

GLD3 LLC v Albra

2020 NY Slip Op 35761(U)

September 24, 2020

Supreme Court, Westchester County

Docket Number: Index No. 51088/2020

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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GLD3, LLC and SNOOK-9 REALTY, INC., and HERRING HOLDINGS, LLC,

Index No. 51088/2020

Plaintiffs,

Motion Seq. No. 2

– against –

DECISION & ORDER

OZEM "OZZY" ALBRA, and "JOHN DOE", "JANE DOE", "DOE ASSOCIATES",

Defendants.

----- X

In an action to recover damages for malicious prosecution and intentional tort, the defendant Ozem "OzzY" Albra moves to dismiss the complaints, pursuant to CPLR 3211(a)(7) & (g), to amend his answer to include a counterclaim under the anti-SLAPP statute, and for sanctions under the anti-SLAPP statute:

Papers Considered NYSCEF Doc. No. 48-63; 79-99

1. Notice of Motion/Affirmation of Craig M. Cepler, Esq./Exhibits A-M;
2. Affirmation of Kenneth M. Stenger, Esq. in Opposition;
3. Affirmation of Stephen J. Riccardulli, Esq. in Opposition/Exhibits A-C;
4. Reply Affirmation of Craig M. Cepler, Esq./Exhibit L/Reply Affidavit of Azem "Ozzy" Albra.

Factual and Procedural Background

The plaintiffs GLD3 LLC and Snook-9 Realty, Inc. (hereinafter collectively referred to as GLD3) are developers based in Pelham Manor that own a parcel of real property located in the Town of Fishkill in Dutchess County to be developed as a colonial village known as Continental Commons. The Continental Commons is to operate as a commercial, social, and educational center with a visitor's center, museum, restaurant, shops, and an inn.

The plaintiff Herring Holdings, LLC (hereinafter Herring) owns land in the Town of Fishkill on Old Route 9 that sits on two zoning districts; one of the districts is zoned as R15 and one is zoned as general business. Herring sought approval from the Town of Fishkill Planning Board to approve an application to re-zone the R15 district to general business. The Planning Board made a negative determination as to the environmental

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impact of the re-zoning, i.e. the Board determined that the re-zoning would not have a negative effect on the environment and recommended that the application be granted.

In furtherance of the development of Continental Commons, GLD3 submitted an application to the Fishkill Town Board to extend Blodgett Water District #1 and Blodgett Sewer District #1 to include its commercial property and provide municipal sewer and water to Continental Commons. The Town Board scheduled public hearings for December 4, 2019, on GLD3's application.

On December 4th, the public hearings regarding the Blodgett water and sewer districts were opened and closed. A motion before the Board was made to reconsider the closure and as a result, the public hearings were continued to December 18, 2019. At the same meeting, the Town Board adopted a resolution to schedule an initial public hearing for December 18, 2019, concerning Herring's application to expand the general business zoning on Old Route 9 ("Local Law 9").

On December 18, 2019, only two Board members were present at the meeting and no quorum to proceed. Robert LaColla, the Fishkill Town Supervisor, called for a special meeting to be held on December 30, 2019, at 7:00 p.m. In addition, the public hearings that were to be held on the 18th were also rescheduled to December 30th.

The Underlying Special Proceeding in Dutchess County

On December 30, 2019, the supervisor-elect for the Town of Fishkill, Ozem "Ozzy" Albra, commenced an article 78 proceeding in the Supreme Court, Dutchess County (hereinafter referred to as the underlying action or proceeding). Albra commenced the proceeding as a resident and taxpayer asserting that the current Fishkill Supervisor Robert LaColla, unlawfully scheduled three public hearings for 7:00 p.m. on December 30, 2019. The respondents identified in the special proceeding included LaColla and the Fishkill Town Board. GLD3 and Herring were included as interested parties.

In the underlying proceeding, Albra sought a judgment declaring, inter alia, that the acts of the Town Supervisor to reschedule the Blodgett public hearings and to schedule the Local Law 9 public hearings were arbitrary and capricious and in violation of lawful procedure. Accompanied by the commencement documents, Albra brought an order to show cause seeking a temporary restraining order restraining, among others, LaColla and the Town Board of the Town of Fishkill from conducting the public hearings.

On December 30, 2019, a hearing on the TRO took place before the Supreme Court, Dutchess County (Egitto, AJSC). Present for the hearing were attorneys for Albra, GLD3, and Herring¹. Included among the arguments by GLD3 and Herring was that Albra did not have standing to commence the special proceeding as he lived 5 miles away and therefore, did not fall within the property zone.

¹ According to the hearing transcript, the Town Attorney did not appear but submitted an affirmation to the Court.

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After the hearing, the Court (Egitto, AJSC) issued a TRO staying and restraining the respondents from conducting the Blodgett and Local Law 9 public hearings scheduled for that night, December 30, 2019, until such hearings were rescheduled by the Fishkill Town Board. The Court provided a briefing schedule to the parties to hear the merits of the motion. The Court denied Herring and GLD3's request that Albra be required to post an undertaking as a condition of granting the TRO. The following day, December 31, 2019, Albra discontinued the underlying proceeding.

The Complaints

In January 2020, GLD3 commenced this action against Albra for malicious prosecution. GLD3 asserts that Albra did not have probable cause to commence the underlying special proceeding and prosecuted the action with the sole intent of blocking a vote by the outgoing Town Board to approve its application to extend the water and sewer districts to serve the Continental Commons project. GLD3 alleges that Albra's action was an abuse of process designed to manipulate local government procedure to deprive the outgoing Town Board of jurisdiction over GLD3's application and to move the vote into 2020 when Albra, as Town Supervisor, would have a vote. GLD3 alleges that Albra's campaign platform while running for Town Supervisor was to stop the development of Continental Commons. In fact, the complaint asserts that after winning the election, Albra advised the Southern Dutchess News that his priority when taking office was to stop Continental Commons.

GLD3 alleges that the Town Board properly gave notice to the public of the December 30, 2019, meeting. Despite knowing that he did not have probable cause, Albra filed the underlying special proceeding specifically waiting until December 30th to file a last-minute order to show cause with a TRO to limit GLD3's ability to seek appellate review that same day before the scheduled meeting. GLD3 alleges that by subsequently discontinuing the action, Albra conceded that he was not entitled to the TRO or any other relief requested and that such discontinuance without GLD3's consent is the equivalent of that action being fully litigated and resolved in GLD3's favor.

Herring previously moved to intervene in this action. The motion was unopposed and was granted by this Court in an order dated May 5, 2020, directing Herring to file a supplemental summons and complaint.

Herring filed a complaint asserting causes of action for malicious prosecution and prima facie tort and thereafter, an amended complaint². Herring asserts that Albra did not have standing or probable cause to commence the underlying special proceeding and never intended to prosecute the merits of that petition. Herring alleges that such action was an abuse of process to deprive the former Town Board of the vote. Albra assured the Dutchess County Supreme Court during the TRO hearing that the applications would be given fair judgment at a public hearing scheduled after he took

² After Albra's motion to dismiss was filed, Herring filed an amended complaint as of right as Albra's time to answer has not yet expired.

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office. However, Herring alleges that Albra already planned to use his authority as Town Supervisor to establish a moratorium to provide time to secure the denial of Herring's application. Herring asserts that throughout January 2020, Albra refused to consider the scheduling of the public hearing resulting in Herring withdrawing the application to re-zone its property and to proceed before the Planning Board for approval of a reduced development play allowable in the portion of the property zoned for commercial use. In so doing, Herring asserts that it was damaged in the amount of \$175,000 which was spent on the re-zoning application, a 25% reduction of the scale of its original proposed development, and an inchoate damage from its loss. Herring asserts that Albra knew he did not have standing to bring the underlying proceeding.

Herring further alleges that on December 31, 2019, its counsel filed a letter with the court in the underlying proceeding at 4:49 p.m. that it was considering a claim against Albra for malicious prosecution and objected to any discontinuance of the special proceeding. The complaint alleges that six minutes later Albra's attorney discontinued the proceeding.

Albra's Motion to Dismiss

Albra moves to dismiss the complaints pursuant to CPLR 3211(a)(7) & (g). Albra argues that plaintiffs failed to adequately plead their claims. As to the malicious prosecution claim, Albra argues that neither GLD3 nor Herring were parties to the underlying special proceeding as they were solely named as interested parties. Albra further argues that plaintiffs were not the prevailing parties in the underlying action as Albra received all of the relief he sought in that proceeding. Once the TRO was granted enjoining the meeting, there was no further relief left and therefore, Albra discontinued the action. Albra further argues that the entry of the TRO in the special proceeding demonstrates probable cause. Moreover, Albra argues that the allegations that he acted with malice are conclusory and unsubstantiated.

Albra argues that Herring's claim for prima facie tort must be dismissed as the allegations sound in malicious prosecution.

Albra also moves to amend his answer to assert a counter claim under the anti-SLAPP statute (see Civil Rights Law 70-a, 76-a) and seeks sanctions pursuant to same.

In opposition, Herring argues that it has standing to assert a claim for malicious prosecution as it was indeed a party to the underlying action. Herring further argues that the underlying special proceeding was terminated in its favor. Albra was not the prevailing party as Albra discontinued the underlying proceeding without the consent of Herring or GLD3. Herring argues that it sufficiently plead facts regarding lack of probable cause. Herring argues that the allegations in the amended complaint overcome the presumption of probable cause afforded to Albra as a result of the TRO. Herring also argues that it sufficiently plead facts alleging malice and special injury.

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Further, Herring argues that prima facie tort may be plead with malicious prosecution and that its amended complaint satisfies each element of prima facie tort.

GLD3 argues that the complaint sufficiently pleads a claim for malicious prosecution. GLD3 argues that it was a party to the underlying action and that it prevailed in that action as Albra discontinued the action without its consent. GLD3 argues that Albra is not entitled to the presumption that the issuance of the TRO creates probable cause due to Albra's obstructionist delay tactics. GLD3 argues that the duty judge in the underlying action was forced to consider the TRO application on the same day the meeting was scheduled without the benefit of a written response from GLD3 and explicitly stated it would not issue a decision on the merits. In any event, GLD3 argues that it sufficiently plead facts to overcome the presumption of probable cause. Albra lacked standing to commence the underlying proceeding and it was brought solely to block the vote so he would have the opportunity to suppress the project. GLD3 argues that Albra acted with malice in commencing the underlying proceeding.

GLD3 opposes Albra's motion to amend its answer to assert an anti-SLAPP counterclaim as meritless and argues that Albra is not entitled to sanctions.

Discussion

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v Belkin BV*, 109 AD3d 520 [2d Dept 2013]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2d Dept 2013]).

The mere bringing of a civil suit, even if groundless and ill-motivated, does not result in special damage or injury sufficient to sustain an action for malicious prosecution (*Hornstein v Wolf*, 109 AD2d 129, 132-133 [2d Dept 1985]). In order to sustain a cause of action for malicious prosecution, a plaintiff must demonstrate (1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) a lack of probable cause, and (4) malice (see *Hornstein v Wolf*, 109 AD2d at 132-133). Albra argues that the complaints fail to adequately plead any of the elements for a malicious prosecution claim.

Albra argues that the complaints do not assert that a proceeding was commenced against plaintiffs as Herring and GLD3 were not respondents in the underlying article 78 proceeding but were merely interested parties. This argument is without merit. Albra cites to a case from New Mexico to support his position which is clearly not binding on this Court and fails to cite to any New York case to support his position. Herring and GLD3 were identified as interested parties in the underlying proceeding and were the only parties who appeared at the TRO hearing. Further, the

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granting of the TRO had an adverse impact on GLD3 and Herring and therefore, they were parties to that proceeding (see CPLR 7802[d]).

Albra argues that the complaints fail to allege that the underlying proceeding was terminated in favor of plaintiffs. Albra asserts that once the Court issued the TRO enjoining the December 30th meeting, there was no further relief left for Albra to achieve and the action was appropriately discontinued since he was the prevailing party. Contrary to Albra's contention, the issuance of the TRO does not demonstrate that the underlying civil action was terminated in his favor.

"The favorable termination element must be established by evidence that the court passed on the merits of the charge or claim . . . under such circumstances as to show . . . nonliability, or evidence that the action was abandoned under circumstances which fairly imply the plaintiff's innocence" (internal quotation marks omitted) (*Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700, 703 [2d Dept 2010] quoting *Castro v East End Plastic, Reconstructive & Hand Surgery, P.C.*, 47 AD3d 608, 609 [2d Dept 2008], quoting *Pagliarulo v Pagliarulo*, 30 AD2d 840, 840 [1968]). The discontinuance of the civil action by Albra, without the consent of Herring and GLD3, is sufficient evidence that the action was abandoned under circumstances fairly implying their innocence (*c.f. Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700; *Furgang & Adwar, LLP v Fiber-Shield Indus., Inc.*, 55 AD3d 665 [2d Dept 2008]).

Albra argues that he had probable cause to commence the underlying proceeding and therefore, the complaints fail to state a cause of action for malicious prosecution. With regard to probable cause, a plaintiff must allege that the underlying action was filed with a purpose other than the adjudication of a claim and that there was an entire lack of probable cause (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613-614 [1st Dept 2015] quoting *Engel v CBS, Inc.*, 93 NY2d 195, 204 [1999]).

The issuance of the TRO by the Supreme Court in the underlying proceeding creates a presumption of probable cause. Contrary to GLD3's contention, Albra is entitled to the presumption. GLD3 argues that the Court in the underlying proceeding was forced to consider the TRO application the very day the meeting was scheduled to proceed without the benefit of a written response. However, that is the very nature of requests for TRO's which are typically given with twenty-four-hour notice.

To overcome the presumption, the plaintiff must show fraud, perjury or the withholding of evidence in order to obtain the provisional order (*Hornstein v Wolf*, 109 AD2d 129, 132-133 [2d Dept 1985]). The pleading of conclusory allegations does not overcome the presumption of probable cause (see *Hornstein v Wolf*, 109 AD2d at 132). The allegations in the GLD3 complaint and the Herring amended complaint regarding Albra's lack of probable cause are conclusory and therefore, insufficient to support the lack of probable cause element of their malicious prosecution claim.

Herring and GLD3 argue that Albra knew or should have known that he did not have standing to commence the Article 78 proceeding and without standing, he had no

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legitimate right to prosecute the action. Despite these arguments, which were also made before the Court in the underlying proceeding, it cannot be said that Albra filed the underlying action with a purpose other than the adjudication of the claim. Standing is an issue that is vigorously litigated in many actions. In addition, Albra did not withhold evidence from the Court in the underlying proceeding. The Court was apprised of plaintiffs' arguments that Albra was the supervisor elect and that by temporarily staying the December 30th meeting, the incoming board would be voting on the plaintiffs' applications. The allegations are insufficient to overcome the presumption that Albra had probable cause to commence the underlying proceeding against the plaintiffs.

Inasmuch as plaintiffs cannot demonstrate the existence of the element of probable cause, the Court need not consider the remaining elements of actual malice or special injury (*see Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d at 614).

The branch of the defendant's motion for leave to amend the answer to include an anti-SLAPP³ counterclaim is denied as academic. In any event, even if the Court were to grant that branch of the motion, Albra failed to demonstrate entitlement to sanctions under Civil Rights Law 76-a.

Accordingly, it is

ORDERED that the branch of the motion of the defendant Ozem "Ozzy" Albra to dismiss the complaints pursuant to CPLR 3211(a)(7) is **GRANTED**; and it is further

ORDERED that the branch of the motion of the defendant Ozem "Ozzy" Albra for leave to amend his answer is **DENIED** as academic; and it is further

ORDERED that the complaints and the amended complaint are **DISMISSED**.

Dated: White Plains, New York
September 24, 2020



HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST -2/GLD3, LLC v. Albra

³ Civil Rights Law § 76-a was passed to protect citizens facing litigation arising from their public petitioning and participation by deterring strategic lawsuits against public participation, termed SLAPP suits (*see Waterways at Bay Pointe Homeowners Assn., Inc. v Waterways Dev. Corp.*, 132 AD3d 975, 979 [2d Dept 2015]). "An 'action involving public petition and participation' is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission" (Civil Rights Law § 76-a [1] [a]).