

Geraci v Gatsby Dining LLC
2020 NY Slip Op 32148(U)
June 30, 2020
Supreme Court, Kings County
Docket Number: 525113/2019
Judge: Lorna J. McAllister
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At an IAS Term, Part 10, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of June, 2020.

P R E S E N T:

HON. LORNA J. MCALLISTER,

Justice.

-----X

SALVATORE GERACI,

Plaintiff,

-against-

Index No.: 525113/2019

GATSBY DINING LLC a/k/a GATSBY DINING, LLC
and ROBERTO NICOLIA,

Defendants.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 ¹
Opposing Affidavits (Affirmations) _____	3
Affidavits/ Affirmations in Reply _____	4
<u>Other Papers: Memorandum of Law in Reply</u> _____	5

Defendants Gatsby Dining LLC a/k/a Gatsby Dining, LLC (“Gatsby”) and Roberto Nicolia (“Nicolia”) (hereinafter “defendants”) move for orders:

¹ While the court normally would not number memoranda as being considered, in light of the fact that the plaintiff opposes the instant motion through a “memorandum in opposition,” the court has numbered the memoranda filed in connection with the instant motion.

(1) pursuant to CPLR 3211(a)(1) and (a)(7), dismissing plaintiff Salvatore Geraci's (Geraci) complaint against them and,

(2) pursuant to CPLR 503(a), 509, 510 and/or 511(a) and/or (b), changing venue of the matter from Kings County to Suffolk County.

Facts and Procedural Background

Gatsby operated a restaurant located at 712 Main Street in Islip under the name "Nico's Ristorante at the Mansion" and/or "The Gatsby" (the restaurant). Prior to March 14, 2008, Nicolìa's wife and Steven Patsis (Patsis) each held a fifty percent (50%) membership interest in the restaurant. On March 14, 2008, Nicolìa and Patsis entered into an agreement whereby Patsis sold and transferred his interest in Gatsby to Nicolìa (the Patsis agreement). The balance of the purchase price, secured by a promissory note, would become due and owing from Nicolìa to Patsis in the event Nicolìa sold, transferred or conveyed his interest. Nicolìa subsequently acquired the remaining 50% interest in Gatsby from his wife, rendering him sole member and manager of the restaurant.

On or about March 18, 2009, Dorothy Geraci, the ex-wife of plaintiff, as well as Maria Borruso (Borruso) and Jack Guarneri (Guarneri, collectively, the purchasers) entered into an asset purchase agreement (purchase agreement) with Gatsby to purchase the restaurant for seven hundred thousand dollars (\$700,000). The agreement provided for a down payment of fifty thousand dollars (\$50,000) and the balance of six hundred and fifty thousand dollars (\$650,000) to be paid at closing via the purchasers' execution of a promissory note. Pursuant to the purchase agreement, the "closing" would not take place until liquor license approval was given by the State Liquor Authority. On the same date, Dorothy Geraci also entered into a management agreement (management agreement) with Gatsby to manage the restaurant for a period of time prior to closing of the purchase agreement. The restaurant eventually failed, with Dorothy Geraci and her partners

vacating same and Nicolia resuming direct control on February 15, 2010. Nicolia subsequently sold off the assets and closed the restaurant.

On or about March 25, 2010, Patsis commenced an action against Nicolia in the Supreme Court of the State of New York, Suffolk County (the Patsis action), alleging that Nicolia breached the terms of the Patsis agreement when he failed to pay Patsis pursuant to the terms of the promissory note after selling Gatsby's assets. The Court (Emily Pines, J.) granted Patsis' motion for summary judgment against Nicolia. Nicolia appealed, and on September 27, 2014 the Appellate Division, Second Department affirmed Justice Pine's decision.

On or about June 28, 2010 Gatsby commenced a breach of contract action against Salvatore Geraci, Dorothy Geraci and Guarneri in the Supreme Court of the State of New York, Suffolk County (index No. 23521/10 - breach of contract action) alleging (1) that they breached the asset purchase agreement by failing to pay the balance of the purchase price of \$650,000, and (2) that Dorothy Geraci, as manager, breached the management agreement by failing to pay expenses including rent. On June 27, 2012, Gatsby moved for default judgment against Dorothy Geraci for her failure to appear at court conferences, and on December 5, 2012, the Court (James Hudson, A.J.) issued a default judgment against Dorothy Geraci (the default judgment) in the sum of \$651,093.00 with interest thereon. Gatsby subsequently discontinued the action as against plaintiff and Guarneri. Dorothy Geraci moved to vacate the judgment, which was denied pursuant to the Court's August 16, 2019 Order.

The Geracis subsequently divorced as a result of a 2012 divorce proceeding in the Supreme Court of the State of New York, Suffolk County (index No. 699/12, Fran Ricigliano, A.J.) (the divorce action).

On or about March 12, 2015, Gatsby commenced a fraudulent conveyance action against Dorothy Geraci and Salvatore Geraci in the Supreme Court of the State of New York, Kings County (index No. 502894/15) (fraudulent conveyance action) seeking to set aside a deed dated November 10, 2009 whereby Dorothy Geraci, as grantor, conveyed one-half interest to Salvatore Geraci, as grantee, in real property (the property).² Gatsby also filed a notice of pendency against the property. Specifically, Gatsby alleged that Dorothy Geraci fraudulently conveyed the property to Salvatore Geraci, her then-husband, with no consideration in an attempt to avoid her debt owed to Gatsby, thus violating sections of Debtor and Creditor Law. Dorothy Geraci moved, pre-answer, for dismissal of the complaint which the court (Debra Silber, J.) denied pursuant to a July 20, 2018 decision. Dorothy Geraci also moved for summary judgment which the court denied pursuant to February 8, 2018 decision based upon “the differing testimony of the defendants.” After a nonjury trial conducted on December 17 and 18, 2018, the Court (Bernard J. Graham, J.), in a April 12, 2019 decision, dismissed the complaint, holding that Gatsby failed to prove actual intent to defraud creditors and to prove that the conveyance of the property was meant to render Dorothy Geraci insolvent or with little capital. Specifically, the Court determined that the transfer of property “was a function of an effort to reach a divorce settlement.”

On November 18, 2019, Salvatore Geraci commenced the present action alleging that defendants Gatsby and Nicolina commenced the fraudulent conveyance action without probable

² Dorothy Geraci conveyed her one-half interest in two properties located at 1802 77th Street, a/k/a 1802 18th Avenue, Brooklyn, New York and 1960 Leslie Lane, Merrick, New York.

cause and with malice. Specifically, plaintiff asserts two causes of action for malicious prosecution and abuse of process.

The Parties' Contentions

Defendants seek dismissal of the complaint pursuant to CPLR 3211(a)(1) based upon documentary evidence that Gatsby had probable cause to commence the fraudulent conveyance action and that there was no malicious intent in commencing said action. Defendants also seek dismissal under 3211(a)(7) for failure to state a cause of action for either malicious prosecution or abuse of process as against Robert Nicolia because Nicolia did not commence the fraudulent conveyance action.

Defendants argue that Gatsby had probable cause to commence the fraudulent conveyance action based upon its right to pursue execution on the default judgment that it obtained against Dorothy Geraci in the breach of contract action. They note that Dorothy Geraci unsuccessfully moved to vacate the judgment, and that the judgment is non-appealable. Defendants also state that they had probable cause to commence the action based upon Dorothy Geraci's conveyance of her interest in property, with no consideration, to Salvatore Geraci at the precise time she stopped making rental payments to Gatsby. In support, they cite to the affidavit submitted by Salvatore Geraci in the Geracis' divorce action wherein he states that "he was to retain title to [Dorothy Geraci's] assets in name only so that [Dorothy Geraci's] assets could be protected from her business liabilities."

In further support, defendants state that the Kings County Supreme Court in the fraudulent conveyance action believed that Gatsby had probable cause to commence the action as evidenced by the court's decisions denying both Dorothy Geraci's motion to dismiss and Gatsby's motion

for summary judgment, as well as the Court's post-trial decision. They note that the court denied Dorothy Geraci's motion to dismiss on the grounds that there was an issue of fact as to whether the Geracis' subsequent divorce factored in the conveyance of property. Defendants also cite to the court's decision wherein it denied Gatsby's motion for summary judgment on the grounds that there was an issue of fact regarding the conveyance based upon the conflicting affidavits of Dorothy and Salvatore Geraci concerning the intent of the transfer. Lastly, defendants refer to the trial decision, which stated that the evidence presented an issue of fact as to whether the conveyance "was made without consideration and whether the transfer was to leave Dorothy with 'unreasonably small capital' or in anticipation of her inability to pay her debts." Moreover, defendants argue that Salvatore Geraci did not move for summary judgment and did not oppose Gatsby's motion to extend the notice of pendency – which they believe further demonstrates that Gatsby had probable cause to commence the action.

According to defendants, additional evidence of a fraudulent conveyance scheme by Dorothy Geraci was uncovered during the prosecution of the fraudulent conveyance action. They refer to a marital settlement agreement between Dorothy Geraci and Salvatore Geraci which provides that Salvatore Geraci was to re-convey the property to her after a seven-year period. Defendants contend that the intent was for Salvatore Geraci to hold assets in his name for seven years assuming all statutes of limitation would expire, and then convey assets back to Dorothy Geraci as part of the divorce agreement. Defendants also refer to the final stipulation of settlement of divorce, which provides that a \$500,000 distribution to Dorothy Geraci was to be paid out as mortgage payments on a house that Dorothy Geraci resided in which was owned by Salvatore Geraci. Lastly, defendants cite to an order rendered by the Court in the divorce action which states

that Dorothy Geraci “transferred her interest in the Merrick home and 18th Ave., Brooklyn property to [Salvatore Geraci] name, apparently in an effort to shield [Dorothy Geraci] from creditors.”

Next, defendants contend that plaintiff cannot assert malice, intent to do harm or collateral objective, as Gatsby is owed a debt under the default judgment and has a right to pursue execution of that judgment. Defendants argue that Gatsby never made a direct claim against Salvatore Geraci, rather, Gatsby’s claim was solely to invalidate Dorothy Geraci’s fraudulent transfer of her interest in the property. Accordingly, they maintain that there was no malice or malicious intent.

Lastly, defendants assert that plaintiff’s complaint should be dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action as against Nicolia, as he was not a party to the fraudulent conveyance action. Defendants note that Nicolia was also not a party in the breach of contract action. Accordingly, defendants argue that plaintiff’s action must be dismissed as against Nicolia.

In opposition, plaintiff contends that he has plainly alleged causes of action for malicious prosecution and abuse of process on the part of the defendants, and that the evidence relied upon by the defendants does not conclusively establish a defense as a matter of law.

Plaintiff argues that Gatsby and Nicolia perpetrated a fraud against the Court in the breach of contract action and used a “fraudulently, frivolously and wrongfully obtained default judgment” against Dorothy Geraci as the basis for the fraudulent conveyance action for which this action is premised. He asserts that, among other things, Gatsby and Nicolia knew that there was no basis for liability against the purchasers because the purchase agreement never closed and the concomitant promissory notes were never executed, and the Gatsby was never transferred to Dorothy or the purchasers. In addition, plaintiff contends that the absence of probable cause to

commence the action is illustrated by the fact that Nicolia took a position in the Patsis action (that the restaurant was never transferred to the purchasers) that was diametrically opposed to Nicolia's position in the breach of contract action (that the restaurant was transferred to the purchasers).

According to plaintiff, defendants moved for default judgment as against Dorothy Geraci despite the fact that Gatsby knew there was no cause for liability under either the purchase or the management agreement. Moreover, plaintiff asserts that Gatsby's application for a default judgment against Dorothy Geraci was made after the court in the Patsis action granted summary judgment as against Nicolia on the grounds that Nicolia's obligation to pay Patsis was triggered by the liquidation and sale of Gatsby's assets, rather than by the sale of Gatsby to the purchasers under the purchase agreement because it never closed. Thus, plaintiff argues that the default judgment was fraudulently obtained by defendants.

Plaintiff contends that defendants subsequently commenced the frivolous fraudulent conveyance action based on the fraudulently obtained default judgment against Dorothy Geraci. Plaintiff also argues that defendants wrongfully filed a notice of pendency encumbering plaintiff's property without any probable cause to believe such an action would succeed on the merits. In support, plaintiff cites to the trial decision wherein the Kings County Supreme Court determined that there was no presumption that Dorothy Geraci's transfer of property to Salvatore Geraci was made to defraud creditors but rather was a function of Geraci's divorce settlement. Specifically, plaintiff notes that the Court stated that Nicolia is "not a believable witness" and that the testimony and evidence presented "do not support a default judgment of the size obtained" by Gatsby against Dorothy Geraci "because there is no provision in the operative documents to make any defendant liable to [Gatsby] if the restaurant was surrendered back to the seller." Moreover, plaintiff refers to the Court's statement that Gatsby would not have been entitled to any recovery stemming from

the purchase and management agreements because the restaurant “was encumbered by many undisclosed problems involving the physical condition of the property” and included “conduct of the seller engaged in litigation between its partners that played a strong role in the failure of the business.”

According to plaintiff, the instant motion to dismiss is really a premature motion for summary judgment, as the defendants seek to resolve factual issues as to motive, malice and probable cause without the plaintiff having had the benefit of discovery. Plaintiff asserts that the documentary evidence submitted by the defendants does not and cannot conclusively resolve all factual issues in their favor because the motion fails to address plaintiff’s factual allegations.

In reply, defendants argue that plaintiff’s claims that the default judgment against Dorothy Geraci was fraudulently obtained are baseless. They also assert that, simply because Gatsby was unsuccessful in the fraudulent conveyance action does not mean that there was no probable cause to commence the action. Finally, defendants maintain that they have been consistent in their position in both the Patsis action and the breach of contract action. In this regard, they assert that ownership of the restaurant was never transferred because of Dorothy Geraci’s failure to pay rent and obtain the requisite liquor license; however, all the operations of the business were transferred to Dorothy Geraci and the balance of the purchase price was made.

Discussion

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(1) based upon documentary evidence, a court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal under CPLR 3211(a)(1) is only granted if “the documentary evidence

utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 106 [2018]; *Leon v Martinez*, 84 NY3d 83, 88 [1994]; *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]).

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the factual allegations are accepted as alleged in the complaint, the plaintiff is afforded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Meyer v North Shore – Long Is. Jewish Health Sys.*, 173 AD3d 880, 880-881 [2016]; *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). The criterion is whether the plaintiff has stated a cause of action rather than ultimate success on the merits (*see Stukuls v State of NY*, 42 NY2d 272, 275 [1977]). However, legal and factual claims flatly contradicted by the evidence will not be presumed true (*Sweeney v Sweeney*, 71 AD3d 989, 991 [2010]).

The elements of a cause of action for malicious prosecution in a civil action are (1) initiation of a civil proceeding against plaintiff (2) by or at the instance of defendant; (3) without probable cause; (4) with malice; (5) which terminated in favor of plaintiff; (6) causing special injury (*see Hudson Val. Mar. Inc v Town of Cortlandt*, 79AD3d 700, 702-703 [2010], *citing Castro v East End Plastic, Reconstructive & Hand Surgery, P.C.*, 47 AD3d 608, 609 [2008]; *see also 347 Cent. Park Assoc., LLC v 347 Pine Top Assoc., LLC*, 83 AD3d 689, 690 [2011]). Malice may be inferred by demonstrating a lack of probable cause (*see Berman v Silver, Forrester & Schisano*, 156 AD2d 624 [1989]; *see also Chu v Greenpoint Bank*, 257 AD2d 589 [1999]). However, a

plaintiff must "prove an entire lack of probable cause in the prior proceeding" (*347 Cent. Park Assoc., LLC v Pine Top Assoc., LLC*, 144 AD3d 785, 785-86 [2d Dept 2016]).

The court finds that plaintiff's factual allegations regarding lack of probable cause and malice in Gatsby's commencement of the fraudulent conveyance action are disproved by the evidentiary material defendants submitted in support of their motion to dismiss. Defendants maintain that they commenced the fraudulent conveyance action based upon, among other things, an order rendered by the Court in the Geraci's divorce action which states that Dorothy Geraci "transferred her interest in the Merrick home and 18th Ave., Brooklyn property to [Salvatore Geraci's] name, apparently in an effort to shield [Dorothy Geraci] from creditors." In further support, defendants cite to the affidavit submitted by Salvatore Geraci in the divorce action wherein he states that "he was to retain title to [Dorothy Geraci's] assets in name only so that [Dorothy Geraci's] assets could be protected from her business liabilities." Defendants' submissions demonstrate that the underlying fraudulent conveyance action did not lack probable cause. That Gatsby obtained a default judgment against Dorothy Geraci which it was entitled to enforce by commencing the underlying fraudulent conveyance action also disproves plaintiff's claim of malice.

Moreover, defendants demonstrated by their submissions, which included decisions issued by the court in the fraudulent conveyance action, that "the prior action, considered as a whole, was not entirely without probable cause" (*Perryman v Village of Saranac Lake*, 41 AD3d 1080, 1082 [2007]). The complaint in the fraudulent conveyance action survived two dispositive motions (a motion to dismiss and Gatsby's own summary judgment motion) and proceeded to trial, which demonstrates that Gatsby's claims were not lacking in probable cause. Judicial recognition of potential merit of prior claims creates the presumption that they did not lack probable cause (*see*

Black v Green Harbour Homeowners' Assn, Inc., 37 AD3d 1013, 1014 [2007], citing *Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 754 [2005]; *Williams v Barber*, 3 AD3d 695, 696-697 [2004]).

The Court finds unavailing plaintiff's arguments premised upon the purchase and management agreements, as plaintiff's allegations with respect to said agreements could have been raised in the breach of contract action. Similarly, plaintiff's allegations that Gatsby "perpetrated a fraud" by commencing the breach of contract action, and by obtaining a default judgment against Dorothy Geraci are not persuasive. The breach of contract action concluded, and Gatsby obtained an enforceable default judgment as against Dorothy Geraci which survived a motion to vacate the judgment. The fraudulent conveyance action, and not the breach of contract action, is the underlying proceeding upon which plaintiff's instant action is based. And insofar as defendants' submissions indicate that the fraudulent conveyance action did not lack probable cause, plaintiff has no cognizable claim for malicious prosecution.

The Court also dismisses plaintiff's cause of action for abuse of process. The elements of a cause of action sounding in abuse of process are "(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" (*Korsinsky v Rose*, 120 AD3d 1307, 1310 [2014], quoting *Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). The mere commencement of a lawsuit cannot serve as the basis for a cause of action alleging abuse of process (*Lynn v McCormick*, 153 AD3d 688 [2017]). There is no indication here that "process" was perversely utilized by defendants when commencing the fraudulent conveyance action. In addition, plaintiff failed to allege that defendants misused the notice of pendency to obtain an end outside its proper

scope (*see Hornstein v Wolf*, 67 NY2d 721, 723 [1986]; *see also Berman v Silver, Forrester & Schisano*, 156 AD2d 624 [1989]).

As plaintiff's causes of action do not survive defendants' motion to dismiss, the court need not address the remaining aspect of defendants' motion to change venue.

Conclusion

The court has considered the plaintiff's remaining contentions and found them to be without merit. Accordingly, it is

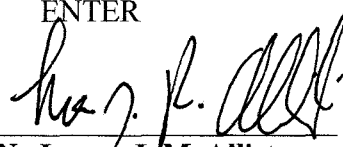
ORDERED that defendants' motion is granted, and plaintiff's complaint is dismissed.

All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

Dated: June 30, 2020

ENTER



HON. Lorna J. McAllister
A.J.S.C.