

**Teller v Galak**

2015 NY Slip Op 32615(U)

October 15, 2015

Supreme Court, Rockland County

Docket Number: 34344/2014

Judge: Robert M. Berliner

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SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory  
time period for appeals as of  
right (CPLR 5513 [a]), you  
are advised to serve a copy  
of this order, with notice of  
entry, upon all parties.

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ADAM J. TELLER,

Plaintiff,

-against-

DECISION AND ORDER

JULIEAN GALAK, LAW OFFICES OF  
JULIEAN GALAK, P.C., THOMAS J.  
SOLOMON, LAZAROWITZ & MANGANILLO,  
LLP, JOEL SHAFFERMAN, SHAFFERMAN &  
FELDMAN, LLP,

Index No.: 34344/2014

Defendants.

Motion Sequences # 1, 2, and 3

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The following papers, numbered 1 to 18, were read on Defendants' separate motions pursuant to  
CPLR §3211 seeking dismissal of Plaintiff's complaint as asserted against them:

Notice of Motion/Affirmation in Support(Kennoy)/Exhibits(A-D)/Memo of Law.....	1-3
Affirmation in Opposition/Exhibits(A-B)/Memo of Law in Opposition.....	4-5
Reply Affirmation/Exhibit(A).....	6
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Reply Affirmation.....	18

Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

The instant action arises from an action commenced by B&M Linen Corp and 220 Coster  
LLC against 220 Laundry LLC, Elliot Spitzer, Michael Steinberg and Adam J. Teller in Supreme  
Court, Nassau County emanating from the purchase of a commercial laundry business. Thereafter,  
B&M Linen Corp. filed a voluntary petition for bankruptcy before the U.S. Bankruptcy Court,

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Southern District of New York, prompting the stay and eventual transfer of the Nassau County action to the Bankruptcy Court as an adversarial proceedings. U.S. Bankruptcy Court Judge Allan L. Gropper dismissed Plaintiff from the adversarial proceedings following a finding, as pertinent herein, that he had not executed personal guaranties in connection with the purchase of the commercial laundry business.

In his complaint, Plaintiff asserts causes of action sounding in malicious prosecution, intentional infliction of emotional distress, and prima facie tort against Defendants for allegedly bringing and maintaining a baseless claim upon non-existent personal guaranties and seeks a money judgment, punitive damages and costs and disbursements.

Defendants have all filed pre-answer motions to dismiss Plaintiff's complaint as asserted against them. Defendants Thomas J. Solomon and Lazarowitz & Manganillo, LLP (hereinafter collectively the "Solomon Defendants") move to dismiss Plaintiff's complaint as untimely under CPLR §3211(a)(5) and for failing to state a cause of action under CPLR §3211(a)(7) and seek the imposition of sanctions pursuant to 22 NYCRR 130-1.1. Defendants Juliean Galak & Law Offices of Juliean Galak, P.C. (hereinafter collectively the "Galak Defendants") seek dismissal on the same bases as the Solomon Defendants. Defendants Joel Shafferman and Shafferman & Feldman, LLP (hereinafter collectively "Shafferman Defendants") also seek dismissal on the same bases as the Solomon Defendants as well as pursuant to CPLR §3211(a)(1) based upon documentary evidence in the related bankruptcy proceeding.

The Galak Defendants represented B&M Linen Corp and 220 Coster LLC in the Nassau County action and, in that capacity, retained the Solomon Defendants as trial counsel. The Shafferman Defendants represented B&M in the adversarial proceeding before the bankruptcy court.

Inasmuch as there is substantial overlap in Defendants' separate dismissal applications, the Court will address the grounds for dismissal collectively as appropriate.

#### Statute of Limitations

The three causes of action alleged in Plaintiff's complaint sound in malicious prosecution, intentional infliction of emotional distress, and prima facie tort. Defendants aver that the causes of action accrued no later than Judge Gropper's July 12, 2013 Memorandum of Decision for statute of

limitations purposes. Plaintiff acknowledges that “[v]irtually all the competing factual contentions by the parties in the underlying action have been resolved by the Bankruptcy Court, first in its Memorandum of Decision dated July 12, 2013, then finally by the September 16, 2013 Order which actually directed dismissal of all claims against Plaintiff and the removal of his name from the case caption in the underlying Adversary Proceeding”.<sup>1</sup> Plaintiff maintains, in substance, that the proceedings did not conclude until the entry of Judge Gropper’s September 16, 2013 Order, at which time Plaintiff’s causes of action accrued.

Malicious prosecution and intentional infliction of emotional distress causes of action are governed by a one-year statute of limitations. CPLR §215; *Hansen v Petrone*, 124 AD2d 782 [2d Dept 1986].

The Court begins and ends its analysis with the text of Judge Gropper’s written determinations within the context of the bankruptcy proceedings. In his July 12, 2013 Memorandum of Decision, Judge Gropper found, in pertinent part,

“The Buyers also moved to dismiss with prejudice all claims against Adam J. Teller (“Teller”), who was listed as a defendant solely by reason of his alleged guaranties on the two promissory notes, on the ground that he did not execute a guaranty of either of the two notes. The Debtor and the Markuses do not demonstrate in response that he guaranteed anything, and Teller is entitled to dismissal of the complaint on that ground as well as the ground that Sellers first materially breached the contract”.<sup>2</sup>

The September 16, 2013 Order offered by Plaintiff in support of its position refers to this earlier determination, as it states on page 2:

“...and the Court, having considered all written submissions by the parties and having heard oral argument of the Motion and Cross-Motion for Summary Judgment, and having issued its Memorandum of Decision, dated July 12, 2013, disposing of matters raised by the Motion and Cross-Motion”.<sup>3</sup>

The July 12, 2013 Memorandum of Decision established Plaintiff’s entitlement to dismissal and terminated the proceedings in his favor. The September 16, 2013 Order memorializing the July

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<sup>1</sup> Dec. 1, 2014 Aff. of Stephen R. Sugrue at ¶4.

<sup>2</sup> July 12, 2013 Memorandum of Decision at 8-9 n 4.

<sup>3</sup> Sep. 16, 2013 Order at 2 [emphasis added].

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12, 2013 determinations does not alter this operative date. As such, July 12, 2013 is the date Plaintiff's causes of action accrued. Plaintiff commenced the instant action on September 15, 2014, more than one year after the accrual of the malicious prosecution and intentional infliction of emotional distress causes of action. Accordingly, those two causes of actions are hereby dismissed as untimely.

Defendants also assert that Plaintiff's prima facie tort cause of action is subject to a one-year statute of limitations and is therefore similarly untimely. Although Plaintiff accepts the fact that he will not be permitted to prevail on both his prima facie tort and claim for malicious prosecution, he posits that both claims should be allowed at this early juncture in the proceedings and defends the sufficiency of his pleadings.

"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, and 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" *Havell v Islam*, 292 AD2d 210, 210 [1st Dept 2002].

In his Complaint, Plaintiff argues that "[t]o the extent Defendants are not found liable to Plaintiff on the First [Malicious Prosecution] or Second [Intentional Infliction of Emotional Distress] Cause of Action, Defendants should be found liable on the grounds of *prima facie tort* as they intentionally inflicted harm upon Plaintiff without excuse or justification by means of exercising a right to file a legal claim on behalf of their clients".<sup>4</sup>

The Court has reviewed the contents of Plaintiff's complaint, which alleges that Defendants acted intentionally in pursuing a baseless claim against him premised upon non-existent personal guaranties, notwithstanding their alleged knowledge that no such guaranties were executed. Given these assertions, the essence of Plaintiff's prima facie tort claim is an intentional tort that is governed by a one-year statute of limitations. Given the Court's analysis and recitation of the operative dates in connection with the malicious prosecution and intentional infliction of emotional distress causes of action, *supra*, Plaintiff's third cause of action sounding in prima facie tort is similarly dismissed as untimely.

The Court need not address the balance of the parties' contentions in light of these

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<sup>4</sup> Sep. 15, 2014 Complaint at ¶71.

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determinations. Defendants' requests for the imposition of sanctions is denied, in the Court's discretion. All other requests for relief not explicitly addresses herein are denied, in the Court's discretion.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York  
October 15, 2015

ENTER

  
HON. ROBERT M. BERLINER, J.S.C.

To:

Coti & Sugrue  
Morrison Mahoney LLP  
Law Offices of Julican Galak  
Traub Lieberman Strauss & Shrewsberry LLP