

Eline Capital Corp. v Auto Connection Long Is., Inc.
2009 NY Slip Op 32930(U)
December 7, 2009
Supreme Court, Nassau County
Docket Number: 9717/09
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
ELINE CAPITAL CORP.,

Plaintiff,

-against-

**AUTO CONNECTION LONG ISLAND, INC.,
PAUL WEINBERG, HAROLD M. SOMER, P.C.
and HAROLD M. SOMER**

Defendant.

-----x

**TRIAL PART: 19
NASSAU COUNTY**

INDEX NO: 9717/09

MOTION SEQ. NO: 1,2

SUBMIT DATE: 11/4/09

The following papers having been read on this motion:

- Notice of Motion 1,2**
- Memorandum of Law.....3**
- Opposition.....4**
- Reply.....5,6**

Companion motions by defendants Auto Connection Long Island, Inc. (Auto Connection) and Paul Weinberg and by defendants Harold M. Somer, P.C. and Harold M. Somer respectively to dismiss the complaint against said defendants pursuant to CPLR §3211(a)(1), (5) and (7) are granted as hereinafter provided.

This action arises out of the Somer defendants' representation of Eline Capital Corp. [Eline], the plaintiff herein, in a prior action for specific performance of a purported oral lease agreement, with option to purchase, regarding commercial property located at 1213 Hempstead Turnpike, Elmont, New York. The action, brought by Auto Connection against Eline¹ was dismissed pursuant to the order of the Hon. Roy S. Mahon entered December 6, 2007. Shortly thereafter, on or about January 17, 2008, Auto Connection terminated its relationship with Mr. Somer and his firm and the law office of Hopkins & Kopilow, Esqs. was substituted as attorneys for Harold Somer, Esq.

The issue of costs and sanctions which Mr. Justice Mahon directed would be determined at a hearing, was ultimately resolved by agreement of the parties and a stipulation placed on the record in open court on May 12, 2008. The stipulation provided that \$10,000.00 would be paid by Auto

¹The underlying action bears the caption *Auto Connection of Long Island v Eline Capital Corp.*, Supreme Court: Nassau County, index no. 002705/07.

Connection in full satisfaction of the sanctions issue and that the subject property would be purchased by Auto Connection at a contemplated price of \$1.5 million. A formal contract was to be entered on or about June 16, 2008, if, *inter alia*, issues involving financing, the title report and environmental concerns were satisfactorily resolved. Additionally, the stipulation provided that Auto Connection would withdraw its motion for summary judgment to dismiss Eline's counterclaim for abuse of process, with leave to renew, should it become necessary.

A contract of sale apparently was never consummated and, upon renewal, Auto Connection's cross-motion was renewed and upon renewal Eline's counterclaim was dismissed by order of the Hon. Roy S. Mahon entered January 28, 2009.

Despite the existence of the so ordered stipulation dated May 12, 2008 purportedly cancelling the "*lis pendens*," and the attempts by substituted counsel and by Auto Connection's former counsel (Harold M. Somer) to cancel the notice of pendency, it appears that the cancellation was never filed with the County Clerk and, as of August 11, 2009, the notice of pendency remained in effect. Plaintiff's counsel offers no explanation, however, for its failure to take steps to insure that the so ordered stipulation was indeed filed and notice of pendency removed.

The gravamen of the compliant, which asserts a total of eighteen causes of action, is that defendants Auto Connection and Paul Weinberg, the sole shareholder and officer of Auto Connection, by and through their former counsel, defendants Harold M. Somer, P.C., and Harold M. Somer, filed a harassing and meritless notice of pendency and commenced an action for specific performance of an allegedly never agreed upon five year lease with option to purchase.

There are now two motions before the court wherein defendants seek dismissal of the complaint on various CPLR 3211(a) bases including documentary evidence, statute of limitations and failure to state a cause of action.

Even assuming the truth of the facts pleaded, and allowing for every favorable inference to determine whether any cognizable legal theory can be discerned (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]), under the circumstances extant, there is no basis to sustain plaintiff's claims for abuse of process and malicious prosecution asserted against defendants Auto Connection and its president, Paul Weinberg, in the first through eighth causes of action, and against defendants Harold M. Somer, P.C. and Harold M. Somer, individually, in the tenth through seventeenth causes of action. Nor is there a basis to pierce the corporate veil (ninth and eighteenth causes of action) to hold Paul Weinberg and/or Harold M. Somer personally liable for the

alleged acts of their respective corporations.

The torts of malicious prosecution and abuse of process are closely allied. While malicious prosecution concerns the improper issuance of process, the gist of abuse of process is the improper use of process after it is regularly issued.

The elements of a cause of action for malicious prosecution based upon a prior civil action include 1) initiation or continuation of a proceeding despite the lack of probable cause; 2) a termination of that proceeding which is favorable to the party there sued and now aggrieved as plaintiff; and 3) a showing of malice in the pursuit of the underlying proceeding. *Purdue Frederick Co. v Steadfast Ins. Co.*, 40 AD3d 285, 286 [1st Dept. 2007]. An action brought with actual malice is one brought with conscious falsity. *Hornstein v Wolf*, 109 AD2d 129, 133 [2nd Dept. 1985], *aff'd*, 67 NY2d 721 [1986]. A cause of action for malicious prosecution requires a showing of some special injury to, or a highly substantial and identifiable interference with, person, property or business rights beyond the damages normally attendant on being sued. *Engel v CBS, Inc.*, 93 NY2d 195, 205 [1999]; *Honzawa v Honzawa*, 268 AD2d 327, 329 [1st Dept. 2000]. Mere commencement of a civil suit, even if groundless and ill motivated, does not itself result in special damage or injury sufficient to sustain an action for malicious prosecution. *Hornstein v Wolf*, *supra*, at p. 132. Plaintiff has failed to make the necessary showing to avoid dismissal of its malicious prosecution claim.

A cause of action for abuse of process has three essential elements: 1) regularly issued process, either civil or criminal; 2) an intent to do harm without excuse or justification; and 3) use of process in a perverted manner to obtain a collateral objective. *Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; *Panish v Steinberg*, 32 AD3d 383 [2nd Dept. 2006]. The process used must involve an unlawful interference with one's person or property. *Island Federal Credit Union v Smith*, 60 AD3d 730, 733 [2nd Dept. 2009]. The institution of a civil action by summons and compliant does not by itself give rise to an action for abuse of process as said process is not considered process capable of being abused (*Sipsas v Vaz*, 50 AD3d 878,879 [2nd Dept. 2008]), nor does a malicious motive alone give rise to a cause of action for abuse of process. *Curiano v Suozzi*, *supra* at p. 117. A plaintiff's likelihood of success on the merits is irrelevant. *551 West Chelsea Partners LLC v 556 Holding LLC*, 40 AD3d 546, 548 [1st Dept. 2007].

Here, plaintiff has failed to allege any actual misuse of the notice of pendency to obtain an end outside of its proper scope. Plaintiff has not alleged the gist of an abuse of process claim having failed to allege any manner in which process was improperly used after it was issued or how it was

specifically harmed by it. The filing of a notice of pendency in an action for specific performance is a proper use of a provisional remedy in an action affecting title to real property and is, therefore, perfectly permissible. CPLR 6501; *RKO Properties, Ltd. v Boymelgreen*, 37 AD3d 580, 581 [2nd Dept. 2007]. Under the circumstances extant, the device was used to effect its proper function, i.e., to give constructive notice to a prospective purchaser or encumbrancer of real property that an action is pending that would affect title to the subject property. CPLR §6501.

There is no indication of any attempt on defendants' part to utilize the filing of the notice of pendency, or commencement of the underlying action, to accomplish some collateral advantage outside the legitimate ends of the process or that they perverted the process in any way. Bad faith may not be found where, as here, a party utilizes a notice of pendency in a manner consonant with the purpose for which it was designed. *Andesco, Inc. v Page*, 137 AD2d 349, 357 [1st Dept. 1988].

Inasmuch as there is no evidence that defendants sought to accomplish an unlawful purpose, not justified by the nature of the process or to achieve some improper collateral advantage, no cause of action has been stated to recover damages for abuse of process.

While plaintiff alleges that the underlying action and notice of pendency "continues to harm" plaintiff "with each passing day," plaintiff's contention that Mr. Somer and his law firm, which ceased representing Auto Connection on or about January 17, 2008, had an obligation, nonetheless, to ensure that the so-ordered stipulation was filed with the County Clerk and the notice of pendency removed, lacks merit.

The doctrine of piercing the corporate veil is a doctrine employed by a third-party to go behind the corporate existence in order to circumvent the limited liability of an owner such as Paul Weinberg or Harold M. Somer in order to hold the individual defendants liable for some corporate obligation. *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]; *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2nd Dept. 2009]. An attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation. *Hart v Jassem*, 43 AD3d 997, 998 [2nd Dept. 2007]. Rather, it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on the owner. *Old Republic Nat. Title Ins. Co. v Moskowitz*, 297 AD2d 724, 725 [2nd Dept. 2002]. The ninth and eighteenth causes of action are, therefore, untenable.

Moreover, those seeking to pierce the corporate veil bear a heavy burden of showing that a corporation was dominated as to the transaction attacked and that such domination was the

instrument of fraud or otherwise resulted in wrongful or inequitable consequences. *Shkolnik v Krutoy*, 65 AD3d 1214 [2nd Dept. 2009]. Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance. *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998].

Notably, even under the liberal notice pleading requirements of CPLR §3013, a complaint still must allege, *inter alia*, the material elements of each cause of action asserted. Conduct constituting an abuse of the privilege of doing business in the corporate form is a material element of any cause of action seeking to hold an owner personally liable for the actions of his or her corporation under the doctrine of piercing the corporate veil. Here, nothing in the complaint asserts or suggests that the individual defendants failed to respect the separate legal existence of the corporation, treated corporate assets as their own, did not respect corporate formalities, or, in any other way, abused the privilege of doing business in the corporate form. *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 24 [2nd Dept. 2008]. Without any allegation that conduct of either of these individuals constituted an abuse of the privilege of doing business in the corporate form, the complaint fails to allege a material element of a cause of action under the theory of piercing the corporate veil (*see Lawlor v Hoffman*, 59 AD3d 499, 500 [2nd Dept. 2009]).

To the extent that the complaint may be read to include claims against defendants based on the theory of *prima facie* tort, the court notes that the requisite elements of such a claim are the intentional infliction of harm, resulting in special damages without excuse or justification by an act or series of acts which are otherwise legal. *Del Vecchio v Nelson*, 300 AD2d 277, 278 [2nd Dept. 2002]. In the absence of any showing that disinterested malevolence was defendants' sole motivation for commencing the underlying action, or for filing the notice of pendency thereon, as a result of which plaintiff sustained identifiable and particularized special damages, plaintiff cannot establish a cause of action for *prima facie* tort. *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]; *Lerwick v Kelsey*, 24 AD3d 931, 932 [3rd Dept. 2005], *lv to appeal denied* 6 NY3d 711 [2006].

Accordingly, in light of the foregoing determination, the court need not consider the merits of the alternative dismissal grounds raised by defendants in the respective moving papers, i.e., documentary evidence, statute of limitations and *res judicata*.

The motion and cross motion are granted and the complaint is dismissed as to all defendants pursuant to CPLR §3211(a)(7).

This constitutes the decision and order of the court.

ENTERED

DATED: December 7, 2009

ENTER
DEC 09 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**
HON. ARTHUR M. DIAMOND
J. S.C.

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