

**Motcomb Estates, Ltd. v CMB Export Infrastructure
Inv. Group 48, LP**

2025 NY Slip Op 30570(U)

February 14, 2025

Supreme Court, New York County

Docket Number: Index No. 653343/2024

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

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MOTCOMB ESTATES, LTD., REUBEN BROTHERS, LTD.,

Plaintiffs,

- v -

CMB EXPORT INFRASTRUCTURE INVESTMENT GROUP
48, LP, CMB EXPORT LLC, PATRICK F. HOGAN, NEAL
LEE, LEWIS BRISBOIS BISGAARD & SMITH LLP,

Defendants.

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INDEX NO. 653343/2024

MOTION DATE 10/25/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

In this malicious prosecution action, which arises from disputes between various lenders to a multi-billion-dollar real estate project in Century City, California (the "Project"), the plaintiffs claim that defendant CMB Export Infrastructure Investment Group 48, LP (CMB 48) maliciously commenced a fraud action in anticipation of a loan foreclosure action being commenced and fraudulently obtained a preliminary injunction. The defendants move, pre-answer to dismiss the complaint pursuant to CPLR 3211(a)(7). The plaintiffs oppose. The motion is granted.

II. BACKGROUND

The facts herein are drawn from the complaint and the attachments thereto unless otherwise noted.

The Project was financed by three tiers of loans: a mortgage loan (the "Senior Loan") by nonparty JP Morgan Chase Bank, N.A. ("JPM"); a Senior Mezzanine Loan by nonparty CDCF IV Century Mezz LLC ("CDCF"); and a Junior Mezzanine Loan by CMB. All three loans were effectively secured by a direct or indirect 100% ownership interest in the Project. The plaintiffs, Motcomb Estates, Ltd. ("Motcomb") and Reuben Brothers, Ltd. ("Reuben Brothers," and,

together with Motcomb, “RB”), are senior lenders to the Project while defendant CMB 48 is a junior subordinated lender.

In July 2016, JPM, CDCF, and CMB executed an intercreditor agreement (the “ICA”), which established that the lenders were operating at arm’s length and authorized the Senior Mezzanine Loan holder to fund protective advances to the Project at a default interest rate and to commence a UCC foreclosure sale of the Property upon default. Additionally, the ICA subordinated CMB’s right to repayment and limited its right to purchase an interest in the Senior Mezzanine Loan unless it purchased the entire loan.

In the Spring of 2020, the lenders sought additional funding to “upsized” one or more of the Project loans. In July 2020, defendant Neal Lee, a principal of CMB, and CMB’s attorneys at Lewis Brisbois received a summary term sheet describing a proposal for RB to provide such additional financing (the “Term Sheet”). The Term Sheet stated that RB would lend \$275 million to the Project and would simultaneously execute a side deal with CDCF (the “Participation Agreement”), pursuant to which, as described in the Term Sheet, it would obtain a participating interest alongside CDCF in the Senior Mezzanine Loan, which interest, along with that retained by CDCF, would be subject to unspecified transfer restrictions. The Term Sheet further provided for the partial allocation of the additional loan funds, with \$68 million to CDCF as reimbursement, \$65 million toward an interest reserve, and \$75 million to be drawn in accordance with the terms of the Senior Loan. CMB did not inquire about any of the above terms or the substance of the referenced Participation Agreement.

In connection with the upsizing of the Senior Mezzanine Loan, the lenders executed an amendment to the ICA, dated September 1, 2020 (the “Fourth Amendment to the ICA”), pursuant to which CMB consented to the execution of other, additional loan documents which, *inter alia*, allocated the additional Senior Mezzanine Loan funds provided by RB and created RB’s participation interest in the Senior Mezzanine Loan. Simultaneously with the execution of the Fourth Amendment to the ICA, and consistent with the Term Sheet, RB and CDCF entered into the Participation Agreement.

In August 2022, RB sent notice to all relevant parties that it intended to commence a UCC foreclosure on the Senior Mezzanine Loan (the “UCC Foreclosure”). CMB responded, in October 2022, by commencing an action in this court against RB concerning the Project ([CMB Export Infrastructure Investment Group 48, LP v. Motcomb Estates Ltd., et al.](#), Index No.

653821/2022) (the “Fraud Action”), asserting claims, *inter alia*, for fraudulent inducement and fraudulent concealment, and seeking to preliminarily and permanently enjoin RB from proceeding with the UCC Foreclosure. The complaint alleged, *inter alia*, that RB induced CMB’s approval of the Fourth Amendment to the ICA by misrepresenting how the new financing it provided would be used, and by concealing from CMB the existence of the transfer restrictions in the Participation Agreement, which “extinguished” CMB’s right to acquire an ownership interest in the Senior Mezzanine Loan by effectively prohibiting non-party CDCF from selling any of its interest therein to CMB.

In the Fraud Action, CMB obtained a now vacated preliminary injunction that enjoined RB from proceeding with the planned foreclosure. On February 6, 2023, an evidentiary hearing was held on CMB’s preliminary injunction motion (the “February Hearing”), wherein defendant Patrick Hogan, a principal of CMB, testified that “Reuben Brothers misrepresented that it would make its entire 275 million tranche with limited exceptions . . . available through project completion” and that the Participation Agreement “was completely hid[den] from us,” while Lee testified that “[a] participation agreement was not disclosed to CMB[.]”

By an amended order dated February 28, 2023 (the “Preliminary Injunction Order”), the court (Ostrager, J. [Ret.]) granted CMB’s motion for a preliminary injunction and enjoined the UCC Foreclosure. In so ruling, Justice Ostrager found that the testimony adduced at the February Hearing established a likelihood that CMB would not have agreed to the Fourth Amendment to the ICA had it known about the Participation Agreement and the transfer restrictions contained therein. By order dated March 6, 2023, Justice Ostrager denied RB’s motion to dismiss the complaint in the Fraud Action. Justice Ostrager denied RB’s motions to reargue and renew CMB’s preliminary injunction motion and to reargue and renew their motion to dismiss the complaint, by orders dated April 4, 2023, and June 16, 2023, respectively.

In moving to renew CMB’s preliminary injunction motion, RB had relied on CMB’s production, in March 2023, of its copy of the Term Sheet, arguing that CMB’s possession of the Term Sheet demonstrated it was on notice regarding the existence of the Participation Agreement and the transfer restrictions therein, as well as the partial allocation of the additional loan funds to non-construction related costs. At a subsequent hearing on the renewal motion on April 4, 2023 (the “April Hearing”), CMB acknowledged it had received the Term Sheet but failed to make further inquiries. The court (Ostrager, J. [Ret.]) nevertheless denied RB’s motion to renew, stating that:

Nothing that you've submitted in your motion to renew and reargue alters the fact that CMB established to my satisfaction that they never would have entered into the Fourth Amendment to the [ICA] if they had known that there was a participation agreement that precluded any interest in the Senior Mezzanine Loan Agreement in being transferred to CMB. And we disagree as to whether or not a single line referencing a participation agreement in the nine-page single-space term sheet should have put CMB's counsel on notice that the [Participation Agreement] might operate to preclude CMB from ever acquiring the interest in the Senior Mezzanine Loan and thereby protecting itself from being wiped out[.]

RB appealed Justice Ostrager's orders. By an order dated January 18, 2024, the Appellate Division, First Department, dismissed the appeal from the order granting the preliminary injunction as academic and reversed the order denying RB's motion to renew their opposition to the preliminary injunction motion, granted the motion to dismiss the complaint as against RB and vacated the Preliminary Injunction. See CMB Exp. Infrastructure Inv. Grp. 48, LP v Motcomb Ests., Ltd., 223 AD3d 513 (1st Dept. 2024). That Court held that the preliminary injunction should not have been granted because CMB failed to demonstrate both irreparable harm and a likelihood of success on the two fraud causes of action on which it relied in seeking the injunction. See id. at 513-14. The First Department also held, as relevant here, that the fraudulent concealment claim must be dismissed because, among other reasons, the Term Sheet shared with CMB "disclosed that there would be a participation agreement with unspecified 'transfer restrictions,' yet [CMB], a sophisticated party, neither asked to see this agreement nor requested more information." Id. at 515.

RB commenced the present action in July 2024, asserting a single cause of action for malicious prosecution. RB alleged that the defendants—CMB 48, its affiliate CMB Export LLC (together "CMB") and their respective principals, Neal Lee and Patrick F. Hogan, as well as counsel Lewis Brisbois Bisgaard & Smith LLP ("Lewis Brisbois"), which represented CMB 48 in its prior action—lacked probable cause to commence the Fraud Action and obtained the subject preliminary injunction to enjoin the UCC Foreclosure. RB argues that because CMB, having received the Term Sheet, was aware of the Participation Agreement and its transfer restrictions, as well as the partial allocation of the additional loan funds provided by RB to non-construction related costs. RB further allege they suffered damages of approximately \$25 million per month in lost default interest payments on the Senior Mezzanine Loan during the pendency of the preliminary injunction. The instant motion to dismiss ensued.

III. DISCUSSION

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a cause of action is adequately stated, the court must "liberally construe" the pleading, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference," and determine only whether the facts as alleged fit within any cognizable legal theory. Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 (2013); Simkin v Blank, 19 NY3d 46 (2012); Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

A plaintiff asserting a claim for malicious prosecution must allege and prove: "(1) the commencement or continuation of a proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the plaintiff, (3) the absence of probable cause for the proceeding and (4) actual malice." Facebook, Inc. v DLA Piper LLP (US), 134 AD3d 610, 613 (1st Dept. 2015) (ellipses and brackets omitted), quoting Broughton v State of New York, 37 NY2d 451, 457 (1975). With respect to the probable cause element, the 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 in the prior proceeding.'" Id., quoting Engel v CBS, Inc., 93 NY2d 195, 204 (1999). Indeed, "the lack of probable cause must be 'patent.'" Id. at 614, quoting Butler v Ratner, 210 AD2d 691, 693 (3rd Dept. 1994).

"[W]hen a judgment or decree was rendered against the malicious prosecution plaintiff in the prior action of which he complains, that fact is either conclusive or *prima facie* evidence of probable cause for the prior action, which is not overcome by the subsequent reversal or setting aside of the judgment or decree." Crown Wisteria, Inc. v F.G.F. Enterp. Corp., 168 AD2d 238, 240 (1st Dept. 1990) (internal quotation marks omitted); see I.G. Second Generation Partners, L.P. v Duane Reade, 17 AD3d 206 (1st Dept. 2005). Thus, "[t]he granting of [the]a preliminary injunction in [CMB's] favor in [the Fraud Action] ... create[s] a presumption that [CMB] and [its] lawyers had probable cause to bring that [action]." Napoli v James, 204 AD3d 413, 413 (1st Dept. 2022); see Hornstein v Wolf, 67 NY2d 721, 723 (1986); Facebook, Inc. v DLA Piper LLP (US), supra at 614. The presumption of probable cause was not overcome by the First Department's subsequent decision reversing Justice Ostrager's orders, vacating the preliminary injunction and dismissing the Fraud Action. See Crown Wisteria, Inc. v F.G.F. Enterp. Corp., supra; see also I.G. Second Generation Partners, L.P. v Duane Reade, supra.

To otherwise overcome the presumption of probable cause created by Justice Ostrager's order granting the preliminary injunction in the Fraud Action requires "specifically pleaded facts" (Facebook, Inc. v DLA Piper LLP (US), supra at 614; see Hornstein v Wolf, supra) showing that the preliminary injunction was obtained by "fraud, perjury or the withholding of evidence" (Hornstein v Wolf, 109 AD2d 129, 132 [2nd Dept. 1985] affd 67 NY2d 721 [1986]; see I.G. Second Generation Partners, L.P. v Duane Reade, supra). RB's complaint does not satisfy this requirement. RB points to the allegations in the complaint regarding the purportedly false allegations in the Fraud Action complaint, and the associated testimony given by Hogan and Lee at the February Hearing, that RB concealed the Participation Agreement and its transfer restrictions from CMB and misrepresented how its additional loan financing would be allocated. RB alleges that this testimony, on which Justice Ostrager apparently relied in granting CMB's preliminary injunction motion, was fraudulent because, having been given the Term Sheet, CMB was on notice regarding the allocation of the loan funds and the existence of the Participation Agreement's transfer restrictions.

However, Justice Ostrager expressly considered and passed upon the Term Sheet and considered the testimony given in denying RB's motion to renew its opposition to the preliminary injunction and concluded that it did not alter his assessment of CMB's likelihood of success or the propriety of the injunctive relief granted. See Facebook, Inc. v DLA Piper LLP (US), supra at 614; Hornstein v Wolf, supra at 132. In particular, in denying the motion to renew at the April Hearing, Justice Ostrager reasoned that a passing reference in the Term Sheet to the existence of the Participation Agreement did not give CMB notice as to the substance of the transfer restrictions contained therein. That is determinative here – there was no "patent lack of probable cause" in the granting of the preliminary injunction. See Engel v CBS, Inc., supra at 204.

While the court need not reach RB's damages claim, it notes that RB's assertion that they suffered damages of approximately \$25 million per month in interest during the pendency of the preliminary injunction was rejected in the Fraud Action as a basis for recovery by RB under CPLR 6312 and 6315.

For these reasons, the complaint must be dismissed pursuant to CPLR 3211(a)(7) since, even as liberally construed, it fails to state a cause of action for malicious prosecution or any other cognizable claim.

IV. CONCLUSION

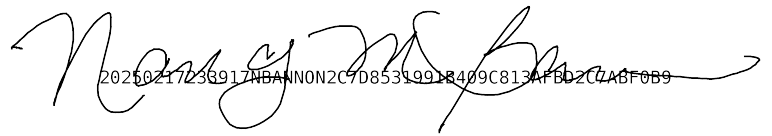
Accordingly, upon the foregoing papers, it is

ORDERED that the defendants' motion to dismiss pursuant to CPLR 3211(a)(7) is granted and the complaint is dismissed; and it is further

ORDERED that the preliminary conference scheduled for February 27, 2025, is canceled, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.


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2/14/2025

DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: