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Kenneth M. Steinhouse and Bleecker Charles Company, Plaintiffs v. Norma Neyer Lesser and Marion Neyer, Defendants, 112196/10

Supreme Court, New York County, Part 55

112196/10

New York Law Journal

08-16-2012

Cite as: Steinhouse v. Lesser, 112196/10, NYLJ 1202567349247, at *1 (Sup., NY, Decided July 30, 2012)

Justice Cynthia S. Kern

Decided: July 30, 2012

Decision and Order

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Plaintiffs commenced this action seeking a court order requiring that defendants sign an operating agreement converting a limited partnership to a limited liability company. Plaintiffs now move to dismiss defendants' counterclaims and for an order permitting them to withdraw the action. Defendants cross-move to disqualify plaintiffs' attorney and for summary judgment on their counterclaims. For the reasons set forth more fully below, plaintiffs' motion to withdraw the action and dismiss the counterclaims is granted and defendants' cross-motion for disqualification is denied.

The relevant facts are as follows. On or about March 10, 1960, a number of individuals

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joined together to create a real estate limited partnership (plaintiff Bleecker Charles Company or the "Partnership"), the purpose of which was to acquire and operate a commercial apartment building located at Charles and Bleecker Streets. The Partnership Agreement and Certificate of Limited Partnership of the new entity, plaintiff Bleecker Charles Company specified that the Partnership was to terminate on December 31, 2012. After the death of the last two original general partners, the court appointed, by order dated April 1984, Kenneth B. Newman as the liquidating partner. By order dated

March 11, 2007, the court substituted plaintiff Kenneth M. Steinhouse as the Liquidating Partner on the ground that Kenneth B. Newman was no longer capable of performing that role. At the same time, the court ratified Time Equities, Inc. ("TEI") as successor managing agent for the Partnership.

Plaintiffs commenced this action in 2010 to compel defendants, two of the limited partners of the Partnership, to sign an operating agreement which would convert the limited partnership to a limited liability company. At the time plaintiffs brought this action, 88 of the 90 partners representing 98.68 of the equity of the Partnership, had already agreed to this conversion and defendants were the only two partners that had not consented to the conversion. After the court declined to grant any mandatory equitable relief with respect to plaintiffs' action, the plaintiffs took no further action in prosecuting the action. They now seek leave of court to discontinue the action and dismiss the counterclaims asserted by defendants.

Before determining whether plaintiffs should be permitted to discontinue this action or whether the counterclaims should be dismissed, the court must first determine defendants' cross motion to disqualify plaintiffs' counsel. As will be explained below, this court finds that there is no basis for disqualifying plaintiffs' counsel from representing plaintiffs. Daniel A. Schwartzman, Esq, who is an employee of TEI, the managing agent of the Partnership,

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represents plaintiff Steinhouse and the plaintiff Partnership in this matter. Defendants argues that Schwartzman should be disqualified as counsel on the ground that he is representing conflicting interests — that the interest of the plaintiff Partnership is to liquidate the Partnership by December 31, 2012 in accordance with the terms of the partnership agreement and that the interest of Steinhouse is for a continuation of the real estate entity after December 31, 2012. The court finds that plaintiff Partnership and Steinhouse do not have conflicting interests with respect to the subject matter of the litigation before this court. The purpose of this litigation was to attempt to obtain defendants' consent to converting the Partnership to a limited liability company. The action of attempting to convert the Partnership into a limited liability company was not contrary to the Partnership's interest in liquidating the Partnership as of December 31, 2012. To the contrary, section 1006 (c) of the Limited Liability Company Law expressly provides that a limited partnership such as the Partnership may be converted to a limited liability company on consent of the partnership. There is nothing inherently inconsistent or ultra vires in the Partnership converting to a limited liability company as part of the liquidation process. In other words, the Partnership's interest in liquidating the Partnership by December 31, 2012 is not inconsistent with its interest in converting to a limited liability company. In fact, an overwhelming majority of the partnership interests in fact approved the conversion to a limited liability company as part of the liquidation of the Partnership and there would have been nothing improper in the Partnership converting to such a company as long as it was done in compliance with the limited liability company law. Based on the foregoing, there was no conflict in the same attorney representing both Steinhouse and the Partnership in an attempt to get the defendants' consent to such a conversion.

There is also no basis for defendants' argument that Schwartzman's professional

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judgment on behalf of a client will be adversely affected by his own financial and business interests. Defendants argue that Schwartzman has a conflict because he is an employee of TEI, the managing agent of the Partnership, and therefore has an interest in the Partnership continuing rather than the Partnership being liquidated since he will obtain further management fees. Initially, as already held, there is nothing improper in the Partnership attempting to convert to a limited liability company. Moreover, the mere fact that Schwartzman may have a financial interest in the continuation of the Partnership is not a basis for disqualifying him from representing the Partnership.

The court now turns to plaintiffs' motion to dismiss defendants' counterclaims and defendants' cross-motion for summary judgment on those counterclaims. Although defendants' counterclaims are not so labeled, defendants state in their cross-motion that their counterclaims are for intentional infliction of emotional distress, abuse of process and prima facie tort. The court will construe the counterclaims as identified by defendants in their cross-motion.

Defendants' first counterclaim, for intentional infliction of emotional distress, is dismissed on the ground that defendants fail to state such a claim. The elements of a claim for intentional infliction of emotional distress are "(1) extreme and outrageous conduct; (2) an intent to cause — or disregard of a substantial probability of causing — severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) the resultant severe emotional distress." *Lau v. S&M Enterprises*, 72 A.D.3d 497, 498 (1st Dept 2010). The conduct in this case — repeated letters and calls

with requests or demands that defendants sign the new operating agreement — fails to rise to the level of "extreme and outrageous conduct" and therefore defendants fail to state a claim for intentional emotional distress. Accordingly, this counterclaim is dismissed and defendants' motion seeking summary judgment on this counterclaim is denied.

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Plaintiffs' motion to dismiss defendants' counterclaim for abuse of process is also granted and defendants' summary judgment motion on that cause of action is denied. In order to prevail on an abuse of process claim, the party bringing that claim must plead the following elements: (1) a regularly issued process, either civil or criminal; (2) intent to do harm without excuse or justification; and (3) use of the process in a perverted manner to obtain a collateral objective. See *Curiano v. Suozzi*, 63 N.Y.2d 113 (1984). In the instant action, defendants have failed to plead that plaintiffs used the legal system in a perverted manner to obtain a collateral objective. Plaintiffs' objective was to get defendants to sign the new operating agreement and they used the legal system for exactly that purpose. *Hauser v. Bartow*, 273 N.Y. 370, 374 (1937). As the court in *Hauser* said of the plaintiff there, "she used the process of the court for the purpose for which the law created it. She used it, she did not abuse it." *Id.* Here, too, plaintiffs used the legal system for its intended purpose. Moreover, "it is not enough that the [party being sued for abuse of process] have an ulterior motive in using the process of the court." *Id.* Accordingly, defendants' counterclaim for abuse of process is dismissed.

Finally, defendants' counterclaim for prima facie tort is also dismissed. The elements of prima facie tort are that (1) the tortfeasor acted maliciously; (2) inflicted intentional harm by an otherwise legal action; and (3) that plaintiff suffered special damages. See *Curiano*, 63 N.Y.2d 113. The claim of "[p]rima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy." *Id.* To demonstrate special damages, the party asserting the claim must show "specific and measurable loss." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985). Defendants fail to enumerate any such specific and measurable loss and therefore fail to plead that they sustained special damages. In addition, they fail to plead that plaintiffs acted maliciously other than by stating so in

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conclusory fashion. Therefore, that counterclaim is dismissed as well.

Accordingly, defendants' cross-motion to disqualify plaintiffs' attorney is denied. Plaintiffs' motion to dismiss defendants' counterclaims is granted and defendants' cross-motion for summary judgment on their counterclaims is denied. Plaintiffs are granted leave to discontinue their action. This constitutes the decision and order of the court.