Holber Assoc., L.P. v Reckson Operating Partnership, L.P.
2017 NY Slip Op 32089(U)
October 3, 2017
Supreme Court, New York County
Docket Number: 652468/2015
Judge: Martin Schoenfeld

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28
---x
HOLBER ASSOCIATES, L.P.,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: 652468/2015

RECKSON OPERATING PARTNERSHIP, L.P., REP 35 ENGEL LLC, RECHLER EQUITY PARTNERS, LLC, RECHLER EQUITY MMII, LLC, REP II LLC, MITCHELL RECHLER AND GREGG RECHLER,

Defendants,
---x

HON. MARTIN SCHOENFELD, J.:

Defendants move to dismiss this action pursuant to CPLR 3211(a)(1), (3), (5), and (7). Defendants also ask this Court to impose sanctions on plaintiff for "frivolous conduct" under 11 NYCRR § 130-1.1. For the reasons set forth below, the Court grants defendants' motion to dismiss the complaint and denies their request for sanctions.

BACKGROUND

Plaintiff, Holber Associates, L.P. (Holber), and Defendant, Reckson Operating Partnership, LLC (ROP), entered into a commercial triple net ground lease for 35 Engle Street, Hicksville, NY on December 1,1997 for a term of 20 years. [Plaintiff's Affirmation in Opposition, Exhibit B]. The lease required ROP to pay all expenses including real estate taxes, insurance and maintenance. On November 10, 2003 ROP assigned the lease to REP 35 Engel LLC (REP). [Plaintiff's Affirmation in Opposition, Exhibit C]. In October 2010, REP stopped paying rent to Holber and real estate taxes to Nassau County as was required under the lease.

Holdover Proceeding in Nassau County

Holber commenced a holdover proceeding in Nassau County District Court against REP and ROP seeking possession on January 26, 2012. By stipulation on the record ROP conceded it had no possessory interest in the property and the proceeding was dismissed against it without prejudice to any monetary claims Holber might have had pursuant to the terms of the lease. On March 5, 2012, Holber and REP signed a written stipulation under which REP surrendered possession without prejudice to Holber's rights. Stipulation of Settlement, *Holber Associates LP v. Reckson Operating Partnership, LP*, Index No. LT-000491-12 (Dist. Ct. Nassau County 4th Dist.).

Holber then hired a broker to attempt to re-let the property but was unable to do so or pay the mortgage on the property. The lender instituted a foreclosure action and had a receiver appointed. Holber was forced to sell the property in August 2013 for $6 million.

First New York Supreme Court Action

Prior to selling the property, on March 27, 2012, Holber filed an action in Supreme Court, New York County against both ROP and REP, seeking, among other things, damages for unpaid rent, real estate taxes and additional expenses, and attorney's fees. On December 11, 2013,[1] Judge Coin granted partial summary judgment to Holber, against defendant ROP on the issue of liability and sent the claim against ROP for an inquest. The balance of the motion (summary judgment against REP) was held in abeyance awaiting the outcome of a court case brought by REP against Holber in Nassau County (see below discussion). A motion by defendants to

[1] This decision was made approximately 6 months after Holber sold the property.

reargue was denied.

On March 3, 2015, this Court held an inquest to determine Holber's damages against ROP. The primary issue addressed at the inquest was the date through which rent and additional damages were owed. This Court found that the lease terminated upon the date the property was sold (not the date Holber regained possession as argued by ROP), August 2013. So ordered Transcript of Inquest, *Holber Associates, L.P. v. Reckson Operating Partnership, L.P. and REP 34 Engel, LLC*, Index No. 650939/2012 (Sup. Ct. NY County May 15, 2015).

Accordingly, this Court awarded Holber damages through July 31, 2013. The amount of rent-related damages awarded were $2,817,607.48 with statutory interest to run from September 2013, broken down as follows:

- Base rent totaling $1,291,402.07;
- Late fees on the base rent totaling $77,484.12;
- Tax arrears totaling $1,184,119.70;
- Additional rent pursuant to the lease totaling $27,263.92;
- Late fees on the additional rent totaling $1,635.83;
- Utilities, insurance, maintenance and management fees pursuant to the lease totaling $155,283.65; and
- Late fees on the utilities $9,371.01.

In addition, the Court awarded plaintiff $125,126.37 in attorney's fees and $1,727.36 in disbursements. *Id.* The total award was $2,944,461.21. ROP took an appeal asking the Appellate Division to reverse Judge Coin's summary judgment and this Court's damages judgment. In a written decision, dated June 7, 2016, the Appellate Division affirmed both Judge Coin's and this Court's decisions. In relevant part, it explained:

The inquest court properly fixed the end date of the lease for the purpose of

> calculating rent arrears as the date of the sale of the property, rather than the date of surrender in the stipulation settling a holdover proceeding against REP.

Holber Associates v. Reckson Operating Partnership, L.P., 140 A.D.3d 454, 455 (1st Dept. 2016).

As a result of the Appellate Division's decision, Holber, ROP and REP entered into a stipulation in which Holber agreed to withdraw the summary judgment motion against REP and all parties agreed to settle the case. Pursuant to the stipulation the defendants agreed to pay the entire amount of the judgment, including statutory interest, in the amount of $3,360,776.25 in accordance with the terms and conditions set forth. Stipulation, *Holber Associates, L.P.*, Index No. 650939/2012 (June 9, 2016).

Joint Venture Litigation in Nassau County Supreme Court

In another related proceeding, in December 2011, prior to Holber's holdover proceeding against ROP and REP, REP brought an action in Nassau county against Holber for, among other things, breach of an oral joint venture. In that case, REP argued that it entered into a joint venture agreement with Holber in late 2010-early 2011 to jointly operate, control and manage the property. Holber denied that it had agreed to this joint venture and filed a pre-answer motion to dismiss and later a summary judgment motion, which were both denied.[2] The case was ongoing during the holdover proceeding, the first New York Supreme Court action and the appeal to the First Department. After many years of litigation, including a three-day non-jury trial in April 2016, Justice Bucaria of the Nassau County Supreme Court entered judgment in favor of Holber, dismissing the claims of breach of joint venture against Holber with prejudice.

[2] The motion to dismiss was denied in part. The court did dismiss REP's first two causes of action which requested the court to enjoin Holber from declaring REP in default under the lease and to enforce the joint venture agreement based on the Statute of Frauds. It denied Holber's motion to dismiss the third, fourth and fifth causes of action for unjust enrichment and breach of contract, however.

Judgment, *REP 35 Engel v. Holber Associates, LP*, Index No. 017604/2011 (Sup. Ct. Nassau County June 3, 2016).

Current Litigation

Plaintiff filed the summons and complaint in the above-captioned case on July 14, 2015, approximately four months after this Court entered its damages order in the first Supreme Court case. Among other things, Holber seeks liquidated damages pursuant to an accelerated rent clause in the original lease, attorney's fees and damages pursuant to economic duress claims. In addition to ROP and REP, Holber named several limited liability corporations and two individuals as defendants in this case, who are apparently members of REP.

On September 20, 2016, more than a year after first filing the case and after the Court had begun drafting its decision, Holber filed an amended complaint adding two new causes of action: the sixth seeks damages claiming malicious prosecution in the Nassau County joint venture case and the seventh seeks monetary relief under the theory of prima facia tort.

The seven causes of action are discussed below.

DISCUSSION

First Cause of Action – Damages Pursuant to Acceleration Clause in Lease

The first cause of action in the instant case is for liquidated damages pursuant to an accelerated rent clause in the lease. Holber asks for liquidated damages in excess of $2,130.59 plus interest.

On July 10, 2012, approximately four months after commencing the first New

York Supreme Court action, Holber served a Notice of Acceleration on defendants ROP and REP demanding the payment of $8,073,574 as liquidated damages and noting that the "sum is exclusive of and in addition to the past due rent that is the subject" of the rent action. The letter indicated that it calculated the accelerated rent and additional rent in accordance with Article 24 of the lease. Article 24 states in part:

> Tenant . . . shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the Rent herein reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease . . . for each month of the period which would otherwise have constituted the balance of the term or extended term as the case may be, of this Lease.

[Defendants' Notice of Motion, Exhibit 8 (Exhibit A of Summons and Complaint)]. It indicates that included in such damages are expenses connected with reletting, including legal fees and keeping the property in "good order." In addition, it states that the liquidated damages "shall be paid in monthly installments by the tenant" or "at Landlord's sole option, without regard to whether Landlord has been successful in reletting the Premises at the time of election of this option, in one lump sum." This sum is to be computed "by multiplying the monthly deficiency over the then remaining term of this Lease" and reducing by the Federal Funds rate or the prime rate. *Id.* The demand letter does not indicate how the $8 million plus sum asked for was calculated.

Defendants argue, here, that this first cause of action should be dismissed based on res judicata and collateral estoppel pursuant to CPLR 3211(a)(5). They emphasis that damages stemming from the lease's acceleration clause arise out of the same facts and circumstances as the first Supreme Court case. They argue that plaintiff could have amended its complaint in that case to include this issue and that this Court could have and should have resolved acceleration clause damages as part of the earlier case.

Plaintiff counters that res judicata and collateral estoppel do not apply because the type of damages it seeks here differs from those sought in the previous proceeding. It argues that in the first action they were awarded damages for rent and related <u>past</u> damages suffered, whereas in the current case they seek liquidated damages for <u>future</u> harm. It contends that because the damages sought are fundamentally different, granting damages here will not "destroy" the Court's previous judgment and, therefore, res judicata and collateral estoppel do not apply.

Res Judicata, or claim preclusion, "'operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding.'" *Licini v. Graceland Florist, Inc.*, 32 A.D.3d 825, 826 (2d Dept. 2006) (*quoting Koether v. Generalow*, 213 A.D.2d 379, 380 (2d Dept. 1995); *see Singleton Management v. Compere*, 243 AD.2d 213, 215 (1st Dept. 1998). The corollary principle, collateral estoppel, involves issue preclusion based on the principle that a party "should not be permitted to relitigate an issue that was previously decided against it." *Singleton*, 243 A.D.2d at 215. A party may invoke this principle where the identical issue was decided in a prior action and the party being "precluded from relitigating" the issue had "a full and fair opportunity to contest that prior determination." *Id.* at 215-16.

When a landlord succeeds in a summary proceeding for possession of property, as it did here, the landlord/tenant relationship terminates and "whatever monetary liability the tenant may have had to the landlord at that point [is] no longer in the nature of rent, but [is] in the nature of contract damages." *Ross Realty v. V & A Fabricators,* *Inc.*, 42 A.D.3d 246, 249 (2d Dept. 2007). Thus, when plaintiff brought its first New York Supreme Court case against ROP and REP, it sought damages under the lease. In accordance, the parties extensively briefed their arguments with regard to damages suffered pursuant to defendants' breach. Plaintiff's briefs and exhibits included calculation of damages based on Article 24 of the lease, the article they are now invoking to receive "acceleration clause" damages. This Court thoroughly reviewed the evidence, including the relevant lease provisions. Based on the foregoing it determined that the lease terminated upon the sale of the property and awarded damages accordingly.

In the first Supreme Court case, plaintiff had a full and fair opportunity to litigate the issue of damages resulting from the breach of the commercial lease in a court with subject matter jurisdiction over all damages. Plaintiff made its arguments before both this Court and the Court of Appeals citing to provisions in the lease. The fact that it chose not to amend its complaint, reference the acceleration clause or make an argument for what it now labels "future" damages during that case, does not give it the right to relitigate the damages issue where the facts are the same and the claims could have been resolved at the time of the first proceeding. *Licini,* 32 A.D.3d at 827. Therefore, the motion to dismiss as to the first cause of action based on res judicata and collateral estoppel is granted.

Furthermore, even if the Court did not find that res judicata and collateral estoppel applied here, it would still dismiss this claim under CPLR 3211 as the facts do not "fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Liquidated damages that are "'grossly disproportionate to the amount of actual damages'" constitute a penalty and are unenforceable. *Van Duzer Realty Corp. v. Globe Alumni Student Assistance Assoc.*, 24 N.Y.3d 528, 535 (2014) (quoting *Truck Rent-A-Car v. Puritan Farms 2nd, Inc,* 41 N.Y.2d 420, 424 (1977). In its earlier decision this Court determined that the lease terminated upon plaintiff's sale of the property for $6 million. Plaintiff has already received over $3 million in damages pursuant to the lease for the period up until the sale. A grant of over $2 million more for "future damages" would be a "windfall" here where the damages sought are for a period when it no longer owned the property in question. *See Altamuro v.* Capoccetta, 212 A.D.2d 904, 905 (3d Dept. 1995). A request for such disproportionate liquidated damages would not survive a motion to dismiss. *See Ralusa, Inc. v. 1101 43rd Avenue Realty LLC*, 2015 WL 7348963, at *6-7 (Sup. Ct. NY County 2015).

Accordingly, the Court grants defendants' motion to dismiss the first cause of action.

Second Cause of Action – Attorney's Fees

The second cause of action requests legal fees and related expenses in excess of $500,000 allegedly incurred pursuant to Article 25 of the lease which allows for reasonable attorney's fees to the "prevailing party" in a default action between the Landlord and Tenant.

Plaintiff may not bring an independent cause of action for attorney's fees separate from its recovery pursuant to the lease. *Pier 59 Studios L.P. v. Chelsea Piers L.P.*, 27 A.D.3d 217 (1st Dept. 2006). This Court has already awarded $125,126.37 in legal fees for defendants' breach of the lease in the first New York Supreme Court action. Res judicata and collateral estoppel bar plaintiff from double dipping and receiving another award here. Therefore, this cause of action is dismissed.

Third Cause of Action – Economic Duress

In its paper submitted in opposition to defendants' motion to dismiss, plaintiff explains that its third cause of action is for economic duress. Plaintiff contends that it makes out its claim because defendants stopped paying rent and taxes "for the real and predominant purpose of gaining an economic advantage" and they "willfully, and with malicious intent, knowingly made it impossible for Holber to make its mortgage payments, resulting in Holber's default under its mortgage." [Plaintiff's Affirmation in Opposition, Exhibit A (Summons and Complaint ¶¶ 44-47)]. Plaintiff indicates that "[a]s a direct consequence" a foreclosure proceeding began and a receiver was appointed and Holber "was damaged by having to pay interest at the default rate of interest, bank legal fees, fees for the receiver and legal fees to protect its rights in the foreclosure proceeding." *Id.* It asks for in excess of $882,000 plus interest.

As above, plaintiff's claim for economic duress is barred by res judicata and collateral estoppel. Plaintiff was awarded breach of lease damages of over $3 million in the first Supreme Court proceeding before this Court, where the parties and the facts and circumstances were the same as here. If plaintiff believed it was entitled to other damages as a consequence of its lease with defendants, those claims could have and should have been brought as part of that proceeding. Plaintiff cannot now, after receiving its breach of lease money judgment, ask for more damages under a new theory.

Moreover, this cause of action would be dismissed regardless of whether res judicata and collateral estoppel apply here. Even accepting "the facts as alleged in the complaint as true" and according plaintiff "the benefit of every possible favorable inference", plaintiff has failed to allege a cognizable claim for economic duress. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Under the theory of economic duress, a court may void a contract and grant damages when it is established that the plaintiff "was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will." *805 Third Ave. Co. v. M.W. Realty Assoc.*, 58 N.Y.2d 447, 451 (1983) (internal citations omitted); *see Austin Instrument v. Loral Corp.*, 29 N.Y.2d 124, 130 (1971). A plaintiff establishes economic duress by proving that "one party to a contract has threatened to breach the agreement by withholding [performance] unless the other party agrees to some further demand." *Id.*

Plaintiff argues that economic duress applies here because defendants stopped paying rent and taxes with the aim of forcing plaintiff "to agree to the termination of the Lease and [to] enter into a joint venture agreement." Plaintiff emphasizes that defendants knew that, as a small family limited partnership, plaintiff would not be able to pay its mortgage if defendants stopped paying rent. [Plaintiffs Memorandum of Law in Opposition to the Motion to Dismiss at 12.] This argument is unconvincing.

First, even accepting that defendants intentionally breached the lease when they stopped paying rent and taxes, there is no evidence that as a result of the threat of the breach Holber agreed to any "further demand[s]" by the defendants. In fact, the demand the plaintiff points to is the formation of a joint venture between Holber and the defendants – an agreement that it argued in Nassau County Supreme Court did not exist. Indeed, the Nassau County Court agreed with plaintiff, dismissing defendants' claims of a joint venture. "[A] mere threat that does not force the other party to accede to some further demand does not constitute economic duress." *Minnelli v. Soumayah*, 41 A.D.3d 388, 389 (1st Dept. 2007) citing to *805 Third Ave. Co. v. M.W. Realty Assoc.*, 58 N.Y.2d 447, 451 (1983).

Second, a claim of economic duress allows a plaintiff to ask a court to **void a contract** and grant damages where plaintiff "was compelled to agree to the contract terms because of a wrongful threat." *805 Third Avenue*, 58 N.Y.2d at 451. Here, plaintiff does not identify a contract it would like the Court to void. Certainly, plaintiff is not asking the Court to void a joint venture agreement that it has argued did not exist. The only other relevant contract in this case is the lease itself. There is no evidence to support the proposition, nor does plaintiff argue, that it was compelled to enter into the lease. Furthermore, as this Court found, the lease was terminated when plaintiff sold the property in August 2013. Thus, there can be no claim for economic duress here.

Finally, plaintiff's own actions evidence that this was a simple breach of lease case. After defendants stopped paying rent and real estate taxes, plaintiff brought a summary proceeding in Nassau County for possession of the property and entered into a stipulation with defendants that voided the lease and gave it possession of the property. It then followed up with a breach of lease case in Supreme Court where it failed to make an economic duress claim. Plaintiff has already been awarded breach of contract damages in the first Supreme Court proceeding and has not made out a claim for economic duress here.

For the reasons stated above, the Court grants defendants' motion to dismiss this claim.

Fourth and Fifth Causes of Action

The fourth cause of action seeks damages in excess of $3,000,000 arguing that as a result of defendants' actions, Holber "was forced to sell the Premises at a price that was less than the fair market value of the Premises." [Plaintiff's Affirmation in Opposition, Exhibit A (Summons and Complaint ¶ 49)]. The fifth cause of action asks for $2,000,000 plus interest because REP, Mitchell Rechler and Gregg Rechler, with the acquiescence of ROP, failed to maintain the property and as a result Holber was unable to sell the property for its fair market value.

For the reasons discussed above the plaintiff's fourth and five causes of action are also dismissed. As plaintiff acknowledges these causes of actions "are claims for damages directly resulting from . . . conduct that is alleged in the Third Cause of Action," namely its claim of economic duress [Plaintiff's Memorandum of Law in Opposition to the Motion to Dismiss at 12]. As discussed above, such claims are barred by res judicata and collateral estoppel.

Therefore, the Court grants defendants' motion to dismiss the fourth and fifth causes of action.

Sixth Cause of Action- Malicious Prosecution

The sixth cause of action, which was added as part of the Amended Complaint in September 2015, seeks $1,000,000.00 in damages under the theory that REP maliciously prosecuted Holber in the earlier joint venture action brought in Nassau County Supreme Court.

A malicious prosecution claim requires: (i) an action was commenced; (ii) which was terminated in the proponent's favor; (iii) there was a lack of probable cause; (iv) the action was commenced with malice. *Honzawa v.* Honzawa, 268 A.D.2d 327, 329 (1st Dept. 2000); *Colon v. City of New York,* 60 N.Y.2d 78, 82 (1983). In civil actions, the proponent must also prove it incurred special damages, such as interference with a person's property. *Belsky v. Lowenthal*, 62 A.D.2d 319, 321 (1st Dept. 1978), *aff'd*, 47 N.Y.2d 820 (1979) (internal citations omitted). *see Engel v. CBS, Inc.*, 93 N.Y.2d 195, 196, 205 (1999).

Significantly, courts have found that if there was probable cause in the underlying action, a malicious prosecution claim must fail. In other words, a party that brings a malicious prosecution claim must show "an entire lack of probable cause" in the underlying proceeding. *Engel v. CBS, Inc.*, 93 N.Y. 2d 195, 204 (1999); *see Williams v. Barber*, 3 A.D.3d 695, 697 (3d Dept. 2004).

To determine whether probable cause exists, courts look to whether there was a decision in the underlying action, such as a decision on a summary judgment or a motion to dismiss, that had "evidentiary value". *Wilderhomes, LLC v. Zautner*, 23 Misc. 3d 1112(A) at *3-4 (Sup. Ct., Albany County 2009); *see I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 207 (1st Dept. 2005); *Crown Wisteria, Inc. v. F.G.F. Enterprises Corp.*, 168 A.D.2d 238, 240 (1st Dept. 1990). Such decisions constitute "a judicial recognition of the existence of probable cause for the action." *Wilderhomes, LLC* 23 Misc. 3d 1112(A) at *3-4. In *Wilderhomes*, the parties executed a real estate contract, which never closed and led to plaintiff, the buyer, suing defendants, the seller. The defendants filed a motion to dismiss the plaintiff's case that was originally denied by the court. On appeal, the trial court's denial was reversed and the plaintiff's case was dismissed. Thereafter, the defendants brought a claim against the plaintiff for malicious prosecution. The court held that "the prior . . . [d]ecision in [the underlying] action, which denied defendants' motion to dismiss plaintiff's complaint," even though it was ultimately reversed on appeal, still "constitute[d] a judicial recognition of the existence of probable cause for the action" and hence the court dismissed the defendants' malicious prosecution claim. *Id.*

Defendants, here, argue, in part, that the malicious prosecution claim should be dismissed because REP had probable cause to bring the underlying action. To support their motion to dismiss, they submitted two decisions by Judge Stephen A. Bucaria in Nassau County from the earlier joint venture action.

The first decision, decided on April 16, 2012, granted in part and denied in part Holber's motion to dismiss. In relevant part, the court denied Holber's motion to dismiss REP's breach of contract claim on Statute of Fraud grounds. In doing so, it relied on case law and its review of circumstantial evidence including a January 13, 2011 "letter of intent" between the parties.[3] The court found that this evidence suggested that "there was in fact an oral joint venture agreement" but that the agreement fell outside of the Statute of Frauds. In accordance, the court held the alleged joint venture agreement would not be voided by the Statute of Frauds and thus REP could move forward on its claim. [Defendant's Notice of Motion to Dismiss Amended Complaint, Exhibit 1J].

The second decision, relied on by defendants in their motion to dismiss, is the

[3] The letter of intent set forth each party's prospective responsibilities, interest and income in the subject property. In addition, the letter of intent stated the agreement shall be "incorporated into a mutually acceptable joint venture agreement."

Justice Bucaria's denial of Holber's motion for summary judgment[4] dated December 17, 2014. In this decision, the court relied on the same letter of intent. It found that the contents of this letter reflected the elements of a joint venture and, therefore, that Holber failed to establish that there were no triable issues of fact concerning the existence of the joint venture. [Defendants Notice of Motion to Dismiss the Amended Complaint, Exhibit 2].

This Court agrees with defendants that Justice Bucaria's decisions —denial of a motion to dismiss and denial of a summary judgment motion – were judicial recognitions of probable cause in the underlying joint venture action. As noted above, a party that brings a malicious prosecution claim must show "an entire lack of probable cause" in the underlying proceeding. *Engel v. CBS, Inc.*, 93 N.Y. 2d 195, 204 (1999). Holber has failed to do so here. Therefore, defendants' motion to dismiss the malicious prosecution claim is granted.

Seventh Cause of Action- Prima Facie Tort

The seventh cause of action brought by plaintiff seeks $1,000,000.00 under the theory of prima facie tort.

A prima facie tort is an inexcusable, unjustified intentional act or series of acts that inflicts intentional harm onto the plaintiff. *Belsky v. Lowenthal*, 62 A.D.2d 319, 322 (1st Dept. 1978); *see Ruza v. Ruza,* 286 A.D. 767, 769 (1st Dept. 1955). Unlike malicious prosecution, the prima facie tort does not fall within the category of traditional torts. *Belsky,* 62 A.D.2d at 322; *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985); *Curiano v. Suozzi*, 63 N.Y.2d 113, 118 (1984). If a party invokes a traditional tort as a

[4] Holber's motion essentially argued that there was no joint venture agreement.

cause of action to afford it relief that is ultimately unsustainable, then that party cannot also invoke prima facie tort as an alternative cause of action to afford it the same sought after relief that it could not recover from its unsustainable traditional cause of action. *Freihofer*, 65 N.Y.2d at 143; *Kickertz v. New York Univ.*, 110 A.D.3d 268, 277 (1st Dept. 2013).

Here, as defendants argue, plaintiff is precluded from bringing its prima facie tort claim. Plaintiff has brought a malicious prosecution cause of action based on the same factual allegations that would afford it relief under a traditional malicious prosecution claim. Its prima facie tort claim and malicious prosecution claim both seek damages based on injuries sustained from REP's prior joint venture action. Plaintiff can only plead the traditional tort of malicious prosecution; it cannot also plead a prima facie tort claim as an alternative form of redress. Therefore, defendants' motion to dismiss the prima facie tort claim is granted.

<u>Liability of Defendants Rechler Equity Partners, LLC, Rechler Equity MM II, LLC, REP II LLC, Mitchell Rechler and Gregg Rechler</u>

Defendants argue that Rechler Equity Partners, LLC, Rechler Equity MM II, LLC, REP II LLC, Mitchell Rechler and Gregg Rechler being members of REP (or members of members of the LLC) should not be held liable here pursuant to N.Y. Lim Liability Co. Law § 609. Based on the foregoing, this Court is granting defendants' motion to dismiss the complaint. Therefore, there is no need to address this argument.

<u>Sanctions</u>

Defendants ask this Court to sanction plaintiff, arguing that plaintiff's claims are, among other things, frivolous, an attempt to obtain litigation advantage in related actions, and an abuse of the court system. Under 22 NYCRR 130-1.1(a), courts have "discretion" to award reasonable attorney's fees and/or to impose financial sanctions on parties and lawyers who engage in "frivolous conduct." Conduct is frivolous if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law"; or it is undertaken to delay or prolong the litigation or to harass the other party. Courts must, however, "be careful to avoid the imposition of sanctions in cases where the [party] asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure." *Yenom Corp. v. 155 Wooster Street Inc.,* 33 A.D.3d 67, 70 (1st Dept. 2006).

A court will grant sanctions if it finds that a party is abusing the judicial system. *Jason v. Chusid*, 78 N.Y.2d 1099, 1100 (1991) (internal citations omitted). For instance, the Court of Appeals has granted sanctions where "[t]he nature and repetition of plaintiffs' litigation tactics over a five-year period" resulted in four separate adjudications and "constitute[d] a strategy of dilatory, harassive, abusive and frivolous conduct." *Jason v. Chusid*, 78 N.Y.2d 1099, 1100 (1991); *see Levy v. Carol Management Corporation*, 260 A.D.2d 27, 34-36 (1st Dept. 1999).

Despite having been awarded substantial damages by this Court, including rent and attorney's fees, plaintiff commenced the instant action throwing into this simple breach of lease case everything but the kitchen sink. Thereafter, more than a year later, plaintiff did throw in the kitchen sink by adding two more causes of action. Nevertheless, plaintiff's complaints do raise colorable arguments, particularly in light of the defendants' vigorous resistance to meeting their payment obligations under the lease. This was further exacerbated by defendants' commencement of the Nassau

County action alleging a joint venture, which, although surviving dismissal motions, proved at trial to be lacking in merit.

Therefore, this Court, in its discretion, denies defendants' request for sanctions against plaintiff. However, both sides should be aware that all issues having now been resolved, it is time for this litigation to end.

In accordance with the foregoing, it is

ORDERED that defendants' motion to dismiss the complaint dated June 24, 2015 is in all respects granted; it is further

ORDERED that defendants' motion to dismiss the amended complaint dated September 20, 2016 is in all respects granted; and it is further

ORDERED that defendants' motion for sanctions is denied.

This constitutes the decision and order of this court.

Dated: New York, New York

October 3, 2017

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Martin Schoenfeld, J.S.C.