SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

ABRAHAM LICHTENSTEIN,

Plaintiff,

- against -

MORDECHAI DANINO, STAR NADLAN LLC, E.N.Y. PLAZA LLC and ALAD DANINO,

Defendants,

Decision and order

Index No. 515841/17

MS 5

July 23, 2018

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to dismiss the counterclaims filed by the ENY Plaza LLC on the grounds they fail to state any causes of action. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff alleges that he loaned the defendant $125,000 during 2008 and indeed on October 24, 2008 the defendant Mordechai Danino signed a confession of judgement which was subsequently entered under Index Number 19038/2009 on July 28, 2009. Toward the end of 2013 Danino requested of plaintiff the removal of the confession of judgement so property he owned at 3605 Avenue K in Kings County could be sold without any liens. Indeed, the plaintiff signed such release on December 8, 2013. In exchange for that concession Danino signed a separate document entitled a 'Write of Commitment' wherein he acknowledged a debt owed of $200,000. The Writ further stated that the money would be repaid

by selling property he owned located at 471 Flushing Avenue in Kings County or from a mortgage on property located at 1054 East New York Avenue also in Kings County. The defendant asserted that he no longer owned either of those properties, that he transferred the Flushing Avenue property to an LLC named Star Nadlan which had been formed by Mr. Danino and that the 1054 property was not owned by Mr. Danino, rather it was owned by an entity ENY Plaza LLC, of which Mr. Danino was a member. The court denied ENY Plaza's motion to dismiss and subsequently ENY Plaza answered the complaint and asserted four counterclaims. The plaintiff has now moved seeking to dismiss all the counterclaims.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course,

plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The first counterclaim alleges the plaintiff's Notice of Pendency constitutes slander of title. It is well settled that to succeed on a claim of slander of title it must be demonstrated that there was a communication falsely casting doubt on the validity of complainant's title, reasonably calculated to cause harm that resulted in special damages (see, Fink v. Shawangunk Conservancy Inc., 15 AD3d 756, 790 NYS2d 249 [3rd Dept., 2005]). In Brown v. Bethlehem Terrace Associates, 136 AD2d 222, 525 NYS2d 978 [3rd Dept., 1988], the court held that the filing of a notice of pendency is "an undeniably true statement" since it merely declares that "an action has been commenced and is now pending in this court upon the complaint of the above-named plaintiff against the above-named defendants for the purpose of obtaining a judgment of specific performance, directing the defendants to convey certain real property * * * to the plaintiff" (id) (see, also, Seidman v. industrial Recycling Properties Inc., 83 AD3d 1040, 922 NYS2d 451 [2d Dept., 2011]). Since the filing of a notice of pendency cannot create a cause of action for slander of title the motion seeking to dismiss the fist counterclaim is granted.

To succeed on a claim of malicious prosecution the party seeking relief, namely ENY Plaza must demonstrate (1) the commencement and prosecution of a judicial proceeding against ENY Plaza, (2) by or at the instance of Lichtenstein, (3) without probable cause, (4) with malice, (5) which has terminated in favor of ENY Plaza in the malicious prosecution action, (6) to ENY Plaza's injury, and (7) it must also be shown that the ENY Plaza suffered interference from some provisional remedy (see, Molinoff v. Sassower, 99 AD3d 528, 471 NYS2d 312 [2d Dept., 1984]). In this case essential elements of the cause of action are lacking, namely there has been no termination in favor of ENY Plaza in any action (see, Laval Realty Inc., v. Shell Realty Company, 151 AD2d 321, 542 NYS2d 585 [1st Dept., 1989]). Moreover, there has been no showing at all that plaintiff acted with malice. Indeed, the prior litigation in this lawsuit demonstrates the plaintiff filed the lis pendens with good cause, undermining the lack of probable cause and malice (see, Berman v. Silver, Forrester $& Schisano, 156 AD2d 624, 549 NYS2d 125 [2d Dept., 1989]). Therefore, the motion seeking to dismiss the second counterclaim is granted.

The third counterclaim, namely cancelling the notice of pendency pursuant to CPLR 6514 is not really a counterclaim since the cancellation of a notice of pendency can only be made by motion (see, Lessard Architectural Group Inc., P.C., v. X & Y

Development Group LLC, 88 AD3d 768, 930 NYS2d 652 [2d Dept., 2011]). Therefore, the motion seeking to dismiss the third counterclaim is granted.

The motion seeking to dismiss the last counterclaim is granted. There is no merit to the claim the plaintiff has engaged in any frivolous conduct at all.

At this juncture the motions seeking to dismiss the affirmative defenses are denied except the eight affirmative defense that the claims are barred by the statute of limitations which is patently inapplicable. The remaining affirmative defenses, although very briefly recited in the answer are the proper subject of further discovery. The motion is without prejudice and may be re-filed at any time.

So ordered.

ENTER:

DATED: July 23, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC