

Haberman v Xander Corp.

2018 NY Slip Op 30073(U)

January 8, 2018

Supreme Court, Nassau County

Docket Number: 21508/10

Judge: Jack L. Libert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

SINCLAIR HABERMAN and BELAIR BUILDING, LLC,

Plaintiffs,

-against-

**XANDER CORP., AARON WAGNER, DENNIS
BERKOWSKY, HERMAN NEUMAN, JEANETTE
IANNUCCI and FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,**

Defendants.

**TRIAL PART 25
NASSAU COUNTY**

**MOTION # 07, 08
INDEX # 21508/10
MOTION SUBMITTED:
AUGUST 15, 2017**

XANDER CORP.,

Third-Party Plaintiff,

-against-

**MICHAEL G. ZAPSON and DAVIDOFF MALITO &
HUTCHER, LLP,**

Third-Party Defendants.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2, 3, 4
Reply Affidavits.....5, 6, 7
Memoranda of Law.....8, 9

Plaintiffs Sinclair Haberman and Belair Building, LLC (collectively "Haberman") move for summary judgment on the issue of liability (Motion seq. No. 7) against defendants Xander Corp., Rhoda Wagner as Executrix of the Estate of Aaron Wagner, Dennis Berkowsky, Herman Neuman and Jeanette Iannucci (collectively "Xander"). That motion is denied. Xander cross-moves for summary judgment dismissing the complaint. The cross-motion is denied with respect to dismissal of the causes of action for malicious

prosecution and granted with respect to that portion of the motion seeking dismissal of the causes of action for abuse of process.

Facts

This action arises out of an earlier dispute concerning title to real property (the "Underlying Action"). In that action, Xander, the fee owner of real property known as 360 Shore Road, Long Beach, NY (also referred to as the "Xander Property") claimed adverse possession of or a prescriptive easement over a portion of real property located at 350 Shore Road, Long Beach (also referred to as the "Haberman Property"). The Haberman property is adjacent to the Xander Property.

In January of 1998 Xander acquired the Xander Property from an entity controlled by Haberman. The sale was part of a proposed development of four high-rise cooperative apartment towers, the first of which was built on the Xander Property. The second tower was to be built on the Haberman Property. The building on the Xander Property was the first constructed. The overall development included the construction of a parking structure to be shared by the cooperators of the tower on the Xander Property and the cooperators of the tower on the Haberman Property. The parking structure was to be built at the time of construction of the building on the Haberman Property. Until the parking spaces in the structure became available, the Xander Property lacked sufficient off-street parking to comply with the requirements of the Long Beach Building Code (one parking space for each apartment unit). In order to satisfy the parking requirement, a portion of the Haberman's Property was used to provide 24 outdoor parking stalls for use by the cooperative owners in the building on the Xander Property.

As the sponsor and holder of unsold shares in the Xander Property cooperative, Haberman maintained a continued relationship with Xander. Although Haberman no longer owned the property, he continued to transfer apartments to purchasers, and took on the roles of president and member of the board of directors of Xander. In those capacities, Haberman exercised considerable control over the operations and management of Xander including oversight of use, occupancy and control of the outdoor parking lot on the Haberman Property. Beginning in 1988, as each cooperator took possession of its unit, Xander issued a document designating parking spaces (the "Designation") for the use by that cooperator. Upon occupancy of its unit, each cooperator began to use the parking space designated. Some of the Designations assigned parking spaces in the outdoor lot on the Haberman Property.

The cooperators with parking spots designated on the Haberman Property were subsequently advised that Xander did not own the lot they utilized for parking; that these spaces were located in an area where another building was to be constructed; and that vehicles utilizing this lot would need to be relocated to accommodate the construction of the new building. These cooperators as well as others, alleged surprise that Xander did not own or control that parking area. Xander claims that this allegation of surprise constituted a reasonable basis to commence the Underlying Action. In addition to the alleged surprise, other facts alleged by Xander suggest circumstances supporting the reasonableness of bringing the Underlying Action. For example, neither the offering plan or the proprietary lease for the building on the Xander Property contains any specific provision regarding use of parking spaces on the Haberman property. Typically in an offering plan, the Sponsor is obligated to disclose all material terms of the transaction to the purchasing public (see *People v Lexington Sixty-First Associates*, 38 NY 588, 595).

“Belief alone, however sincere, is not sufficient, for it must be found on circumstances that make the belief reasonable” (*Burt v Smith*, 19 Bedell 1, 181 NY 1). Haberman asserts that Xander had notice if not knowledge of development of the new building on the site being used for outdoor parking. For example, the offering plan under the category “Improvements-General Description” states that “the complex as fully developed will consist of 126 units, and 126 garage spaces located under the building and platforms in the manner set forth in the Pilot Plan attached hereto as Schedule “A.” That plan depicted the entire development. There was also a diorama of the entire development on display in the unit sales office. The diorama depicted the shared parking structure with a shared pool deck above it.

Malicious Prosecution

An essential element of a cause of action for malicious prosecution is that the offending party bringing the action lacked a “reasonable belief”¹ that it had lawful grounds for prosecuting the action. The lack of reasonable belief does not mean the absence of *any* cause; rather it means the lack of cause sufficient to persuade a person of ordinary care and prudence to believe in the truth of the claim. So, one may act on what appears to be true, even if it turns out to be false, provided he or she believes it to be true and the appearance of the facts sufficiently justify the belief as reasonable. If probable cause exists, it is an absolute

¹As plaintiff points out in its memorandum in support, the term “probable cause” is often used interchangeably with the term “reasonable belief” in the context of malicious prosecution matters.

protection against an action for malicious prosecution, even when express malice is proved (*see Burt v Smith, supra*). The issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn by such facts. Where there is conflicting evidence from which reasonable persons might draw different inferences, the question is for the jury (*see Veras v Truth Verification Corp.*, 87 AD2d 381, 384).

In the instant case there are many facts in dispute. For example: when the defendants learned that the outdoor parking area did not belong to Xander; how they learned of this fact; when and how the defendants learned about the additional buildings and shared parking arrangements; and if defendants mistakenly believed they owned the property, did plaintiff play any role in creating that belief? The “proper inferences to be drawn from those disputed facts” must also be decided by the court (*Burt, supra*.)

Abuse of Process

Abuse of process and malicious prosecution, although closely related and often confused, are substantially different (*see Board of Education of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Ass'n Local 1889 AFT AFL-CIO*, 38 NY2d 397). Abuse of process is the improper use of process after it is regularly issued (*see Place v Ciccotelli*, 121 AD3d 1378). Malicious prosecution is the initiation of an action or the causing of process to be issued improperly that is without basis (*Pagliarulo v Pagliarulo*, 30 AD2d 840). The facts supporting a malicious prosecution claim will not give rise to a claim for abuse of process, since the institution of a civil action by summons and complaint is not the type of process that is capable of being abused (*see Muro-Light v Farley*, 95 AD3d 846). The abuse of process cause of action suffers from a failure to allege any actual misuse or perversion of the process to obtain an end outside its proper scope. The preliminary injunction in the Underlying Action was not used to obtain a collateral advantage or detriment outside of its legitimate use (*see Hornstein v Wolf*, 67 NY2d 721). Examples of abuse of process would be to extort money (*Foy v Barry*, 87 App Div 291); to coerce plaintiff to purchase property from defendant at an unreasonably high price (*Four Star Stage Lighting, Inc. v Merrick*, 56 AD2d 767); to inflict substantial damage on plaintiff's business to obtain some of its valuable trade secrets (*Marwood Mechanical, Inc. v Davis & Warshow, Inc.*, 50 AD2d 900). No act in the use of process outside of the purpose for which the adverse possession claim and prescriptive easement claims were intended occurred after the process was issued. The basis for the dismissal of the cause of action alleging

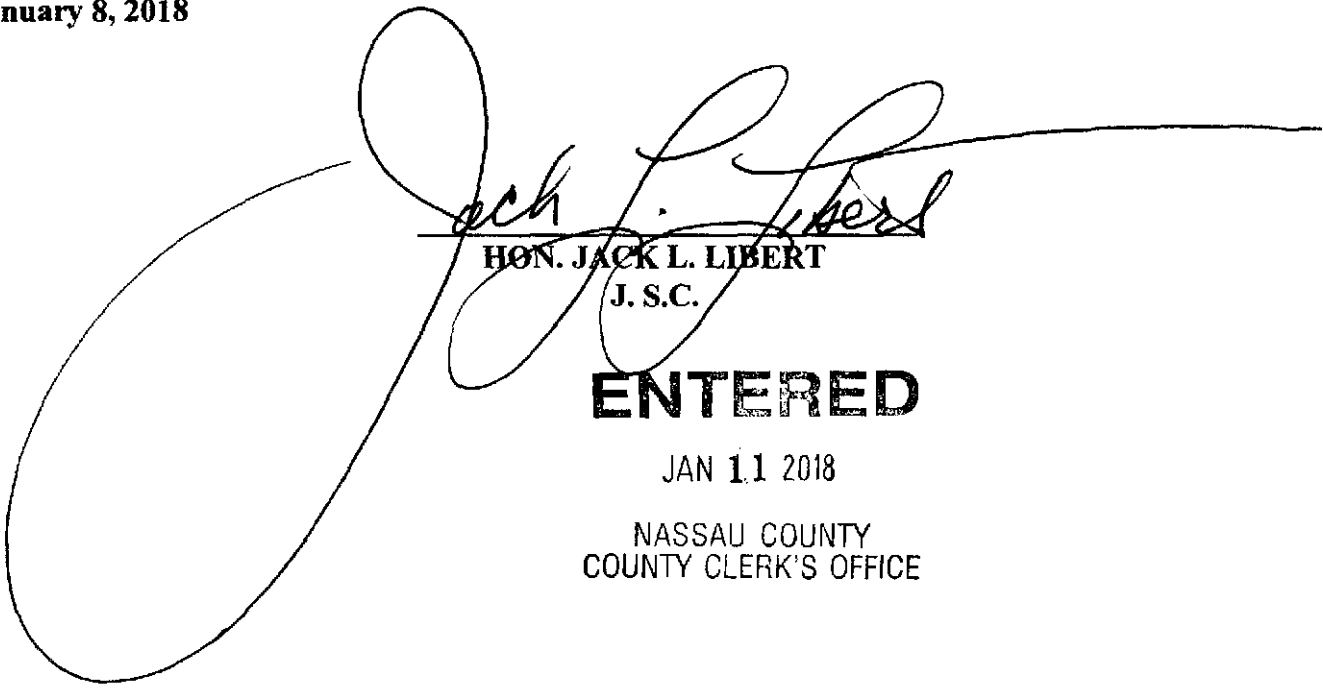
abuse of process in the within action is similar to the following cases where the courts have found an absence of the perversion of the judicial system outside of the legitimate ends of the process used. Issuing a mechanic's lien for recovery of an amount reasonably believed to be due for work performed even if the amount sought was lowered by the court (*Weaver v Acampora* 227 AD2sd 727); issuing a restraining order to protect property (*see Hornstein v Wolf*, 109 AD2d 129); subsequent reversal of judgment does not convert a previously issued restraining notice into an abuse of process (*Williams v Pinks, Feldman & Brooks*, 141 AD2d 723).

Haberman's motion for summary judgment is denied. Xander's motion for summary judgment is granted to the limited extent that the cause of action for abuse of process is dismissed. In all other respects Xander's motion is denied.

This constitutes the decision and order of the court.

ENTER

DATED: January 8, 2018

A large, stylized handwritten signature in black ink, appearing to read "Jack L. Libert", is written over a horizontal line. The signature is highly cursive and extends across most of the width of the page.

HON. JACK L. LIBERT
J. S.C.

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JAN 11 2018

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