

Mannino v Goldstein
2017 NY Slip Op 31350(U)
May 19, 2017
Supreme Court, Queens County
Docket Number: 712257/2016
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

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ROBERT T. MANNINO,
ANDREAS GIANNOPOULOS,

Index
No.: 712257/2016

Plaintiff(s),

Motion Date: February 2, 2017

-against-

Motion Cal. No.: 113, 114 & 115

BARRY M. GOLDSTEIN,
JAY SCOTT MARKOWITZ,
THE LAW OFFICES OF JAY S. MARKOWITZ,
P.C.,
ABDUL MAJEED,
STEVEN M POLLINA.

Motion Seq. No. 2, 3, & 4

Defendant(s).

FILED
MAY 25 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 - 23 read on this (1) motion by Jay Scott Markowitz and the Law Offices of Jay S. Markowitz, P.C. (collectively herein, "Markowitz"), to dismiss the complaint pursuant to CPLR §3211 (a)(1), (5) and (7); (2) motion by Abdul Majeed to dismiss the complaint pursuant to CPLR §3211 (a)(1), (5) and (7); (3) motion by Barry M. Goldstein, Esq., to dismiss the complaint pursuant to CPLR §3211 (a)(1) and (7); and (4) cross motion by plaintiffs to consolidate this action with related actions: *Majeed v Mannino, et al., and Majeed v Giannopoulos, et al.*, under index numbers 7339/2011 and 6734/2011, respectively (herein "the related 2011 actions"), and upon consolidation of the same, to vacate the Court's March 30, 2015 and April 19, 2016 Orders appointing Goldstein as referee and to discharge Goldstein from those roles, and to dismiss the 2011 actions pursuant to CPLR §3211 (a)(1) and (10).

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	1-4, 5-8, 9-13
Notice of Cross Motion - Affidavits - Exhibits	14-17
Answering Affidavits - Exhibits and Reply to Cross-Motion....	18, 19, 20-21
Reply Affidavits	22-23

Upon the foregoing papers it is ordered that the motions and cross-motion are combined herein for disposition, and determined as follows:

This action for, *inter alia*, tortious interference with business relations, is related to two prior actions for specific performance of two contracts for the sale of real property that were contingent upon short sale approval of plaintiffs' lenders. When plaintiffs, as sellers, failed to cooperate in submitting applications to their lenders for short sale approval, Abdul Majeed, as the purchaser under the contracts, commenced actions to compel plaintiffs' performance. The actions resulted in court orders appointing a Referee (Goldstein) to submit applications to lenders and directing plaintiffs to cooperate with the Referee. Instead of complying with the court orders, plaintiffs entered into new contracts to sell the subject properties to a third-party. Plaintiffs then asked Majeed to voluntarily discontinue his actions and remove the *lis pendens* filed in connection therewith, which Majeed declined to do. Plaintiffs then commenced the instant action against the court-appointed referee, Majeed and his counsel Markowitz, and Steven M. Pollina (plaintiffs attorney concerning the subject contracts who continues to hold in escrow Majeed's contract deposits).

Defendants move to dismiss the complaint on various grounds as provided below. Plaintiffs oppose the motions, and cross-move to consolidate the instant action with the related 2011 actions, and to then dismiss the related 2011 actions. Defendants oppose the cross-motion.

Facts:

On June 14, 2010, plaintiff Giannopoulos, as seller and defendant Majeed, as purchaser, entered into a contract for the sale of real property located at 38-14 31st Street, in Queens, New York (Property A/Contract 1). The contracted price for property A was \$275,000. On the same date, plaintiff Mannino entered into a contract with Majeed for the sale of real property located at 38-20 31st Street, in Queens, New York (Property B/Contract 2), for the amount of \$275,000. Contracts 1 and 2 were each subject to the short sale approval of the lenders holding first mortgages secured, respectively, by Property A and Property B. When plaintiffs defaulted in their respective obligations under Contract 1 and Contract 2, to apply for short sale approval from the lenders for the sale of Property A and Property B, Majeed, by and through his attorney Markowitz, commenced two breach of contract actions against plaintiffs in Queens Supreme Court, entitled *Abdul Majeed v Robert Mannino and Real Solutions Group, Inc.*, under Index No.: 7339/2011 ("Action 1), and *Abdul Majeed v Andreas Giannopoulos and Jerry Strklja*, under Index No.: 6734/2011 ("Action 2). Majeed alleged that Mannino and Giannopoulos did not comply with their obligations under the subject contracts. Specifically, Majeed alleged that Mannino and Giannopoulos did not

submit the requisite paperwork to the lenders to secure approval of short sales of the Mannino and Giannopoulos properties.

On October 29, 2014, after plaintiffs failed to comply with numerous court orders and failed to appear by counsel ready to proceed with a consolidated trial of action 1 and action 2, JHO Roger N. Rosengarten conducted Inquests. As part of the relief sought at the Inquests, Majeed (through Markowitz) requested, *inter alia*, that JHO Rosengarten appoint a referee (1) to obtain the short sale applications from the plaintiffs and (2) to submit the short sale applications to plaintiffs' lenders. JHO Rosengarten granted Majeed's application for the appointment of a referee. Notices of Settlement with proposed orders for the appointment of a referee were submitted in the Mannino and Giannopoulos actions.

On March 24, 2015, JHO Rosengarten issued an Order appointing defendant Goldstein as a Referee for Property A and ordered that (1) "the Referee shall submit an application for the Short Sale approval of the underlying real estate transaction at issue [in] the above-captioned case to the lender[s] holding mortgage[s] encumbering the subject property," (2) "the defendant[s] (plaintiffs herein) shall fully cooperate with the Court-appointed Referee", and (3) "the Referee shall file a report with the Court at his or her earliest convenience advising the court as to whether the application for Short Sale approval of the underlying real estate transaction at issue [in] the above-captioned case has been granted or denied by the lender[s] holding mortgage[s] encumbering the subject property." On August 16, 2016, JHO Rosengarten issued a mirror Order appointing Goldstein as Referee concerning Property B. Goldstein was never notified of his appointment as referee in the Giannopoulos or Mannino Actions

Plaintiffs allege that "in April 2016 and June 2016, a new prospective buyer offered a total of \$1,385,000 for the properties and submitted the proposals to the respective lenders, which assented to the proposals. Plaintiffs further allege that on August 8, 2016, the prospective purchaser's lender asked Markowitz to remove the lis pendens that had been filed in Action 1 and Action 2 but that Markowitz declined to do so.

Plaintiffs commenced the instant action against Goldstein, Markowitz, Majeed and Pollina (the escrow agent for the deposit paid by Majeed regarding the aforesaid contracts). Plaintiffs allege three cause of action against the defendants: tortious interference with business relations, tortious interference with prospective business relations, and abuse of process. Defendants, as noted above, move to dismiss the complaint on the grounds of documentary evidence, failure to state a cause of action and on the ground that the abuse of process cause of action is time-barred. Plaintiffs oppose the motion and cross-move to consolidate this action with the 2011 actions. Defendants oppose the cross-motion.

Motions by Markowitz and Majeed:

To succeed on a motion to dismiss pursuant to CPLR §3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim (*FG Harriman Commons, LLC v. FBG Owners, LLC*, 75 AD3d 527 [2010]; *Hallman v. Kantor*, 72 AD3d 895, 896, [2010]; *KMK Safety Consulting, LLC v. Jeffrey M. Brown Assoc., Inc.*, 72 AD3d 650, [2010]; *McMorrow v. Dime Sav. Bank of Williamsburgh*, 48 AD3d 646, 647, [2008]).

“Upon a motion to dismiss for failure to state a cause of action under CPLR §3211 (a)(7), the court must determine whether from the four corners of the pleading “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Salvatore v Kumar*, 45 AD3d 560, 562–63 [2007], citing *Morad v Morad*, 27 AD3d 626, 627 [2006] [internal quotation marks omitted]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss . . . , ‘allegations [as here] consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration’ ” (*Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2007], quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]).

To establish the elements of tortious interference with business relations or prospective business relations, a plaintiff must plead [1] business relations with a third party; [2] defendant's interference with those business relations; [3] that the defendant acted with the sole purpose of harming the plaintiff or used wrongful means to do so; and [4] injury to the business relationship. Here, the causes of action are comprised solely of lists of elements and bare legal conclusions, which are insufficient as a matter of law to state a cause of action (*see Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76 [1999]). Nor does plaintiff's opposition provide any allegations to clarify or augment the complaint.

It is also noted that plaintiffs' claim for tortious interference with business relations fails because plaintiffs concede that they “entered into contracts for sale of the properties to a new buyer.” Tortious interference with business relations applies to situations where the third party *would have* entered into or extended a contractual relationship with plaintiff[s] *but for the intentional and wrongful acts of the defendant* (*M.J. & K. Co., Inc. v Matthew Bender and Company, Inc.*, 220 AD2d 488 [1995]) (emphasis added). Plaintiffs cannot succeed on their claim where, as here, they have not and cannot allege that they were prevented from entering into a contract due to any acts of Markowitz or Majeed (*Id.* at 490).

Moreover, “[c]onduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship” (*Carvel v Noonan*, 3 NY3d at 192). Here, the instant claims fail because “defendants’ alleged conduct concededly was not directed towards any third party with whom plaintiffs had an existing or prospective business relationship (see *Carvel Corp. v. Noonan*, 3 NY3d 182, 192).

Moreover, the complaint fails to allege that Majeed acted with the sole purpose of harming plaintiffs or used wrongful means to do so. Plaintiffs conceded that Majeed, by and through his counsel, Markowitz, acted at all times to enforce Majeed’s rights under the subject contracts in the 2011 actions. There was nothing malicious or wrongful about commencing actions for plaintiffs’ breach of the subject contracts, or in requesting the Orders appointing Goldstein as Referee. The complaint alleges that Majeed, through his counsel Markowitz, did nothing more than zealously pursue his rights under the subject contracts. A defendant who acts in his own economic self-interest cannot be found liable for tortious interference with prospective business relations (*id.* at 191).

Abuse of process is an intentional tort and, thus, is governed by a one-year statute of limitations (see CPLR 215; *Benyo v. Sikorjak*, 50 AD3d 1074, 1077 [2008]; *Peerless Abstract Corp. v. Seltzer*, 35 AD3d 423, [2006]; *Dobies v. Brefka*, 263 AD2d 721, [1999]; *Beninati v. Nicotra*, 239 AD2d 242, [1997]; *Bittner v. Cummings*, 188 AD2d 504, [1992]). The complaint alleges that in November, 2014, JHO Rosengarten directed Markowitz to submit an order for the appointment of a Referee. Since the documentary evidence supporting the instant motion demonstrates that Majeed, through his attorney Markowitz, requested entry of orders appointing a Referee to facilitate submission of the short sale applications on November 26, 2014—more than one year before this action was commenced in October 2016, the cause of action alleging abuse of process is time-barred.

Plaintiffs’ cause of action for abuse of process would still be dismissed even if same were not time-barred. Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (*Curiano v Suozzi*, 63 NY2d 113, 116). Here, the complaint is insufficient to state a cause of action alleging abuse of process (see *Curiano v Suozzi*, 63 NY2d 113, 116-117]), since it fails to allege “any actual misuse of the process to obtain an end outside its proper scope” (*Reisman v Kerry Lutz, P.C.*, 6 AD3d 418, 419 [2004], citing *Hornstein v Wolf*, 67 NY2d 721, 723).

Motion by Goldstein:

The motion by Goldstein to dismiss the complaint is granted there being no opposition, and otherwise on the merits (*see Lodichand v Kogut*, 91 AD3d 608 [2012]). Since the factual allegations of the complaint against Goldstein merely asserted conduct by him in his official capacity as a Court Appointed Referee, which is immune from suit under the doctrine of judicial immunity (*see Mosher-Simons v County of Allegany*, 99 NY2d 214, 219; *Tarter v State of New York*, 68 NY2d 511, 517-518; *Alvarez v Snyder*, 264 AD2d 27, 34 [2000]; *Misek-Falkoff v Donovan*, 250 AD2d 579 [1998]; *Colin v County of Suffolk*, 181 AD2d 653, 654 [1992]; *Lombardoni v Boccaccio*, 121 AD2d 828, 829 [1986]), the allegations fail to state a cause of action against him (*see Young v Campbell*, 87 AD3d 692, 693-694 [2011], *lv denied* 18 NY3d 801 [2011]; *Davey v State of New York*, 31 AD3d 600 [2006]; *Alex-Mitchell: El v State of New York*, 2 AD3d 549, 551-552 [2003]; *Sassower v Finnerty*, 96 AD2d 585, 586-587 [1983]).

Furthermore, the undisputed documentary evidence indicates that the Mannino Action Goldstein Appointment Order and the Giannopoulos Action Goldstein Appointment Order were never served upon Goldstein, and that Goldstein was never notified by any parties in those actions of the Court orders appointing him as referee. Given this lack of notice to Goldstein of the purported appointments, there can be no claim that Goldstein failed in any duties as a Referee when the appointments of Goldstein as Referee in the Mannino and Giannopoulos Actions never went into effect.

Cross-Motion by Plaintiffs:

The cross-motion by plaintiffs to consolidate this action with the related 2011 actions is moot in light of the court's determination above dismissing the instant action.

Moreover, “[t]he power to order consolidation rests in the sound discretion of the court and should be granted in the interest of judicial economy where common issues of law or fact exist” (*Sun v. City of New York*, 99 AD3d 673, [2012]). The two actions sought to be consolidated, while based on the same transaction are otherwise not factually related. The related 2011 actions involves allegations that plaintiffs breached the contract to sell the subject property, while the instant action involves claims of tortious interference with business relations and prospective business relations. Although the related 2011 actions for specific performance, breach of contract, and to recover damages for breach of contract and the instant action, *inter alia*, to recover damages for tortious interference with business relations involve a common question of fact, the instant action involves numerous additional allegations that are irrelevant to the related 2011 actions. Furthermore, the issues and applicable legal principles in the respective actions are so dissimilar, and the trial may prove

so unwieldy, that consolidation would result in jury confusion and prejudice defendants' right to a fair trial (*see Cty. of Westchester v. White Plains Ave., LLC*, 105 AD3d 690, 691[2d Dept. 2013]; *D'Abreau v. American Bankers Ins. Co. of Fla.*, 261 AD2d 501, 502, [1999]; *197 Merrick Rd. Corp. v. 185 Merrick Rd. Assoc. Corp.*, 152 AD2d 551, [1989]; *Gouldsbury v. Dan's Supreme Supermarket, Inc.*, 138 AD2d 675, 676, [1988]; *Brown v. Brooklyn Union Gas Co.*, 137 AD2d 479, 480,[1988]).

Furthermore, final judgments have been entered in the related 2011 actions in favor of Majeed and against plaintiffs.


Accordingly, the cross-motion is denied.

Conclusion:

The motions to dismiss as to defendant's Jay Scott Markowitz, The Law Offices of Jay S. Markowitz, P.C., Abdul Majeed and Barry M. Goldstein are granted.

The cross-motion by plaintiff's to consolidate is denied as moot and otherwise on the merits.

Dated: **MAY 19 2017**



MARGUERITE A. GRAYS
J.S.C.

FILED
MAY 25 2017
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