

SR Holdings I, LLC v Cannavo
2017 NY Slip Op 33372(U)
December 29, 2017
Supreme Court, Westchester County
Docket Number: Index No. 54202/2016
Judge: Sam D. Walker
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To commence the statutory
time 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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
SR HOLDINGS I, LLC

Plaintiff,

-against-

DECISION & ORDER

Index No. 54202/2016

Seq # 3 & 4

JOSEPH CANNAVO, LEONARD CANNAVO, CARMELA
CANNAVO, IRVING PLACE PROPERTIES, LLC, ONE
WAY PROPERTIES LLC, PUTNAM PARK PROPERTIES
LLC, REGENT STREET PROPERTIES LLC,
WASHINGTON PARK PROPERTIES LLC, BLUE
MOUNTAIN PARTNERS LLC, CROWN ROYAL LLC,
HASECO PROPERTIES LLC, WHITETAIL REATY GROUP
LLC, CAPTIAL REATY PARTNERS LLC, ALL NY
HOLDINGS LLC, M&T BANK, PROVIDENT BANK n/k/a
STERLING NATIONAL BANK, RED SOX FUNDING LLC,
BRANCA REATY LLC, CASTLE TITLE INSURANCE
AGENCY INC., BLACK DIAMOND GROUP LLC, RANDOM
PROPERTY GROUP LLC, 82-84 HAMILTON MANOR LLC,
DEREK WASHINGTON, RANCA CONSULTING
SERVICES LLC, CREATIVE SCAPES MANAGEMENT
LLC, SINGER ENERGY GROUP LLC, SHANA SIMMONS,
NEW YORK STATE DEPARTMENT OF TAXATION &
FINANCE, JOHN DOE #1 through JOHN DOE #15
INCLUSIVE,

Defendant.
-----X

The following papers were considered on the motions seeking dismissal of the
complaint:

Notice of Motion/Affirmation/Exhibits A-C	1-5
Memorandum of Law in Support	6
Affirmation/Affidavit in Opposition/Exhibits A-D	7-11
Memorandum of Law in Opposition	12
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Affidavit in Opposition/Exhibits A-D	19-23
Memorandum of Law in Opposition	24
Reply Affirmation/Exhibit A	25-26

Based upon the foregoing the motions are GRANTED.

The plaintiff commenced this action on April 1, 2016, to recover on deficiency judgments against the named defendants from two previously filed foreclosure actions. The plaintiff filed an amended complaint on November 14, 2016. The plaintiff states that on or about September 24, 2012, a judgment was entered in its favor in the amount of \$2,836,459.42 and on or about January 7, 2013, another judgment was entered in its favor in a second action in the amount of \$1,618,929.82. The plaintiff alleges that both judgments remain wholly unsatisfied and seeks, *inter alia*, to set aside alleged fraudulent conveyances of various properties without fair consideration in an attempt to avoid payment on the judgments; and to recover payment on the deficiency judgments.

The amended complaint alleges causes of action for civil conspiracy and RICO violations. This Court previously granted Castle Title Order motion to dismiss civil conspiracy and RICO causes of action. The defendants, Joseph Cannavo and Leonard Cannavo, now file this motion, pursuant to CPLR 3211(a)(7), to dismiss the plaintiff's civil conspiracy and RICO claims. The defendants, Irving Place Properties LLC, One Way Properties LLC, Putnam Park Properties LLC, Regent Street Properties LLC, Washington Park Properties LLC, and Haseco Properties LLC (the "transferor defendants") also now file a motion to dismiss, pursuant to CPLR 3211 (a)(7), to dismiss the civil conspiracy and RICO causes of action.

The defendants assert that New York does not recognize an independent tort of civil conspiracy and such a claim stands or falls with the underlying tort. The defendants also argue that the core of a RICO civil conspiracy is an agreement to commit predicate acts and that a RICO civil conspiracy complaint must specifically allege such an agreement. The defendants argue that the plaintiff's amended complaint fails to allege a conscious agreement between and amongst the defendants and therefore, must be dismissed as a matter of law.

In support of the both motions, the defendants rely upon their attorneys' affirmations or affidavit, memoranda of law and a copies of the pleadings. SR Holdings opposes the motions, relying on affidavits, attorney's affidavits, transfer documents and memoranda of law.

Discussion

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

(7) the pleading fails to state a cause of action..."
(N.Y. Civ. Prac. L. & R. 3211[a] [7]).

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...." (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory

(see *Brevtman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; see also *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]).

In this Court's prior Decision and Order, the Court stated that, "conspiracy to commit a fraud is never of itself a cause of action" (*Agostini v Sobol*, 304 AD2d 395 [1st Dept 2003]) and dismissed the civil conspiracy claims against Castle Title Order. For the same reason, the Court now dismisses the civil conspiracy claims against Joseph and Leonard Cannavo and the transferor defendants. "While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action (see *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 [1st Dept 2011]). Therefore, the Court dismisses the independent civil conspiracy claims.

With regard to the RICO claims, the core of a RICO civil conspiracy is an agreement to commit predicate acts. Therefore, a RICO civil conspiracy complaint, at the very least, must allege specifically such an agreement" (see *House of Spices (India), Inc. v SMJ Servs., Inc.*, 103 AD3D 848 [2d Dept 2013]. Here, there is no such allegation of a conscious agreement. Additionally, as a necessary element, the plaintiff must show proof of a "pattern of racketeering activity", which requires at least two acts of racketeering predicates that are related and amount to or threaten the likelihood of continued criminal activity (see *H.J. Inc. v Northwestern Bell Telephone Co.*, 492 US 229 [1989]). Here, the amended complaint also fails to satisfy the continuity element of a RICO cause of action, since it does not allege facts to support an inference of a threat of continuing criminal activity. Therefore, the defendants' motions to dismiss the plaintiff's RICO claims, are granted.

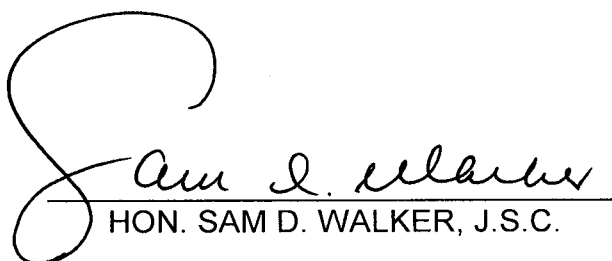
Accordingly, it is

ORDERED that Joseph Cannavo and Leonard Cannavo's motion to dismiss the civil conspiracy and RICO causes of action, is granted; and it is further

ORDERED that the defendants, Irving Place Properties LLC, One Way Properties LLC, Putnam Park Properties LLC, Regent Street Properties LLC, Washington Park Properties LLC, and Haseco Properties LLC's motion to dismiss the civil conspiracy and RICO causes of action, is granted.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 29, 2017



HON. SAM D. WALKER, J.S.C.