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ROBERT S. SMITH
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New York Supreme Court
Appellate Division – First Department

Appellate Case No.: 2018-1123

SUTTON 58 ASSOCIATES LLC,

Plaintiff-Respondent,

– against –

PHILIP PILEVSKY, MICHAEL PILEVSKY, SETH PILEVSKY, PRIME ALLIANCE GROUP, LTD., and SUTTON OPPORTUNITY LLC,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiff's[1] brief struggles to avoid the obvious: the "wrong" for which it has sued defendants consists solely of helping the Borrowers to file bankruptcy petitions. This inescapable fact requires a holding that plaintiff's claims are preempted by the bankruptcy laws and barred by the *Noerr-Pennington* doctrine. Plaintiff's arguments to the contrary lack merit.

ARGUMENT

I.

PLAINTIFF'S BRIEF CONFIRMS THAT ITS CASE IS BASED ON THE BANKRUPTCY FILINGS

Plaintiff manages to keep the word "bankruptcy" off the first page of its brief, but only by a very careful choice of words. Plaintiff says that "defendants' actions were meant to – and, for a significant period, did – *prevent plaintiff from exercising its contractual foreclosure rights*". Brief of Plaintiff-Respondent ("Pl. Br.") at 1 (emphasis added). Plaintiff does not say *what* prevented it from foreclosing on the Borrowers' collateral, but the answer is clear and undisputed: the foreclosure was delayed because, and only because, it was automatically stayed by the bankruptcy filings. *See* 11 U.S.C. § 362(a) (filing of petition "operates as a stay").

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[1] We use the same abbreviated names as in our previous brief ("Def. Main Br.").

Later, when plaintiff describes the basis for its lawsuit, it cannot avoid saying what it is really talking about - bankruptcies. Defendants' alleged "Tortious Interference", in plaintiff's narrative, "Begins to Unfold" at page 10 – and the first sentence under this dramatic heading says that Mezz Borrower "borrowed $50,000 …from defendant Prime Alliance…to pay a retainer to Mezz Borrower's *bankruptcy* counsel". Pl. Br. at 10-11 (emphasis added). The following sentence says: "That same day…Mezz Borrower filed a voluntary petition for *bankruptcy* under Chapter 11 of the Bankruptcy Code". *Id.* at 11 (emphasis added). The third sentence in plaintiff's description of the alleged tortious interference quotes defendant Philip Pilevsky as explaining that the money was loaned to Mezz Borrower so that it "could file for reorganization under Chapter 11 of the Bankruptcy Code." *Id.*

Similarly, when plaintiff's brief describes the second of defendants' two alleged tortious acts – a transfer of apartments by an entity affiliated with defendants to Mortgage Borrower – plaintiff cannot avoid giving a central role to Mortgage Borrower's bankruptcy. Plaintiff explains the point of the apartment transaction as follows:

> On April 6, 2016, Mortgage Borrower filed a voluntary petition for bankruptcy …. *Enabled by defendants' tortious interference* with Mortgage Borrower's loan covenants, Mr. Beninanti swore in the bankruptcy petition that Mortgage Borrower

> was not a 'Single Asset Real Estate' debtor under the Bankruptcy Code.

Pl. Br. at 14 (emphasis added).

Thus plaintiff expressly admits that the conduct for which it sues defendants "[e]nabled" Mortgage Borrower's bankruptcy filing. Plaintiff does not allege that the apartment transaction had any other purpose, or any other significant impact. This transfer, like the loan to Mezz Borrower, was, according to plaintiff's own claim, a bankruptcy-enabling transaction, and nothing else.

In short, plaintiff's brief confirms what defendants' previous brief said: plaintiff is suing defendants for the "tort" of helping two debtors file bankruptcy petitions. Def. Main Br. at 1.

II.

DEFENDANTS ARE NOT SEEKING TO INVALIDATE ANY LOAN COVENANTS

Repeating Supreme Court's error, plaintiff argues that accepting defendants' arguments here would mean "rendering unenforceable work-a-day loan covenants" and "would undermine the way business is dealt with in New York City…and upend the whole development industry". Pl. Br. at 3, quoting R21 and R15. This is simply incorrect.

Defendants have never suggested that the covenants at issue in this case are generally unenforceable. They are, as plaintiff says, commonplace covenants and no doubt enforceable in the great majority of cases. But, like all

other loan covenants, they are unenforceable when used to burden or frustrate a debtor's right to petition a United States Bankruptcy Court for relief. To say that contractual provisions, no matter how widely used, may be trumped by the federal bankruptcy laws is not some radical doctrine. It is inherent in the nature of bankruptcy.

Plaintiff's brief simply ignores the distinction between holding that covenants are always invalid and holding that they may not be invoked in ways that thwart the objectives of federal law. Defendants argue for the latter holding, not the former. Plaintiff is attacking a straw man.

III.

PLAINTIFF'S ARGUMENTS ON THE PREEMPTION ISSUE ARE ILLOGICAL AND UNSUPPORTED BY AUTHORITY

Plaintiff's main argument against bankruptcy preemption is an extraordinary one: It says that there can be no preemption "because plaintiff's claims involve state law, not bankruptcy law." Pl. Br. at 25. But the claims in every federal preemption case "involve state law". The whole point of preemption is that claims arising under state law must give way when they conflict with federal law.

The argument that preemption is impossible because the claims arise under state law could have been made in every one of the sixteen cases cited at and discussed at pages 17-24 of our previous brief – all of which held that state-law tort claims based on bankruptcy-court filings were preempted. These include five

cases in which the tort allegations were based on pre-bankruptcy conduct. *See*, *Astor Holdings, Inc. v. Roski*, 325 F. Supp. 2d 251, 260-62 (S.D.N.Y. 2003); *Choy v. Redland Ins. Co.*, 103 Cal. App. 4th 789, 798-99, 127 Cal. Rptr. 2d 94, 100-01 (2002); *National Hockey League v. Moye*s, 2015 WL 7008213 *4 (D. Ariz. Nov. 12, 2015); *Casden v. Burns*, 504 F. Supp. 2d 272, 280-81 (N.D. Ohio 2007), *aff'd* 306 F. Appx. 966 (6th Cir. 2009); *In re Repository Techs., Inc.,* 601 F.3d 710, 720-23 (7th Cir. 2010). They also include seven cases brought against non-debtors. *See*, *Gonzales v. Parks*, 830 F.2d 1033, 1033-34 (9th Cir. 1987); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 426 (6th Cir. 2000), in addition to the cases just cited. If plaintiff's theory is correct, every one of the sixteen cases defendants rely on was wrongly decided.

Plaintiff's brief cites two cases in which state-law tort claims predicated on bankruptcy filings were allowed to proceed: *Davis v. Yageo Corp.*, 481 F.3d 661 (9th Cir. 2007) and *F.D.I.C. v. Barton*, 1998 WL 169696 (E.D. La. April 8, 1998). *See* Pl. Br. at 25. Both of these cases involved very unusual facts. In *Davis* the claims sued on had been specifically preserved as part of a confirmed plan approved by the Bankruptcy Court and had been assigned to the plaintiffs with Bankruptcy Court approval (481 F.3d at 668); in *Barton*, the bankruptcy filing had been made while the debtor was party to a restrictive agreement with federal bank regulators, and without notice to the regulators. 1998 WL 169696 at *1, *2.

Both cases contain loose language, but they cannot fairly be read as anything but rare exceptions to the general rule, reflecting the overwhelming weight of authority, which was stated in *Choy* and approved by Judge Lynch in *Astor*: "no *authorized proceeding* in bankruptcy can be questioned in state court or used as the basis for the *assertion of a tort claim in state court against any defendant*." 103 Cal. App. 4th at 801, 127 Cal. Rptr. at 103 (latter emphasis added), quoted in 325 F. Supp. 2d at 262.

The other cases on which plaintiff relies are not on point. The court in *In re Extended Stay Inc.*, 435 B.R. 139, 149 (S.D.N.Y. 2010) said that *contract* claims against guarantors of a debtors' obligations were not preempted – a very unsurprising suggestion. To enforce a non-debtor's guarantee of a bankrupt debtor's obligation is not akin to treating assistance given to a debtor's bankruptcy filing as a tort. The former does not interfere with a debtor's bankruptcy filing; the latter is highly likely to discourage or prevent such filings.

The court in *Extended Stay* did not suggest that the *tort* claims asserted there were not preempted. It decided only that the tort case was not one "arising under" federal law. *Id.* at 151-152. As to the tort claims, the defense of preemption was left to be litigated in state court. *See id.* at 149, quoting *MSR Exploration, Ltd. v. Meridian Oil, Inc.*74 F.3d 910, 912 (9th Cir. 1995) ("preemption assertions are normally matters of defense and will not suffice to

establish federal jurisdiction"). Still less apposite is *BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 919 F. Supp. 2d 310 (S.D.N.Y. 2013), which involved claims not derived from any bankruptcy filing, brought by the purchaser of a debtor's assets against a competitor.

The preemption case which most resembles this one is *Astor*, discussed in our previous brief at pages 17-19. Plaintiff makes only a cursory, unsuccessful attempt to distinguish that case. *See* Pl. Br. at 28. It notes that the tort claims in *Astor* were preempted only "insofar as they were based on" a bankruptcy filing – but the present case, as we have shown, is wholly based on such filings. The conduct plaintiff complains of here is not alleged to have any purpose or effect other than to enable the Borrowers to file for bankruptcy, and no damage except delay resulting from the bankruptcies is claimed. Plaintiff goes on to suggest that *Astor* is limited to cases where the bankruptcy was filed "in bad faith or for an improper purpose" – but that suggestion is absurd. It cannot seriously be argued that federal law gives *more* protection to a bad faith filing than a good faith one. *Astor* stands for the broad proposition it quoted from *Choy*, and which we quoted above (p. 6): *no* lawful bankruptcy proceeding can be the basis of a state-law tort claim.

Nor does plaintiff respond adequately to the policy point made at pages 16-17 of defendants' previous brief: that claims for "inducing breach",

where the breach consists of facilitating a bankruptcy, will chill bankruptcy filings and thus thwart the purpose of the bankruptcy laws. This point was expressed by the court in *Casden v. Burns*, in language quoted at page 22 of our previous brief: the threat of a "potential future claim" based on a bankruptcy filing will "interfere sufficiently with the bankruptcy process to trigger preemption." 504 F. Supp. 2d at 281. Plaintiff's answer is essentially to describe defendants' alleged conduct in inflammatory terms, while struggling, as usual, to avoid the word "bankruptcy": defendants, plaintiff says, were "frustrating plaintiff's contractual security rights" – but nothing frustrated those rights unless it was the Borrowers' bankruptcies. Pl. Br. at 31.

In sum, plaintiff has failed to refute defendants' showing that this case is preempted by the federal Bankruptcy Code.

IV.

PLAINTIFF FAILS TO SHOW THAT THE NOERR-PENNINGTON DOCTRINE IS INAPPLICABLE

On the *Noerr-Pennington* issue, plaintiff's main argument is a repetition of the incorrect assertion that this case is not based on the bankruptcy filings: "Plaintiff does not claim that defendants are liable for tortious interference because they caused Borrowers to file for bankruptcy." Pl. Br. at 35. But that is exactly what plaintiff does claim. The only acts of tortious interference alleged are a loan that enabled Mezz Borrower to pay a bankruptcy lawyer and a transfer to

Mortgage Borrower that caused it not to be a Single Asset Real Estate entity within the meaning of the Bankruptcy Code. These bankruptcy impacts were not incidental by-products of the transactions in suit. They were, according to plaintiff's own allegations, the whole point of the two transactions. And the only damage plaintiff claims is the delay in enforcement of its alleged contractual rights that resulted from the bankruptcy stay.

For that reason, this case is completely different from the ones cited in the *Noerr-Pennington* section of plaintiff's brief. *See* Pl. Br. at 35-36. *Am. Mfg. Servs., Inc. v. Official Comm. of Unsecured Creditors of Match Elec. Grp., Inc.*, 2006 WL 839550 (N.D.N.Y. March 28, 2006) involved a lengthy course of conduct, much of which had nothing to do with the bankruptcy case. In *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1076-79 (W.D. Wis. 2012), the court *upheld* a *Noerr-Pennington* defense to the extent the claim was based on the bringing of litigation; it rejected the defense only to the extent it related to inducing the breach of a contract by which the plaintiff was to purchase computer chipsets, a claim unrelated to the lawsuits. The court in *eBay, Inc. v. Bidder's Edge Inc.*, 2000 WL 1863564 at *2 (N.D. Cal. July 25, 2000) merely observed that while some of the conduct alleged might be protected under *Noerr-Pennington*, other conduct clearly was not. The other cases plaintiff relies on in this part of its brief are even

farther off point: none of the claims upheld in those cases were based on the filing of litigation, or on any other attempt to influence governmental bodies.

Plaintiff argues in the alternative that *Noerr-Pennington* does not apply because the bankruptcy cases were "shams". Pl. Br. at 38. This argument is completely meritless. If the bankruptcies were shams, plaintiff should have asked the Bankruptcy Court to dismiss them; but it withdrew its motion to dismiss in one of the cases, and made no such motion in the other. *See* Def. Main Br. at 9.

The bankruptcies were not only bona fide, they were successful in achieving the purpose of chapter 11 bankruptcy proceedings: the confirmation by the Bankruptcy Court of a plan of reorganization. This result was obtained with plaintiff's support, as explained in our previous brief. Def. Main Br. at 9-10. It takes considerable gall for plaintiff to attack as "shams" cases in which a court awarded the relief sought at plaintiff's own request. Unsurprisingly, plaintiff cites no case in which a *successful* court proceeding was held to be a sham for *Noerr-Pennington* purposes.

Plaintiff says that Mezz Borrower's bankruptcy was a sham because "the purpose of filing for bankruptcy was to prevent plaintiff from exercising its contractual right to conduct the UCC Sale." Pl. Br. at 38. Of course, bankruptcy by its nature prevents the enforcement of contractual rights. That is what it is for – to protect debtors who are unable to perform their obligations to their creditors. But

plaintiff's choice of words is revealing, because it echoes the words used at the beginning of plaintiff's brief to describe the basis for its lawsuit: "defendants' actions were meant to…prevent plaintiff from exercising its contractual foreclosure rights." Pl. Br. at 1. Thus, plaintiff uses the words "filing for bankruptcy" and "defendants' actions" interchangeably. Could there be a clearer illustration that the bankruptcy filings are the actions for which plaintiff is suing defendants?

V.

PLAINTIFF HAS ASSERTED NO VALID BASIS FOR PIERCING THE CORPORATE VEILS

This is simply not a veil-piercing case, and nothing in plaintiff's brief shows that it is.

Plaintiff relies on seven factual assertions, listed at pages 41-42 of its brief. Four of them (the third, fourth, fifth and sixth on the list) have nothing to do with the veil-piercing issue: they simply give plaintiff's version of one of the transactions in suit, the transfer of apartments to Mortgage Borrower for the purpose of facilitating that corporation's bankruptcy filing. Thus, plaintiff demonstrates, yet again, that this case is all about the bankruptcies, but it demonstrates nothing that would justify veil-piercing.

Plaintiff's remaining assertions are that members of the Pilevsky family "owned and dominated" the corporate defendants; that one entity in the

corporate group was caused to enter a single transaction for the benefit of another[2]; and that the same lawyer represented two affiliated, Pilevsky-owned corporations. (Plaintiff also says that the lawyer represented Mortgage Borrower and its principal – an irrelevant assertion, because plaintiff is not trying to pierce Mortgage Borrower's corporate veil.) These or similar facts could be alleged in virtually every lawsuit involving a group of affiliated corporations. Plaintiff has not come close to meeting the requirements of veil-piercing established by the case law. *See* Def. Main Br. at 29-30. Specifically, *Cortland Street Recovery Corp. v. Bonderman*, 31 N.Y.3d 30 (2018) is a vastly different case, for the reasons we previously explained. Def. Main Br. at 31.

Plaintiff's claims against the individual defendants should be dismissed.

[2] This assertion overstates the evidence on which plaintiff relies to support it. *See* R1177, ¶ 7.

CONCLUSION

For the reasons given above and in defendants' earlier brief, the order appealed from should be reversed and defendants' motion for summary judgment granted.

Dated: October 19, 2018

Respectfully submitted,

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