

Pelsinger v Spirer

2013 NY Slip Op 32163(U)

September 10, 2013

Supreme Court, New York County

Docket Number: 150566/2011

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 150566/2011
PELSINGER, JAY
vs.
SPIRER, GARY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion ~~to~~ for partial summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants plaintiffs' motion for summary judgment to the extent of dismissing defendant's remaining counterclaim, after defendant discontinued their first counterclaim pursuant to the accompanying 10/10/12 stipulation; otherwise denies plaintiffs' motion; and grants defendant's summary judgment dismissing plaintiffs' claims against defendant Spira and for abuse of process and tortious interference with a contract or with business relations against the remaining defendants. C.P.L.R. § 3212(b).

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

Dated: 8/30/13

Lucy Billings, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x
JAY PELSINGER and LEONIDES GUADARRAMA,

Index No. 150566/2011

Plaintiffs

- against -

DECISION AND ORDER

GARY SPIRER, GS EQUITIES, LTD., and
EROSTRA, LLC,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs Pelsinger and Guadarrama sue defendants to recover damages for malicious prosecution, abuse of process, and tortious interference with a contract or with business relations. Plaintiffs' claims arise from an action that defendants GS Equities, Ltd., and Erostra, LLC, commenced in the United States District Court against plaintiffs and other defendants, based on a contractual dispute between those defendants and nonparty Blair Ryan Co., of which Pelsinger was an officer and shareholder, and with which Guadarrama conducted business. Defendants counterclaimed for malicious prosecution and abuse of process. Plaintiffs move for summary judgment on liability for their claims against defendants and for summary judgment dismissing defendants' counterclaims. C.P.L.R. § 3212(b). For the reasons explained below, the court grants plaintiffs' motion to the limited extent set forth.

II. APPLICABLE STANDARDS

Plaintiffs, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If plaintiffs satisfy this standard, the burden shifts to defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the plaintiffs' motion, the court construes the evidence in the light most favorable to defendants. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

III. PLAINTIFFS' CLAIMS

A. Malicious Prosecution

To support a prima facie claim for malicious prosecution, plaintiffs must show that defendants commenced a criminal action against plaintiffs without probable cause and with malice and that the action terminated in plaintiffs' favor. Martinez v. City of Schenectady, 97 N.Y.2d 78, 84 (2001). If defendants encouraged, importuned, or played a catalytic role in the

criminal action against plaintiffs, defendants may be liable for malicious prosecution. Sital v. City of New York, 60 A.D.3d 465, 466 (1st Dep't 2009); Maskantz v. Hayes, 39 A.D.3d 211, 213 (1st Dep't 2007); Brown v. Sears Roebuck & Co., 297 A.D.2d 205, 209 (1st Dep't 2002); Ramos v. City of New York, 285 A.D.2d 284, 298-99 (1st Dep't 2001).

Plaintiffs may base a malicious prosecution claim on the commencement of a civil Racketeer Influenced and Corrupt Organizations Act (RICO) action, 18 U.S.C. § 1964(c), by defendants G.S. Equities and Erostra against plaintiffs. See Fischer v. Crown Hgts. Jewish Community Council, 1 A.D.3d 187 (1st Dep't 2003); Fischer v. Chevra Machziket H'Shechuna, 295 A.D.2d 227, 228 (1st Dep't 2002). Although the United States District Court's finding that the RICO claims were frivolous demonstrates a lack of probable cause for commencing the action, see Galland v. Kossoff, 34 A.D.3d 306, 307 (1st Dep't 2006); Black v. Green Harbour Homeowners' Assn., Inc., 37 A.D.3d 1013, 1014 (3d Dep't 2007); Fink v. Shawangunk Conservancy, Inc., 15 A.D.3d 754, 755 (3d Dep't 2005), the conflicting affidavits by Pelsinger and Spierer regarding defendants' motivation for the action fail to demonstrate malice as a matter of law. Nineteen N.Y. Props. Ltd. Partnership v. Uk Jee Kim, 251 A.D.2d 104, 105 (1st Dep't 1998); Hassan v. Marriott Corp., 243 A.D.2d 406, 407 (1st Dep't 1997). See Du Chateau v. Metro-North Commuter R.R. Co., 253 A.D.2d 128, 132 (1st Dep't 1999).

B. Abuse of Process

To establish abuse of process, plaintiffs must present evidence of (1) the regular issuance of civil or criminal process, (2) defendants' intent to harm plaintiffs without excuse or justification, and (3) perverted use of the process to secure a collateral objective. Curiano v Suozzi, 63 N.Y.2d 113, 116 (1984); Casa de Meadows Inc. (Cayman Is.) v. Zaman, 76 A.D.3d 917, 921 (1st Dep't 2010); Fisk Bldg. Assoc. LLC v. Shimazaki II, Inc., 76 A.D.3d 468, 469 (1st Dep't 2010); Matthews v. New York City Dept. of Social Servs., Child Welfare Admin., 217 A.D.2d 413, 415 (1st Dep't 1995). See Tray-Wrap, Inc. v. Pacific Tomato Growers, Ltd., 61 A.D.3d 545, 546 (1st Dep't 2009). Plaintiffs must demonstrate more than defendants' malicious motive to establish abuse of process; such evidence supports only the second element of the claim. Curiano v. Suozzi, 63 N.Y.2d at 117; Matthews v. New York City Dept. of Social Servs., Child Welfare Admin., 217 A.D.2d at 415.

Commencing a civil action by a summons and complaint is not process subject to abuse and therefore fails to sustain an abuse of process claim. Curiano v. Suozzi, 63 N.Y.2d at 116; Casa de Meadows Inc. (Cayman Is.) v. Zaman, 76 A.D.3d at 921; Muro-Light v. Farley, 95 A.D.3d 846, 847 (2d Dep't 2012). See Leon v. Couri, 285 A.D.2d 493, 494 (2d Dep't 2001). Here, plaintiffs contend merely that G.S. Equities and Erostra maliciously commenced a baseless civil RICO action to harass and cause monetary harm to plaintiffs in retaliation for their dealings

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with Blair Ryan. Even accepting plaintiffs' allegations as true, defendants' commencement of the action simply does not constitute abuse of process. Curiano v. Suozzi, 63 N.Y.2d at 117; Casa de Meadows, Inc. (Cayman Is.) v. Zaman, 76 A.D.3d at 921; Muro-Light v. Farley, 95 A.D.3d at 847. Even if the abuse of process claim were based on process other than a civil action's summons and complaint, again the conflicting affidavits by Pelsinger and Spirer would raise factual issues whether the civil process was unjustified and to achieve a collateral objective. Nineteen N.Y. Props. Ltd. Partnership v. Uk Jee Kim, 251 A.D.2d at 105.

C. Tortious Interference With a Contract or With Business Relations

A claim of tortious interference with a contract requires (1) a valid contract to which plaintiffs were a party, (2) an actual breach of that contract by another party to the contract, (3) defendants' knowledge of the contract, (4) their intentional procurement of the breach, and (5) damages to plaintiffs from that interference. White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007); Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996); Foster v. Churchill, 87 N.Y.2d 744, 749-50 (1996); Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dep't 2006). To establish tortious interference with non-binding or prospective business relations, plaintiffs must show that (1) they engaged in business relations with a nonparty, (2) defendants knew of the relationship and interfered with it, (3) their interference derived solely from their malice or from their criminal or independently tortious conduct, and (4) their

interference injured those business relations. Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 47 (1st Dep't 2009); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 108 (1st Dep't 2009). A claim for interference with business relations requires that defendants engaged in more culpable conduct than for interference with a contract. Carvel Corp. v. Noonan, 3 N.Y.3d 182, 189-90 (2004); NBT Bancorp v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614, 621 (1996); Leonard v. Gateway II, LLC, 68 A.D.3d 408, 409-10 (1st Dep't 2009); Lobel v. Maimonides Med. Ctr., 39 A.D.3d 275, 277 (1st Dep't 2007). See Schorr v. Guardian Life Ins. Co. of Am., 44 A.D.3d 319 (1st Dep't 2007).

Plaintiffs present no evidence identifying a contract with which defendants interfered, see Havana Cent. NY2 LLC v. Lunney's Pub, Inc., 49 A.D.3d 70, 72 (1st Dep't 2007); 330 Acquisition Co., LLC v. Regency Sav. Bank, F.S.B., 19 A.D.3d 174, 175 (1st Dep't 2005); Risley v. Rubin, 272 A.D.2d 198 (1st Dep't 2000); American Preferred Prescription v. Health Mgt., 252 A.D.2d 414, 416 (1st Dep't 1998), or specifying business relations lost from defendants' commencement of the RICO action or publicity about the action. Havana Cent. NY2 LLC v. Lunney's Pub, Inc., 49 A.D.3d at 74; Learning Annex Holdings, LLC v. Gittelman, 48 A.D.3d 211 (1st Dep't 2008); American Preferred Prescription v. Health Mgt., 252 A.D.2d at 416. See Lansco Corp. v. Strike Holdings LLC, 90 A.D.3d 427, 428 (1st Dep't 2011). Therefore, regardless of defendants' opposition, plaintiffs fail to make even a prima facie showing of entitlement to relief on this

claim. Smalls v. AJI Indus., Inc., 10 N.Y.3d at 735; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384-85.

IV. DEFENDANTS' COUNTERCLAIMS

Defendants counterclaimed against plaintiffs for malicious prosecution and abuse of process based on plaintiffs' commencement of this action against defendants. Defendants withdrew their counterclaim for malicious prosecution in a stipulation dated October 10, 2012. As discussed above, commencing a civil action by a summons and complaint is insufficient to sustain an abuse of process claim. Curiano v. Suozzi, 63 N.Y.2d at 116; Casa de Meadows Inc. (Cayman Is.) v. Zaman, 76 A.D.3d at 921; Muro-Light v. Farley, 95 A.D.3d at 847. See Leon v. Couri, 285 A.D.2d at 494. Defendants' failure to establish this essential element of abuse of process requires dismissal of defendants' remaining counterclaim. Leon v. Couri, 285 A.D.2d at 494.

V. SEARCHING THE RECORD

The court may search the record and grant summary judgment to a non-moving party on claims and issues that are subject of a summary judgment motion. New Hampshire Ins. Co. v. MF Global, Inc., 108 A.D.3d 463, 467 (1st Dep't 2013); RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d 618, 619 (1st Dep't 2009); Scott v. Beth Israel Med. Ctr., Inc., 41 A.D.3d 222, 224 (1st Dep't 2007); Filannino v. Triborough Bridge & Tunnel Auth., 34 A.D.3d 280, 281 (1st Dep't 2006). See Castlepoint Ins. Co. v. Moore, 105 A.D.3d 472, 474 (1st Dep't

2013); Atiencia v. MBBCO II, LLC, 75 A.D.3d 424 (1st Dep't 2010).

A. Defendant Spirer's NonLiability

Although plaintiffs moved for summary judgment against all defendants, none of plaintiffs' claims pertain to defendant Spirer, an owner of both G.S. Equities and Erostra, the parties that commenced the federal action against plaintiffs. Plaintiffs have presented no evidence to support piercing the corporate veil to render Spirer liable for any of those business entities' actions or omissions. The doctrine of piercing the corporate veil applies to limited liability companies (LLCs) like Erostra as well as corporations like G.S. Equities. Matias v. Mondo Props. LLC, 43 A.D.3d 367, 368 (1st Dep't 2007); Retropolis, Inc. v. 14th St. Dev. LLC, 17 A.D.3d 209, 210 (1st Dep't 2005). To hold Spirer liable for the actions or omissions of an LLC or a corporation, plaintiffs must show that, as a member or a manager or as a shareholder or an officer, he completely dominated the LLC or corporation, abusing the privilege of doing business under the corporate form, to commit a wrong or injustice injuring plaintiffs. East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc., 16 N.Y.3d 775, 776 (2011); Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 142 (1993); Stewart Tit. Ins. Co. v. Liberty Tit. Agency, LLC, 83 A.D.3d 532, 533 (1st Dep't 2011); Fantazia Intl. Corp. v. CPL Furs N.Y., Inc., 67 A.D.3d 511, 512 (1st Dep't 2009).

Plaintiffs point to no factors indicating misuse of the corporate form. Morris v. New York State Dept. of Taxation &

Fin., 82 N.Y.2d at 143-44; Do Gooder Prods., Inc. v. American Jewish Theatre, Inc., 66 A.D.3d 527, 528 (1st Dep't 2009). See Shisgal v. Brown, 21 A.D.3d 845, 848 (1st Dep't 2005). Even had plaintiffs demonstrated such factors, to pierce the corporate veil plaintiff must demonstrate further that that misuse involved Spirer availing himself of the LLC or corporation as a vehicle for his own personal business. Do Gooder Prods., Inc. v. American Jewish Theatre, Inc., 66 A.D.3d at 528; Shisgal v. Brown, 21 A.D.3d at 848; Brito v. DILP Corp., 282 A.D.2d 320, 321 (1st Dep't 2001). Although the complaint alleges that all defendants, including Spirer, commenced and continued the federal RICO action against plaintiffs, the record shows that Spirer was not a plaintiff in that action. While Pelsinger attests that Spirer was responsible for the actions of G.S. Equities and Erostra, neither the complaint nor Pelsinger's affidavit claims any misuse of the corporate form. These omissions are fatal to plaintiffs' claims against an individual owner of defendant corporate entities.

B. Plaintiffs' Second and Third Claims Lack Merit.

As discussed above, plaintiffs' second claim, for abuse of process, may not rest on defendants' commencement of a civil action. Plaintiffs' third claim, for tortious interference with a contract or with business relations, rests on nothing more than a damaged business reputation and unspecified lost business. Like plaintiffs' evidence regarding this claim, discussed above, the complaint equally fails to identify any contracts breached or

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specify any business opportunities lost due to defendants' civil RICO action. Plaintiffs' principal evidence, Pelsinger's affidavit, adds little to these deficient allegations, deficiencies that are similarly fatal to plaintiffs' tortious interference claim.

VI. CONCLUSION

Consequently, the court grants plaintiffs' motion for summary judgment to the extent of dismissing defendants' remaining counterclaim for abuse of process, but otherwise denies plaintiffs' motion. C.P.L.R. § 3212(b). Since plaintiffs moved for summary judgment on their claims against defendants, upon searching the record, the court grants summary judgment to defendants and dismisses plaintiffs' claims against defendant Spirer and claims for abuse of process and tortious interference with a contract or with business relations. Id.; Murphy v. RMTS Assoc., LLC, 71 A.D.3d 582, 583 (1st Dep't 2010); RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619. See Castlepoint Ins. Co. v. Moore, 105 A.D.3d at 474. Thus plaintiffs' claim against defendants GS Equities, Ltd., and Erostra, LLC, for malicious prosecution is the only claim remaining in this action. This decision constitutes the court's order and judgment dismissing defendants' remaining counterclaim, plaintiffs' claims against defendant Spirer, and plaintiffs' second and third claims, for abuse of process and

tortious interference with a contract or with business relations.
The court will mail copies to the parties.

DATED: August 30, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

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

PASINLER ET ANO.

V.

SPIER ET AL.

INDIVIDUAL ASSIGNMENT PART 46

STIPULATION

INDEX NO. ~~15086~~ / 11

MOTION CALENDAR NO.


DATE 10/10/12

IT IS HEREBY STIPULATED AND AGREED by and between the below-named attorney(s) as follows:

DEFENDANTS DISMISS THEIR FIRST COUNTERCLAIM FOR
(MALICIOUS PROSECUTION).

Attorney for Plaintiff

Date: 10/10/12



Attorney for Defendant

So Ordered.



Attorney for Defendant

ENTER: Lucy Billings

J.S.C.
LUCY BILLINGS
J.S.C.