiff in a prior action. ELLK

points out that, although the summons demanded an answer to the “annexed complaint”, no such complaint was annexed and, by letter dated April 17, 2009, defendants demanded that a complaint be served, pursuant to CPLR §3012(b). It is ELLK’s position that, as of May 20, 2009, more than twenty (20) days after demand was made, no complaint has been served and the complaint should be dismissed. ELLK argues that plaintiff cannot demonstrate a reasonable excuse for the delay nor a meritorious cause of action for abuse of process, fraud or frivolous litigation and, because the instant litigation is a waste of the time and resources of the Court, the complaint should be dismissed in its entirety.

In opposition to the motion, counsel for SHARF states that he thought that ELLK’s demand letter for the service of a complaint was insufficient because it was not a formal pleading or Notice of Appearance, and that dismissal of the action based on her misunderstanding of the law would be too harsh because of the severity of the damages suffered by the plaintiff. Counsel claims that the complaint is ready for service, and that it was never plaintiff’s attempt to delay service, but no copy of the complaint is annexed to the opposition papers. It is only on a “corrected” version of the opposition papers, submitted to the Court on June 17, 2009, that a complaint is annexed, which is back dated to February 9, 2009. Therein, plaintiff purports to allege three (3) causes of action: 1) for abuse of process, 2) for fraud, and 3) for punitive damages. In essence, it is plaintiff’s position that, despite counsel for plaintiff’s warning that the prior action seeking to pierce the corporate veil had no merit, ELLK’s decision to move forward with said litigation was an abuse of process and a fraud, for which punitive damages are warranted. Counsel for SHARF points to the eventual dismissal of the New York action against SHARF as proof that the claim had no merit, and asserts that ELLK was overzealous in the representation

of its client, and caused plaintiff to incur considerable legal expense and to suffer public humiliation because of the money judgment initially entered against him, a negative impact to his credit report, stress, anxiety, a loss of time with his family and a strain on his marriage. Counsel for plaintiff urges that the motion to dismiss be denied and that plaintiff be permitted to serve his complaint, although no duly filed and served cross-motion for such relief has been made.

CPLR §3012(b) provides as follows:

If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (1) of rule 320 for an appearance. Service of the complaint shall be made within twenty (20) days after service of the demand . . . The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision.

The Court has discretion to dismiss if the Complaint is not made within twenty (20) days of written demand. *Brenner v Cross County Shopping Center*, 308 AD2d 469, 764 NYS2d 638 (2nd Dept. 2003); *Quinn v Wenco Food Systems*, 269 AD2d 437, 703 NYS2d 222 (2nd Dept. 2000); *Culley v Morrison*, 247 AD2d 356, 667 NYS2d 940 (2nd Dept. 1998). To successfully oppose a motion to dismiss for failure to serve a timely complaint, plaintiff “must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action”. *Eglit v County of Westchester*, 46 AD3d 504, 846 NYS2d 658 (2nd Dept. 2007).

The mere commencement of a civil action in itself is not enough to give rise to an action for abuse of process, even if commenced with malicious intent. *I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 793 NYS2d 379 (1st Dept. 2005). “In its broadest sense, abuse of process may be defined as misuse or perversion of

regularly issued legal process for a purpose not justified by the nature of the process.”
Sipsas v Vaz 50 AD3d 878, 855 NYS2d 248 (2nd Dept. 2008). After a careful reading of the submissions herein, the Court finds no evidence that process was adversely utilized by defendants in the prior New York action in seeking to pierce the corporate veil and hold SHARF responsible for the debts of his insolvent corporation. Indeed, the Trial Court found that fraudulent conveyances had been made under the Debtor Creditor Law and, though the action was ultimately dismissed against SHARF, the Court finds that the proposed complaint fails to set forth a meritorious cause of action for abuse of process. *I.G. Second Generation Partners, L.P. v Duane Reade, supra*.

Nor does the cause of action set forth a cause of action based upon fraud. Plaintiffs allegations, that defendants “fraudulently pursued” its claims to pierce the corporate veil by giving the false impression to the Court that their claims were triable and therefore “committed a fraud”, fall far short of the CPLR §3016(b) requirement that a cause of action based upon fraud be pleaded with factual detail and specificity. *See, Sargiss v Magarelli*, 50 AD3d 1117, 858 NYS2d 209 (2nd Dept. 2008); *Pericon v Ruck*, 56 AD3d 635, 868 NYS2d 118 (2nd Dept. 2008). The conclusory allegations of the complaint provide no facts to support a finding that a fraudulent act was committed. The bringing of an unsuccessful claim in Supreme Court does not equate to a fraud upon the Court.

Furthermore, there is no separate cause of action for punitive damages. *See, Barry v City of New York*, 259 AD2d 718(2nd Dept. 1999); *Farrell v K.J.D.E. Corp.*, 244 AD2d 905 (4th Dept. 1997); *Paroff v Muss*, 171 AD2d 782 (2nd Dept. 1991); *Fiesel v Nanuet Properties Corp.*, 125 AD2d 292 (2nd Dept. 1986); and *Cass v Broome County Co-op Insurance*

Company, 94 AD2d 822 (3rd Dept. 1983). Moreover, based on the record herein, no award for punitive damages is warranted. See, *Gellman v Sewane Golf Club*, 24 AD3d 415, 805 NYS2d 411 (2nd Dept. 2005).


Assuming, *arguendo*, that plaintiff's counsel had properly cross-moved for an extension of time to serve the complaint, it is the judgment of the Court that, based on the plain meaning of CPLR §3012 (b), counsel for plaintiff has not demonstrated a reasonable excuse for his delay in serving the Complaint, nor has he pleaded meritorious causes of action sufficient to defeat the motion, as required by CPLR §3012(d). Accordingly, it is hereby

ORDERED, that the motion by ELLK to dismiss this action in its entirety based upon plaintiff's failure to serve a complaint within the time allowed by CPLR §3012(b) is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 16, 2009



WILLIAM R. LaMARCA, J.S.C.

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ENTERED
SEP 21 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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