

WA Route 9, LLC v PF Capital LLC
2019 NY Slip Op 32252(U)
July 25, 2019
Supreme Court, New York County
Docket Number: 651688/2012
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 63EFM

Justice

X

WA ROUTE 9, LLC,

Plaintiff,

- v -

PAF CAPITAL LLC, JACOB FRYDMAN, DAVID
LICHTENSTEIN, PAF CAPITAL, LLC. (4TH PARTY DEFT.),
THE LIGHTSTONE GROUP (4TH PARTY DEFT.),
LIGHTSTONE VALUE PLUS REAL ESTATE INVESTMENT
TRUST INC. (4TH PARTY DEFT.), LIGHTSTONE VALUE
PLUS REAL ESTATE INVESTMENT TRUST INC.II (4TH
PARTY DEFT.), LIGHTSTONE VALUE PLUS REIT LP (4TH
PARTY DEFT.), ADAM FRIEDMAN, ADAM FRIEDMAN
ASSOCIATES LLC. (4TH PARTY DEFT.)

Defendant.

INDEX NO. 651688/2012

MOTION DATE 07/22/2019

MOTION SEQ. NO. 015

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 015) 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

David Lichtenstein and PAF Capital, LLC (hereinafter, collectively, PAF) move for summary judgment, pursuant to CPLR § 3212, dismissing the causes of action for libel and indemnification in the fourth-party complaint. Jacob Frydman cross-moves for summary judgment on the same causes of action. For the reasons set forth below, both the motion and cross motion are denied.

THE RELEVANT FACTS AND CIRCUMSTANCES

In July 2006, WA Route 9, LLC (WA Route 9), an entity owned and managed by Mr. Frydman, took out a loan for \$600,000 from Park Avenue Bank (the Route 9 Loan) (4th Party Complaint, ¶ 56). The Route 9 Loan was secured by real property located at 2055 South Road, U.S. Route 9, Poughkeepsie, New York 12601 (the Route 9 Property). In June 2007, McDonald Ave Acquisition LLC (McDonald Ave), another entity owned and managed by Mr. Frydman, took out a loan for \$12 million from PAF (the McDonald Loan) (*id.*). The McDonald Loan was secured by real property located at 385 McDonald Avenue, Brooklyn, New York 11218 (the McDonald Property). Park Avenue Bank assigned the Route 9 Loan to PAF in December 2006 (*id.*). Both the Route 9 Loan and the McDonald Loan were personally guaranteed by Mr. Frydman (the Route 9 Guaranty and the McDonald Guaranty, respectively) (*id.*).

On July 1, 2009, McDonald Ave defaulted on the McDonald Loan. Mr. Frydman represented that he would be unable to satisfy the McDonald Guaranty as his assets had been severely depleted. Mr. Frydman requested that PAF extend the maturity date of the McDonald Loan (*id.*, ¶ 59). PAF expressed a preference to sell the McDonald Property instead, on the belief that it could be sold for more than the balance due on the McDonald Loan (*id.*, ¶ 60-61). However, by the end of 2009, the parties had been unable to find a buyer for the McDonald Property, and Mr. Frydman offered to convey the McDonald Property to PAF so that PAF could sell it in satisfaction of the loan and retain any profits (*id.*, ¶ 61). PAF agreed.

The parties entered into an Agreement of Purchase and Sale (the PSA), dated January 6, 2010, by and between McDonald Ave and PAF McDonald Ave, LLC (an affiliate of PAF, hereinafter

PAF McDonald), pursuant to which PAF MacDonalld agreed to purchase the McDonald Property from McDonald Ave in exchange for an assumption of all of the obligations secured by the McDonald Property, including the indebtedness relating to the McDonald Loan (NYSCEF Doc. No. 64). In connection with this transaction, the parties entered into a Release of Liability Agreement (the First Release), dated of even date with the PSA, by and among PAF, McDonald Ave, and Mr. Frydman, pursuant to which PAF agreed to waive "any and all rights to collect a deficiency judgment or pursue the Guarantor [i.e., Mr. Frydman] for any other personal liability in connection with enforcement of the [McDonald Loan]" (NYSCEF Doc. No. 65). As a condition of the First Release, Mr. Frydman provided PAF with personal financial statements, which were current through May 30, 2009, which he updated with certain hand-written notes which he represented reflected his financial condition as of December 31, 2009. Mr. Frydman proffered the financial statements to confirm his inability to satisfy the McDonald Guaranty. PAF accepted the financial statements with the hand-written updates.

Contemporaneously with the transfer of the McDonald Property, and as consideration for an extension of the Route 9 maturity date to September 1, 2010, White Acre Capital, LLC, an affiliate of Mr. Frydman, also transferred 12.5% of its ownership interest in the Route 9 Property to PAF East 127th St., LLC, an affiliate of PAF (4th Party Complaint, ¶ 71). On September 1, 2010, WA Route 9 defaulted on the Route 9 Loan.

Subsequently, PAF sought to restructure one of its affiliated entities, McDonald LLC, which was created for real estate transfer tax purposes in connection with the prospective sale of the McDonald Property (*id.*, ¶ 72). PAF requested and Mr. Frydman agreed to assist with the

restructuring deal provided that, as consideration for his participation, PAF would agree to a complete and unconditional release of all of Mr. Frydman's obligations relating to the McDonald Loan (*id.*, ¶ 73). PAF agreed, and the parties entered into a Release of Liability and Indemnity Agreement, (the Second Release), dated June 24, 2010, by and among PAF Capital, McDonald Ave, and Mr. Frydman, pursuant to which PAF agreed to release Mr. Frydman and any of his affiliates from any and all obligations relating the McDonald Loan and the McDonald Guaranty (NYSCEF Doc. No. 67, ¶ 2). To wit, Paragraph 4 of the Second Release states:

[PAF], on behalf of itself and [PAF McDonald] hereby releases any and all claims . . . debts or liabilities of any nature whatsoever in law and in equity, both past and present, whether known or unknown, suspected or claimed against [Mr. Frydman and his affiliates] which [PAF or PAF McDonald] or any of their successors or assigns, ever had, now have, or hereafter may have, by reason of any matter, cause, or thing whatsoever, from the beginning of any initial dealings with [Mr. Frydman and his affiliates] and through the time of execution of this [Second Release], whether arising from or relating in any way to the [McDonald Property], the PSA, the [McDonald Loan] . . . and the [McDonald Guaranty] (emphasis added).

In January 2012, Mr. Frydman announced his plan to form a new SEC-registered Real Estate Investment Trust (REIT) known as United Realty Trust Incorporated (URTI) (4th Party Complaint, ¶ 81). Significantly, URTI would be a direct competitor to certain REITs controlled by Mr. Lichtenstein. Around the time of Mr. Frydman's announcement, Mr. Frydman and PAF's President, Elliot Nuemann, were in the process of negotiating a proposed forbearance agreement relating to the Route 9 Loan (*id.*, ¶ 82). A draft forbearance agreement was circulated but never executed.

In April 2012, PAF demanded repayment of the Route 9 Loan based on its original terms with interest and penalties and issued default notices to Mr. Frydman seeking to enforce the terms of

the Route 9 Loan and Route 9 Guaranty. In response, WA Route 9 commenced the instant action seeking to enforce the terms of the proposed forbearance agreement. PAF counterclaimed and interposed the third-party complaint against Mr. Frydman and certain other guarantors under the McDonald and Route 9 Loans asserting causes of action for fraud. Mr. Frydman interposed the fourth-party complaint against PAF, asserting causes of action for libel, injunctive relief, tortious interference, unfair competition, *prima facie* tort, and indemnification.

After commencing the third-party action against Mr. Frydman, PAF caused press releases to be issued discussing their claims and Mr. Frydman's proposed REIT. Articles, blog posts, and social media posts about PAF's claims against Mr. Frydman began to proliferate online. For example, on June 25, 2012, Yahoo! Finance ran an article discussing PAF's claims which detailed how Mr. Frydman defaulted on his personal guaranty of the Route 9 Loan and set forth PAF's various allegations of fraud (NYSCEF Doc. No. 70). A press release published by Marketwire, a press release distribution service, dated July 3, 2012 and bearing the heading "PAF Capital LLC Sues for Fraud," stated that PAF had filed claims against Mr. Frydman and WA Route 9 based on allegations of fraud (NYSCEF Doc. No. 71). Notably, the Marketwire press release and several blog and social media posts stated that Mr. Frydman was in the process of forming his own REIT, a reference to URTI, which was not involved in any of the underlying transactions at issue in this case as it was not yet in existence. The Marketwire press release and the Yahoo! Finance article attribute PAF as their source.

Mr. Frydman moved for summary judgment dismissal of the second cause of action for fraudulent inducement and the third cause of action for negligent misrepresentation in the third-party complaint.

In a Decision and Order, dated May 22, 2013, New York State Supreme Court Justice Charles Ramos held that the Second Release expressly covered any and all transactions arising from or relating to the McDonald Loan or the McDonald Guaranty, and that PAF failed to identify a separate fraudulent act not covered by the Second Release that would support a cause of action for fraudulent inducement (NYSCEF Doc. No. 350, at 9). The court observed that, “[t]he broad language contained within the [Second Release] . . . indicates an intention by PAF to release causes of action such as fraud,” and that “PAF had an unrestricted opportunity to investigate [Mr. Frydman’s] financial condition” before entering into the Second Release (*id.*, at 11). The court also held that PAF could not establish justifiable reliance, a necessary element of any claim for fraud, as PAF’s due diligence consisted of nothing more than “blindly approving the unaudited financial statement from [Mr. Frydman] and then further accepting handwritten updates” (*id.*, at 12). Accordingly, the court granted Mr. Frydman’s motion to dismiss PAF’s cause of action for fraudulent inducement. The court also dismissed PAF’s cause of action for negligent misrepresentation, finding that PAF failed to allege the existence of a special relationship between PAF and Mr. Frydman that would give rise to an obligation for Mr. Frydman to impart accurate information to PAF (*id.*, at 13). It is important, in light of Mr. Frydman’s arguments to the contrary, to note a crucial distinction in the court’s decision. The court never stated that Mr. Frydman did not engage in fraudulent conduct, or that that he did not otherwise act inappropriately or that he did not conceal or misrepresent his financial condition.

Rather, the court simply stated that any such conduct, if it did occur, was inactionable because the financial statements issued by Mr. Frydman, which formed the basis for the allegations, were given in connection with the First Release and not the Second Release, which Second Release absolutely and unconditionally released Mr. Frydman from his obligations in connection with the McDonald Loan and the McDonald Guaranty. For the avoidance of doubt, to the extent that Mr. Frydman argues that the Second Release also covered the obligations in connection with the Route 9 Loan, the court disagreed, holding that the Route 9 Loan was a separate transaction. As the court stated:

[n]one of the Transaction Documents, including the Releases, reference the Route 9 Loan or the [Route 9 Guaranty]. The sophisticated parties clearly were capable of inserting references to the Route 9 Loan and [Route 9 Guaranty] if they so desired. [Mr. Frydman] failed to demonstrate that the parties intended the [Second Release] to include the Route 9 Loan and the [Route 9 Guaranty] or explain the failure to reference them in the agreements (*id.*, at 16).

With respect to PAF's motion to dismiss Mr. Frydman's forth-party complaint, the court sustained the first cause of action for libel and the second cause of action for injunctive relief and found that dismissal of the third cause of action for indemnification was premature based on its finding that the Second Release was valid and enforceable. The remaining causes of action were dismissed. PAF's motion for summary judgment and Mr. Frydman's cross motion for summary judgment are now before the court.

DISCUSSION

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]):

Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

To prevail on a cause of action for defamation, a plaintiff must establish: (i) a false statement, (ii) published to a third party, (iii) without privilege or authorization, (iv) resulting in harm, except for certain exceptions where a showing of harm is not required (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). A statement's truth or substantial truth is an absolute defense to a defamation claim (*Konrad v Brown*, 91 AD3d 545, 546 [1st Dept 2012]).

PAF argues that summary judgment and dismissal of Mr. Frydman's libel claim is required because either (i) the publication was protected or (ii) the statements were true or substantially true. The court disagrees.

PAF asserts that its action was not filed "solely as a vehicle and occasion to disseminate false and defamatory matter" (*Soumayah v Minnelli*, 19 AD3d 337, 337 [1st Dept 2005] [emphasis added]), but simply to recover money from Mr. Friedman for his fraudulent representations (*see* NYSCEF Doc. No. 355, Lichtenstein EBT at 126:18-126:21; NYSCEF Doc. No. 356, Teichman EBT, at 94:15-94:22; *id.*, at 96:2-96:20). Whether there was another purpose for filing the lawsuit is a factual issue for the trier of fact and not properly resolved on summary judgment.

Put another way, the fact finder could find that PAF brought its third-party claims against Mr. Frydman knowing that it had no provable damages as a result of the Second Release to issue a press release to harm Mr. Frydman's reputation before the launch of his competing REIT.

For his part, Mr. Frydman argues that he is entitled to summary judgment on his libel claim because PAF's conduct in this case falls within the exception to section 74 of the Civil Rights Law set forth in *Williams v Williams* (23 NY2d 592 [1969]). The court disagrees.

Section 74 of the Civil Rights Law provides that,

[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

In *Williams*, the plaintiff and his brother, the defendant, were both principals in the Universal Oven Company, Inc. (23 NY2d at 595). When the plaintiff stepped down from the company, the defendant caused the company to file a lawsuit against the plaintiff alleging that he had conspired to misappropriate the company's trade secrets and assets (*id.*). After filing the lawsuit, the defendant circulated copies of the summons and complaint among members of the trade (*id.*). The plaintiff, in turn, sued the defendant for libel, among other claims (*id.*, at 596). The defendant moved to dismiss the complaint, asserting that the publication of a fair and true report of a judicial proceeding was protected under section 74 of the Civil Rights Law (*id.*). The Court disagreed, stating that the public policy underlying section 74 of the Civil Rights Law "is the protection of reports of judicial proceedings which are *made in the public interest (emphasis added)*" (*id.*, at 599). The court explained that, in light of the purpose of section 74, "it is

impossible to conceive of the Legislature's intending to protect the defendant's perversion of judicial proceedings" (*id.*, at 599). The court explained "that it was never the intention of the legislature in enacting section 74 to allow 'any person' to maliciously institute a judicial proceeding alleging false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute" (*id.*).

Mr. Frydman asserts that, based on the Second Release, PAF knew or should have known that there was no legitimate basis on which to bring an action for fraud against him based on the allegedly false and misleading financial statements because there could be no damages. Therefore, Mr. Frydman argues that, like the defendant in *Williams*, PAF brought its third-party action solely for the purpose of subsequently defaming Mr. Frydman publicly because he was forming a competing REIT. Indeed, here, even more than in *Williams*, where the defendant merely circulated copies of the summons and complaint, PAF issued a press release and worked with a press release distribution company to ensure maximum circulation. PAF also published several social media and blog posts detailing its claims against Mr. Frydman or caused them to be published. And, significantly, PAF included mention of Mr. Frydman's plans to form a new REIT, which was wholly irrelevant to the third-party action as URTI was not in existence when the underlying events occurred. Finally, Mr. Frydman argues that based on Justice Ramos's dismissal of the fraud claims against him, the court necessarily found that he did not commit fraud, and, inasmuch as the PAF press release alleged that he had committed fraud, he is entitled to summary judgment. The arguments however fail. Justice Ramos did not dismiss the fraud claims because he found that Mr. Frydman did not commit fraud. Rather, Justice Ramos dismissed these claims because he found that they were precluded by the Second Release, which

"release[d] any and all claims . . . debts or liabilities of any nature whatsoever in law and in equity, both past and present, whether known or unknown, suspected or claimed" against Mr. Frydman in connection with the McDonald Loan and Guaranty. In other words, Mr. Frydman may very well have committed a fraud, but PAF released him from any liability and PAF's press release may, in fact, be true. In addition, and for the avoidance of doubt, the fact finder could find that PAF brought their complaint not solely for the purpose of smearing Mr. Frydman. They very well may have brought this lawsuit for the purpose of collecting monies that they believe they are owed. Accordingly, the cross motion for summary judgment is also denied.


In light of the foregoing, that branch of the motion for summary judgment that relates to the indemnity cause of action is premature.

Accordingly, it is

ORDERED that David Lichtenstein and PAF Capital, LLC's motion for summary judgment is denied; and it is further

ORDERED that Jacob Frydman's cross motion for summary judgment dismissal is also denied.

7/25/2019
DATE


ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE