Sabo v Candero
2018 NY Slip Op 32890(U)
November 14, 2018
Supreme Court, New York County
Docket Number: 652899/2013
Judge: Kelly A. O'Neill Levy

KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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ABRAM SABO,

Plaintiff,

- v -

ALBERTO CANDERO, HEATH CANDERO, MAXINE CANDERO, KING SPRING TAXI INC, H&M CAB CORP, BONEHEAD LLC, NIGHT OWL NYC LLC, HEATH MANAGEMENT CORP, GOLD TAXI BROKERS INC, CAPITAL ONE EQUIPMENT FINANCE CORP., CAPITAL ONE MDEALLION FINANCE, A TRADE NAME OF CAPITAL ONE EQUIPMENT FINANCE CORP.,

Defendants.

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INDEX NO. 652899/2013

MOTION DATE 09/05/2018

MOTION SEQ. NO. 008, 009

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 008) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 206, 207, 211, 217

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 009) 204, 205, 208, 209, 210, 212, 213, 218, 219, 220, 221, 222, 223

were read on this motion to/for PUNISH FOR CONTEMPT

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 008 and 009 are hereby consolidated for disposition.

This is an action by a judgment creditor related to his attempts to collect on a judgment. Defendant Capital One Equipment Finance Corp. (hereinafter, Capital One) moves (mot. seq. 008) for an order, pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7), dismissing the amended complaint as against Capital One with prejudice. Plaintiff Abram Sabo opposes and moves (mot. seq. 009) for an order finding Capital One in contempt of court. Capital One opposes.

BACKGROUND

This action stems from an attempt by plaintiff to collect a 2007 judgment in the amount of $560,304.41 against Alberto Candero (hereinafter, the Judgment) from a separate action titled

Abram Sabo v. Alberto Candero, et al. (Sup. Ct., New York Cty., Index # 401573/2004). The Judgment remains unsatisfied. Alberto Candero had previously held title to four separate NYC Taxicab medallions through closely-held corporations: H&M Cab Corp. (hereinafter, H&M), possessed Medallions 7N77 and 7N78 (hereinafter, the 7N Medallions), while King Spring Taxi Inc. (hereinafter, King Spring), possessed Medallions 4J68 and 4J69 (hereinafter, the 4J Medallions) (collectively, hereinafter, the Medallions).

On October 17, 2012, H&M sold the 7N Medallions to Bonehead LLC (hereinafter, Bonehead), which was allegedly controlled by Alberto Candero's son, Heath Candero. On May 18, 2013, King Spring sold the 4J Medallions to Night Owl NYC LLC (hereinafter, Night Owl), which was also allegedly controlled by Heath Candero. The New York City Taxicab & Limousine Commission (hereinafter, TLC) approved both sales.

On July 2, 2013, in a related court action titled, *Heath Management Corp., et al. v. Abram Sabo, et al.* (Sup. Ct., N.Y. Cty., Index # 156039/2013), the court issued a first temporary restraining order against King Spring and Heath Management Corp. (hereinafter, Heath Management) preventing Alberto Candero from selling, transferring, or encumbering the 4J Medallions (hereinafter, the First TRO). The court withdrew the First TRO on July 30, 2013. When the court issued the First TRO, Night Owl already owned the 4J Medallions and the transfer was already approved by the TLC. In December 17, 2013, the court issued a second temporary restraining order against previous co-defendants in this action preventing them from selling, transferring or encumbering the stock or ownership interest in the Medallions (hereinafter, the Second TRO) (collectively with the First TRO, hereinafter, the TROs). Neither one of the TROs was issued against Capital One, as both were issued against former co-defendants that are no longer parties to this action.

On July 25, 2013, Capital One entered into an agreement with XL Capital LLC (hereinafter, XL Capital), a corporation allegedly controlled by Heath Candero, making two separate loans in exchange for security interests in the Medallions, one to Bonehead for the 7N Medallions in the amount of $1,600,000 and another to Night Owl for the 4J Medallions in the amount of $1,600,000. Capital One secured UCC-1 liens against each of the Medallions and has a perfected, first lien security interest in the Medallions.

On September 13, 2015, Alberto Candero filed for bankruptcy in an action that was moved to the United States Bankruptcy Court in the Southern District of Florida, West Palm Beach Division (Case No. 16-13707-PGH, Chapter 7) and that resulted in a $200,000 settlement with plaintiff as Alberto Candero's only outstanding creditor (hereinafter, the bankruptcy settlement). Over plaintiff's objection, the bankruptcy settlement proceeded, and on April 5, 2018, this court permitted plaintiff to amend his complaint by adding Capital One as a party and asserting four causes of action against Capital One: (1) fraudulent transfer, (2) interference with prospective economic advantage, (3) civil conspiracy, and (4) negligence. On January 24, 2018, in accordance with the terms of the bankruptcy settlement, plaintiff discontinued this action against all remaining parties except Capital One with prejudice.

On September 6, 2018, after oral argument on the present motions, plaintiff electronically filed additional documentary evidence in further support of his motion for contempt. The court will consider this evidence, despite the late submission.

DISCUSSION

Motion to Dismiss (Mot. Seq. 008)

CPLR § 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every

favorable inference. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). If the court "determine[s] that the plaintiff [is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete" and the complaint must be declared legally sufficient. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995). While factual allegations in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to the presumption of truth. *Summit Solomon & Feldesman v. Lacher*, 212 A.D.2d 487, 487 (1st Dep't 1995). The test is not whether the complaint states a cause of action but whether the pleader has, in fact, a cause of action. *Scarlett Letters, Inc. v. Compugraphic Corp.*, 61 A.D.2d 930, 930 (1st Dep't 1978).

1. Fraudulent Transfer Claim. To establish a fraudulent conveyance claim, plaintiff must show that the transfer of the Medallions was made without fair consideration, that it was made with an actual intent to hinder, delay, or defraud creditors, or that defendants were insolvent or thereby rendered insolvent by the transfer. *See International Ass'n of Machinisits and Aerospace Workers (IAM) by Winspisinger v. Allegis Corp.*, 545 N.Y.S.2d 638, 642 (Sup. Ct., N.Y. Cty., 1989).

Plaintiff asserts the fraudulent transfer claim against Capital One, rather than the actual parties to the transfer of the Medallions, Alberto and Heath Candero and their closely-held corporations, all of whom have since been dismissed from this action with prejudice. Therefore, the only transaction potentially at issue is Capital One's July 25, 2013 financing of the four medallion loans. Plaintiff carries the burden of showing that either Capital One or XL Capital

received inadequate consideration, that they acted with actual fraudulent intent against plaintiff, or that they were insolvent or were thereby rendered insolvent by financing the medallion loans.

The UCC-1 liens giving Capital One a security interest in the Medallions was adequate consideration for the loans. Capital One was not rendered insolvent and was not insolvent at the time it financed the Medallions.

Under N.Y. Debtor and Creditor Law § 276, any property transfer done with actual intent "to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." N.Y. Debtor and Creditor Law § 276. In the Bankruptcy case, Robert C. Furr, the chapter 7 bankruptcy trustee, stated a good faith basis for alleging that the medallion transfers from H&M to Bonehead and from King Spring to Night Owl were fraudulent, however, that statement is not enough to implicate Capital One in this matter. Fraudulent transfer claims are only actionable against the transferees. *See Federal Deposit Ins. Co. v. Porco,* 75 N.Y.2d 840, 842 (1990) (New York has no cause of action for judgment creditors to sue for monetary damages against parties who were neither transferees of the assets nor beneficiaries of the conveyance); *see also Cahen-Vorburger v. Vorburger*, 41 A.D.3d 281, 282 (1st Dep't 2007) (dismissing fraudulent conveyance claim against non-transferees who merely assisted transfer). Capital One was not a transferee, so the fraudulent transfer claim must be dismissed, as it is not actionable in this case.

Plaintiff failed to meet his burden under CPLR § 3211(a)(7) to establish a fraudulent transfer claim, and thus the claim is dismissed.

2. Interference with Prospective Economic Advantage Claim. To establish a tortious interference with prospective economic advantage claim, a party must demonstrate that (1) it had a business relationship with a third party; (2) that the defendant knew of that relationship and

intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or an independent tort; and (4) that the defendant's interference caused injury to the relationship with a third party. *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dep't 2009). To meet the third element, courts have found that physical violence, fraud, misrepresentation, civil suits, criminal prosecutions, and economic pressure suffice. *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 190-91 (1980). Moreover, the three-year statute of limitations for this claim applies when "the gravamen of the complaint is economic injury." *Mannix Industries, Inc. v. Antonucci*, 191 A.D.2d 482, 483 (2d Dep't 1993). Plaintiff seeks to recover for economic injuries alleged against Capital One in its amended complaint.

Here, there is no evidence of a business relationship that Capital One interfered with. *See Rondeau v. Houston*, 118 A.D.3d 638, 639 (1st Dep't 2014); *see also Schoettle v. Taylor*, 282 A.D.2d 411, 412 (1st Dep't 2001). Plaintiff was trying to collect on the Judgment and alleges that Capital One interfered with his ability to do so.

There is no wrongful means by which plaintiff can satisfy the third element of the tortious interference with prospective economic relationship claim. Capital One's motivation in extending the loans was not to specifically injure plaintiff, as it is a financial intuition that extends loans in the regular course of business.

In addition, the three-year statute of limitations controls here. Since the loan was administered on July 25, 2013, five years prior to the filing of the amended complaint with the new claims against Capital One in November 2017, the three-year statute of limitations has tolled, barring plaintiff from making this claim.

Thus, plaintiff fails to meet its burden under CPLR §§ 3211(a)(5) and 3211(a)(7), and the tortious interference with prospective economic advantage claim is dismissed.

3. Civil Conspiracy. Under New York law, a civil conspiracy action may only be maintained to "connect the actions of separate defendants with an otherwise actionable tort," and "a mere conspiracy to commit a [tort] is never of itself a cause of action." *Alexander & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d 968, 969 (1986) (quoting *Brackett v. Griswold*, 112 N.Y. 454, 467 [1889]). There is no independent tort of civil conspiracy in New York, and thus plaintiff must predicate his conspiracy claim on some underlying tort. *See Routsis v. Swanson,* 26 A.D.2d 67, 71 (1st Dep't 1966). Moreover, a "conspiracy to do a lawful act does not give rise to a cause of action unless the act was done for the sole purpose of injuring a party." *Connolly v. New York Shipping Assn.*, 20 A.D.2d 18, 23 (1st Dep't 1963).

Here, plaintiff brings a conspiracy claim against Capital One for its supposed involvement in the fraudulent medallion transfer which interfered with his ability to collect on the Judgment. However, to sustain this claim, plaintiff must demonstrate that Capital One has committed an underlying tort. Plaintiff has failed to meet this burden under CPLR § 3211(a)(7). Therefore, the civil conspiracy claim is dismissed.

4. Negligence. To establish a *prima facie* case of negligence in New York, "a plaintiff must demonstrate that the defendant owed [him] a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by that breach." *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 199 (1st Dep't 2013). Determining whether the defendant owed a specific duty to the plaintiff is the threshold question. *Id.* at 200.

Plaintiff does not establish a basis for which Capital One owed a duty towards him. Also, the negligence claim is time barred by New York's three-year statute of limitations, as the breach

allegedly occurred when Capital One extended the loans to XL Capital in 2013, which is about five years prior to plaintiff's filing of the negligence claim in the amended complaint. Thus, plaintiff fails to meet its burden under CPLR §§ 3211(a)(5) and 3211(a)(7), and the negligence claim is dismissed.

Since plaintiff's claims either fail to adequately plead the causes of action or are time-barred by the relevant statute of limitations, Capital One's motion to dismiss the amended complaint is granted and the amended complaint is dismissed as against Capital One with prejudice.

Motion for Contempt (Mot. Seq. 009)

Plaintiff moves for an order finding Capital One in contempt of court for allegedly transferring and encumbering the Medallions in violation of the TROs.

To establish civil contempt based on the violation of a court order, the movant must establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect, and that the order was disobeyed to a reasonable certainty. *See Dep't of Envtl. Prot. of City of New York v. Dep't of Envtl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 239-240 (1987). The party to be held in contempt must have had knowledge of the court order. *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994). Additionally, prejudice to the rights of a party in the case must be demonstrated. *Id.*

Neither of the TROs was issued against Capital One. Capital One was not a party in either action at the time that the TROs were issued. Capital One allegedly had no notice or knowledge of the TROs. Moreover, neither of the TROs were violated by any of the co-defendants at the time, nor by Capital One, as the stock or ownership interest in the Medallions

had not been sold, transferred, or encumbered by any of the former co-defendants or by Capital One after the TROs were issued.

Capital One was not a party to the separate action in which the First TRO was issued and it was never served with or provided notice of the First TRO. Thus, plaintiff cannot demonstrate that Capital One had knowledge of the First TRO. Moreover, the First TRO was never violated, as Night Owl was already the owner of the 4J Medallions prior to the issuance of the First TRO. Also, the First TRO had expired pursuant to the July 30, 2013 decision on the motion dismissing the entire separate action.

The Second TRO was issued in this action against former co-defendants that were dismissed from this action with prejudice. The Second TRO was never violated by any former co-defendants or by Capital One, as the Medallions were never sold, transferred, or encumbered after the Second TRO was issued in December 2013. The Medallions were already transferred and encumbered before the Second TRO was issued. Moreover, Capital One was not a party in this action at the time the Second TRO was issued and it was never served or provided with notice of the Second TRO, and thus, plaintiff cannot demonstrate that Capital One had actual knowledge of the Second TRO.

Thus, the court denies plaintiff's motion for an order finding Capital One in contempt of court for violating the TROs.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that defendant Capital One Equipment Finance Corp.'s motion (mot. seq. 008) for an order, pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7), dismissing the amended complaint as against Capital One with prejudice is granted; and it is further

ORDERED, that plaintiff Abram Sabo's motion (mot. seq. 009) for an order finding Capital One in contempt of court is denied; and it is further

ORDERED that the amended complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

11-14-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE