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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.

BRIEF OF PLAINTIFF-RESPONDENT

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PRELIMINARY STATEMENT

By this action, plaintiff-respondent seeks to hold defendants-appellants responsible for tortiously interfering with its contracts with two non-party borrowers. Plaintiff lent BH Sutton Mezz LLC ("Mezz Borrower") and Sutton 58 Owner LLC ("Mortgage Borrower"; together, "Borrowers") nearly $150 million in connection with Borrowers' planned development of a residential tower on Sutton Place. As is commonplace, the relevant loan agreements had multiple covenants requiring Borrowers to operate as special purposes entities. Shortly after the loans matured and Borrowers defaulted, defendants caused Borrowers to breach these loan covenants in a number of ways, including by making a prohibited loan to Mezz Borrower, by transferring several low-value Long Island apartments to Mortgage Borrower, and by becoming part of Borrowers' ownership structure. Hoping to capitalize on Borrowers' desperate straits, defendants' actions were meant to – and, for a significant period, did – prevent plaintiff from exercising its contractual foreclosure rights, causing it to suffer approximately $100 million or more in damages as to which plaintiff now seeks recovery against defendants.

With discovery far from completed, defendants moved for summary judgment dismissing plaintiff's tortious interference (and related piercing claims) based primarily on the *Noerr-Pennington* and federal preemption doctrines. The IAS Court (Kornreich, J.) denied their motion from the Bench. Defendants now

bring this appeal based on two insupportable assertions: (1) that contracts may be breached with impunity in order to "facilitate[] a bankruptcy filing" (Defendants' Brief ("Def. Br.") at 2); and (2) that plaintiff "challenge[s] . . . the validity or legitimacy of the Borrowers' bankruptcy filings." (*Id.* at 14). But defendants cite nothing to support the first proposition, and the complaint itself – which seeks redress only for defendants' pre-bankruptcy misconduct – expressly negates the second.

Defendants attempt to use these meritless contentions to prop up their principal appellate argument that plaintiffs' claims are preempted by the Bankruptcy Code. But contrary to defendants' repeated assertions, plaintiff's state law tort claims are *not* based on filings or alleged wrongful conduct in Borrowers' bankruptcy proceedings. Rather, these claims are based on defendants' tortious interference that took place prior to and outside of those proceedings. In denying defendants' motion, Supreme Court repeatedly emphasized this critical distinction, which is fatal to defendants' preemption argument. *See, e.g.,* (R. 23-24) (this case "is not based upon the bankruptcy [proceedings]. It's based upon various clauses in the contract that were breached.").[1] Since plaintiff's claims require the Court to apply only state law, and do not rely on anything that occurred during the bankruptcy proceedings, they should not be preempted.

[1] Citations to the Record on Appeal are denominated as "(R. __)."

Defendants' "policy argument" – that allowing plaintiff's claims to go forward would "seriously disrupt" or even "thwart[]" the purpose of the federal bankruptcy laws (Def. Br. at 2-3) – fails for at least three reasons. First, defendants cite nothing to support their blithe assertion that "many, probably most, bankruptcies entail breaches of contract" (Def. Br. at 1), much less the conclusion they would bootstrap from this unsupported assertion: that there can be no remedy for their willful interference with plaintiff's contracts because it "facilitated a bankruptcy." (Def. Br. at 2). Second, the facts here demonstrate much more than "facilitation"; rather, it is undisputed that defendants executed a calculated, multi-stage scheme to cause numerous contractual breaches in order to obtain, for several hundred thousand dollars, a stake in real property valued at approximately $185 million at the time of their wrongdoing. Third, and closely related, the real policy consideration at stake here is precisely the one identified by the IAS Court: namely, rendering unenforceable work-a-day loan covenants that courts see "all the time" (R. 10) "would undermine the way business is dealt with in New York City when it comes to lenders and developers" (R. 21), and "upend the way contracts are written here . . . and upend the whole development industry." (R. 15). No case or policy supports upsetting established commercial lending practices so that these defendants can avoid answering for their tortious machinations.

Defendants' argument that the *Noerr-Pennington* doctrine requires dismissal fails for at least two reasons. First, *Noerr-Pennington* is inapplicable because plaintiff's claims are not based on, and do not interfere with, Borrowers' invocation of the judicial process. Rather, the claims seek recovery for defendants' tortious interference with loan agreements that occurred prior to and independent of Borrowers' bankruptcy filings. On this score, Justice Kornreich correctly (and repeatedly) stressed that the loan agreements did "not restrict [Borrowers'] filing for bankruptcy." (R. 21). Second, *Noerr-Pennington* protects only *legitimate* invocations of the judicial process. Here, however, the facts available after only limited discovery fully support the inference that the bankruptcy proceedings were "mere shams" intended solely to frustrate plaintiff's ability to exercise its contractual remedies.

Finally, the IAS court was unquestionably correct in denying summary dismissal of plaintiff's piercing claim against the individual defendants. Plaintiff not only sufficiently alleged these claims, but provided ample evidentiary support for them, even though depositions had not yet even begun when defendants filed their motion.

For all of these reasons, the IAS Court's decision should be affirmed in its entirety.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does the federal Bankruptcy Code preempt a non-debtor's state law claims against other non-debtors for tortiously causing third parties to breach loan covenants where those claims "stem from breaches of [contractual] clauses, not from the bankruptcy [proceedings]" (R. 20), and where such claims had no effect on the administration of any bankruptcy estate?

Answer: Supreme Court held that "[t]here's no federal preemption here." (R. 18).

2. Does the *Noerr-Pennington* doctrine bar claims based on defendants' pre-petition tortious interference with loan agreements that did "not restrict filing for bankruptcy" and where plaintiff's claims are "not based upon the bankruptcy"? (R. 21; R. 23).

Answer: The lower court found that *Noerr-Pennington* did not bar plaintiff's claims.

3. Where depositions were not yet underway and the complaint contained "plenty of facts" that "on their face make out a valid [piercing] claim" against individual defendants who used the defendant entities they owned and dominated as "one big enterprise" (R. 27; R. 32), should those claims have been dismissed at the summary judgment stage?

Answer: Finding that "whether Plaintiff can ultimately prove its allegations is not a consideration," the IAS Court denied the motion. (R. 32).

COUNTERSTATEMENT OF FACTS

A. The Project and the Loan Agreements

On June 19, 2015, plaintiff loaned Mortgage Borrower and its sole member, Mezz Borrower, the aggregate principal amount of $147,250,000 to develop a tower at Sutton Place and 58th Street in Manhattan (the "Project"). BH Sutton Owner LLC ("Sutton Parent") owned 100% of the membership interests in Mezz Borrower. (R. 798 at ¶ 21). These loans were documented in a routine mezzanine loan structure, consisting of: (1) a Mezzanine Loan Agreement with Mezz Borrower in the amount of $20,000,000; (2) an Acquisition Loan Agreement with Mortgage Borrower in the amount of $125,850,000; and (3) a Building Loan Agreement with Mortgage Borrower in the amount of $1,400,000, all dated as of June 19, 2015 (collectively, the "Loan Agreements"). (R. 818-80; R. 881-939; R. 940-1014).

Article 4 of the Loan Agreements contains Borrowers' loan covenants, a host of which are central to plaintiff's tortious interference claims. None of the covenants prohibits a potential bankruptcy filing (and only one of the breached covenants even mentions the word "bankruptcy"). Rather, these standard-issue covenants protected plaintiff by making clear that Borrowers' only permitted

purpose was to develop the Project. Because these covenants were so crucial to the Loan Agreements, and so many of them were violated as a result of defendants' tortious interference, we summarize them here, at some length:

- Section 4.16 of the Mezzanine Loan Agreement and the Acquisition Loan Agreement states: "Borrower shall not, directly or indirectly create, incur or assume any indebtedness other than (i) the Building Loan and (ii) unsecured trade payables incurred in the ordinary course of business relating to the ownership and operation of the Property which (A) are not evidenced by a note, (B) do not exceed, at any time, a maximum aggregate amount of $50,000 and (C) are paid within thirty (30) days of the date incurred (collectively, 'Permitted Indebtedness')." (R. 840; R. 902); *see also* (R. 962) (nearly identical provision).

- Section 4.10 and Schedule 3(xv) of each Loan Agreement states that Borrower "will pay its own liabilities . . . out of its own funds and assets." (R. 839; R. 875; R. 901; R. 934; R. 961; R. 1013).

- Section 4.11 of the Acquisition Loan Agreement and Building Loan Agreement states: "Borrower shall not enter into any line of business other than as owner and developer of the Property. Borrower shall not purchase or own any real property other than the Property and the Contract Property [a parcel adjacent to the Property]." (R. 901; R. 961).

- Section 4.10 and Schedule 3(i)-(iii) of the Acquisition Loan Agreement and Building Loan Agreement states, in part, that Mortgage Borrower: (i) "will be organized solely for the purpose of . . . owning the Property"; (ii) "will not engage in any business unrelated to . . . the ownership of the Property"; and (iii) "will not have any assets other than those related to the Property." (R. 901; R. 933; R. 961; R. 1012).

- Section 4.20 of the Acquisition Loan Agreement and Building Loan Agreement states that Mortgage Borrower "shall not . . . engage in any business activity not related to the ownership and operation of the [Project]." (R. 902; R. 962).

- Section 4.10 and Schedule 3(i)-(iii) of the Mezzanine Loan Agreement states, in relevant part, that Mezz Borrower: (i) "will be organized solely for the purpose of . . . acting as a . . . member of the limited liability

company that owns the Property"; (ii) "will not engage in any business unrelated to . . . the ownership of the Property"; and (iii) "will not have any assets other than those related to the Property or its . . . member interest in the . . . limited liability company that owns the Property." (R. 839; R. 874).

- Section 4.18 of each Loan Agreement states: "Borrower shall not directly or indirectly make, suffer or permit the occurrence of any Transfer without the prior written consent of Lender, to be granted or withheld in Lender's sole discretion." A "Transfer," which is also prohibited by Section 7.1(d) of each Loan Agreement, is defined in Section 1.1.2 to mean "(i) any sale, conveyance, transfer, assignment . . . in or affecting (x) all or part of the Property (including any legal or direct or indirect interest therein), (y) any direct or indirect interest in Borrower or (z) all or any part of the Collateral or (ii) any change of Control of Borrower." (R. 828; R. 841; R. 890; R. 902; R. 951; R. 962).

- Section 4.10 and Schedule 3(xxix) of each Loan Agreement states that Borrower "will consider the interests of its creditors in connection with all corporate, partnership, or limited liability actions, as applicable." (R. 839; R. 876; R. 901; R. 935; R. 961; R. 1014).

- Section 4.10 of each Loan Agreement states that Borrower "shall at all times be a Special Purpose Bankruptcy Remote Entity." Pursuant to Schedule 3 of each Loan Agreement, this meant that Borrowers would each remain as single purpose entities devoted solely to the Project (not that bankruptcy filings were prohibited). (R. 839; R. 874; R. 901; R. 933; R. 961; R. 1012).[2]

Mezz Borrower and plaintiff also signed a Pledge and Security Agreement (the "Pledge Agreement") in which Mezz Borrower pledged, as collateral for the Mezzanine Loan, its 100% membership interest in Mortgage Borrower to plaintiff.

[2] Separately, Section 7.1(j) of each of the Loan Agreements makes bankruptcy filings "Events of Default," but does not prohibit them. (R. 853-55; R. 911-13; R. 971-73).

(R. 1015-25). Mezz Borrower and plaintiff agreed that, upon a maturity default, plaintiff could sell that 100% membership interest at a UCC foreclosure sale. (R. 801). The Pledge Agreement thus provided crucial protection to plaintiff; in the event of a default, plaintiff could secure the collateral for its nearly $150 million in loans quickly, and without protracted mortgage foreclosure litigation.

B. The Maturity Defaults and the Preliminary Injunction Proceeding

The loans matured on January 19, 2016. When Borrowers did not pay, plaintiff issued notices of default and sought to conduct a secured party sale (the "UCC Sale") of Mezz Borrower's membership interest in Mortgage Borrower pursuant to the Pledge Agreement. (R. 1026-29; R. 1030-33; R. 1034-50). On February 17, 2016, Borrowers filed a motion for a preliminary injunction to prevent the UCC Sale. On February 23, 2016, Justice O. Peter Sherwood denied Borrowers' motion for a preliminary injunction, holding that they were unlikely to succeed on the merits, that they would not be irreparably harmed by the UCC Sale, and that the equities favored allowing plaintiff to enforce the Pledge Agreement. (R. 1051-53). Justice Sherwood ordered that the UCC Sale could proceed on February 29, 2016. (*Id.*). The day before Justice Sherwood's ruling, Cushman & Wakefield had appraised the Project's development site at 428-432 East 58th Street (the "Property") at an "as is" value of $180-85 million. (R. 1055-56).

C. The Conspiracy Begins: Defendants' General Counsel Is "Hired" by Mortgage Borrower and Its Principal

Immediately following the denial of Borrowers' motion for a preliminary injunction, one of their principals, Joseph Beninati, began conspiring with defendants to prevent the UCC Sale. On February 24, 2016, Mr. Beninati executed an engagement letter with Robyn Tuerk to provide legal services to him and to Mortgage Borrower in connection with the Property. (R. 1057-58). Ms. Tuerk is the Corporate General Counsel of Philips International, a company founded and led by defendant Philip Pilevsky. (R. 1080-81; R. 1350-51). However, Ms. Tuerk did not sign the engagement letter as the General Counsel of Philips International. Rather, she signed in her own name, on her own letterhead. Aside from the engagement letter, defendants have not provided any substantive communications between Ms. Tuerk and Mr. Beninati.

Immediately after Ms. Tuerk began to communicate with Mr. Beninati (under the purported cloak of privilege), the predicate acts of defendants' tortious interference began.

D. The Tortious Interference Begins to Unfold: the Pilevsky Loan

In direct violation of its loan covenants, on February 26, 2016 – two days after Mr. Beninati "retained" Ms. Tuerk – Mezz Borrower borrowed $50,000 (the "Pilevsky Loan") from defendant Prime Alliance Group Ltd. ("Prime Alliance"),

and used the loan proceeds to pay a retainer to Mezz Borrower's bankruptcy counsel, LaMonica Herbst & Maniscalco, LLP ("LH&M"). (R. 1078 at ¶ 3; R. 1176 at ¶ 3). That same day – the last business day before the scheduled UCC Sale – Mezz Borrower filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code (the "Mezz Borrower Bankruptcy") with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). (R. 1071-74). Philip Pilevsky, the president and sole shareholder of Prime Alliance, swore in a declaration:

> The Retainer was wired from Prime Alliance to LH&M on February 26, 2016 so that the [Mezz Borrower] could file for reorganization under Chapter 11 of the Bankruptcy Code. There is no written agreement to the loan and the loan does not bear interest. . . . Jordan Pilevsky is my nephew and a partner at LH&M. Prime Alliance advanced the Retainer to LH&M at the request of Michael Pilevsky, one of the principals of Sutton Opportunity LLC. . . . Michael Pilevsky is one of my sons.

(R. 1176-77 at ¶¶ 3, 5).

Document discovery has not shown that Prime Alliance received any consideration from defendant Sutton Opportunity LLC ("Sutton Opportunity") or Michael Pilevsky for making a loan at their behest. According to an affidavit filed by Mezz Borrower's president on the first day of Mezz Borrower's bankruptcy proceeding, the purpose of the filing was to prevent the UCC Sale planned by plaintiff and to preserve Mezz Borrower's equity in the Property. (R. 1077 at ¶ 18).

E. The Tortious Interference Continues with the Corporate Shell Game and the Pilevsky Apartments Transfer

On February 25, 2016 – one day after Ms. Tuerk was "retained" by Mr. Beninati – Sutton Opportunity was incorporated in Delaware. (R. 1341). Michael Pilevsky and his brother, Seth Pilevsky, own Sutton Opportunity. (R. 1180 at ¶ 7). Then, beginning on February 26, 2016, three one-bedroom cooperative apartments located in Lynbrook, New York (the "Pilevsky Apartments") were transferred in a corporate shell game, ultimately to Mortgage Borrower (the "Pilevsky Apartments Transfer").

Based on discovery to date, it appears that, prior to February 26, 2016, the Pilevsky Apartments were owned by Lynbrook Apartment Associates LLC ("Lynbrook Associates"), whose general partner is affiliated with Philip Pilevsky's entity, Philips International. (R. 1092 at ¶ 1.1; R. 1140; R. 1332-33). Then, on or about February 26, 2016, Lynbrook Associates apparently transferred the apartments to Sutton Opportunity. (R. 1059) (stating in the first Recital that Sutton Opportunity is "owner and holder" of the shares and proprietary lease appurtenant to the Lynbrook Apartments). Lynbrook Associates was represented in the transaction by Ms. Tuerk. (R. 1092 at ¶ 1.4). Next, in direct violation of Mortgage Borrower's loan covenants, Sutton Opportunity obtained a 49% ownership stake in Sutton Parent in exchange for contributing to Mortgage Borrower the Pilevsky Apartments and cash, including $150,000 to pay LH&M a retainer to file a

bankruptcy petition for Mortgage Borrower. (R. 1189-90; R. 1198-1200). Thus, in a corporate shell game, and with the help of Pilevsky-controlled entities and personnel, Sutton Opportunity transferred the Pilevsky Apartments to *Mortgage Borrower*, rather than *Sutton Parent*, even though Sutton Parent paid for them (by providing Sutton Opportunity with 49% of its shares). (R. 1085-90; R. 1091-1125).

Ms. Tuerk was actively involved in executing the Pilevsky Apartments Transfer while simultaneously wearing the hats of counsel to Philips International, Lynbrook Associates, Mortgage Borrower, and Mr. Beninati. On March 21, 2016, Ms. Tuerk wrote employees at the manager of the Pilevsky Apartments: "We will need new leases and stock certificates for the Apartments" and that contractual documents "should reflect an entity called '**<u>Sutton 58 Owner LLC</u>**' " – *i.e.*, Mortgage Borrower – "as the Lessee and Certificate Holder." (R. 1080) (emphasis in original). Ms. Tuerk also wrote: "We do need to close the transaction this week and would be happy to assume any charges to expedite these documents being prepared." (*Id.*). The next day she wrote to the manager's employees, "Do you think this week is feasible? Again, we will absorb any cost to expedite." (*Id.*). On March 24, she reiterated that "[t]he intent is to have [Mortgage Borrower] be a holder of unsold shares" and wrote that she was flexible on the contractual

language "as long as the result is the same." (R. 1082). The Pilevsky Apartment Transfer was completed less than one week later, on March 30. (R. 1085-90).

On April 6, 2016, Mortgage Borrower filed a voluntary petition for bankruptcy (the "Mortgage Borrower Bankruptcy"; together with the Mezz Borrower Bankruptcy, the "Bankruptcy Cases"). (R. 1126-29). Enabled by defendants' tortious interference with Mortgage Borrower's loan covenants, Mr. Beninati swore in the bankruptcy petition that Mortgage Borrower was not a "Single Asset Real Estate" debtor under the Bankruptcy Code. (R. 1127). In a motion Mortgage Borrower filed along with the petition, it represented that it owned assets in addition to the Property – *i.e.*, the Pilevsky Apartments. (R. 1143).

During a sworn examination at a hearing in the Bankruptcy Cases, Mr. Beninati was unable to explain why title to the Pilevsky Apartments had been transferred to Mortgage Borrower rather than to Sutton Parent, which had paid for them. (R. 1201-05). When asked if he could "offer any reason why the cooperative apartments would have been contributed to" Mortgage Borrower, Mr. Beninati replied, "I don't even – no, I don't have the capacity to answer the question." (R. 1204). Mr. Beninati testified that he collected "a little under $3,000 a month in rent" and paid "approximately $2,400 a month" in maintenance and taxes for all three Pilevsky Apartments. (R. 1186; R. 1196). (This monthly net income was not enough to pay even a single day's interest on the loans.) Mr.

Beninati did not testify that the Pilevsky Apartments had any connection with the Project. Thus, through his testimony, Mr. Beninati essentially conceded that: (a) the Pilevsky Apartments were transferred to Mortgage Borrower in violation of the Loan Agreements, since they had nothing to do with the Project; and (b) there was no legitimate business motive for the transfer.

F. Borrowers Treat the Bankruptcy Cases as a Sham, and Use Them for Delay

On March 10, 2016, plaintiff moved to dismiss Mezz Borrower's bankruptcy case or, in the alternative, to lift the automatic stay in order to pursue the UCC Sale. Plaintiff's primary argument was that Mezz Borrower did not have any bona fide creditors – because Mezz Borrower was just a holding company, not an operating business – and that the bankruptcy was merely a two-party dispute that Mezz Borrower had moved from State Court to the Bankruptcy Court to take advantage of the automatic stay. (R. 1151-52; R. 1155; R. 1163-67).

On April 6, 2016, the day before the motion was to be heard, Mortgage Borrower filed for bankruptcy. The filing of Mortgage Borrower's bankruptcy was timed to disrupt plaintiff's motion to dismiss Mezz Borrower's bankruptcy and delay the disposition of the Bankruptcy Cases. In particular, because Mortgage Borrower actually did have creditors (unlike Mezz Borrower), Mortgage Borrower's filing undercut plaintiff's argument that the bankruptcy should be dismissed because it was merely a two-party dispute. It was thus no surprise when,

at the April 7 hearing, the Bankruptcy Court stated that it would be "premature" at that time for the Court to "buy in" to any "narrative about what's going on underlying the project and who did what to whom and how it should be characterized." (R. 1345-46).

Another effort to delay occurred when Borrowers filed an adversary proceeding complaint (the "Adversary Proceeding") alleging twenty-six claims for relief – including claims of unconscionability, breach of contract, breach of fiduciary duty, breach of the duty of loyalty, breach of the covenant of good faith and fair dealing, equitable subordination, fraudulent conveyance, and criminal usury (with respect only to the $1.4 million Building Loan Agreement) – and seeking more than $100 million in damages. (R. 1209-1331). Shortly before the trial, Borrowers abandoned half of their claims. *In re BH Sutton Mezz LLC*, 2016 WL 8352445, at *1 (Bankr. S.D.N.Y. Dec. 1, 2016).

In November 2016, the Bankruptcy Court held a trial in the Adversary Proceeding on the thirteen remaining claims, after which it issued a decision on December 1, 2016. In what was for all intents and purposes a complete victory for plaintiff, the court "conclude[d] that [Borrowers] . . . have failed to establish a basis for relief on twelve of the thirteen counts. The remaining count is criminal usury, where . . . one of the loans at issue had a rate in excess of the New York statute." (*Id.* at *2). The court was still willing to allow interest on the Building

Loan Agreement at a non-usurious rate, but rather than delay matters more while that rate would be computed, plaintiff waived its entire claim for interest on the Building Loan Agreement (less than $1 million). (R. 1343 at ¶ 2; R. 945; R. 1352-58). The only difference this made was that plaintiff's allowed claim was reduced by less than 0.5% to $216,444,376. (R. 1343). Borrowers still had no way of paying off the loans or preventing the sale of the Property, so the tiny reduction in claim amount made no difference.

G. The Liquidation Plan and the Auction Sale

On November 22, 2016, plaintiff and the Committee of Unsecured Creditors filed a Joint Plan of Liquidation (the "Joint Plan"). On December 13, the Property was sold at an auction sale following competitive bidding. Plaintiff's winning credit bid was $86 million**, some $100 million below the appraised value of the Property at the time the UCC Sale was originally scheduled in February 2016**. (R. 1348 at ¶ 5). That bid was ratified, and the Joint Plan was confirmed, as modified and supplemented, in a January 18, 2017 Confirmation Order. (R. 1388).

The Pilevsky Loan and the Pilevsky Apartments Transfer (collectively, the "Pilevsky Scheme") caused Borrowers to breach the Loan Agreements and prevented plaintiff from exercising its contractual remedies for Borrowers' maturity defaults. This contractual right to a quick sale was important to minimize plaintiff's exposure to rezoning efforts and the volatile New York real estate

market.[3] The Pilevsky Scheme has required plaintiff to spend substantial attorneys' fees and costs, and the Project – rather than being put up for auction in February 2016 – was left undeveloped and at a standstill in a falling real estate market. The value of the Project also dropped because a community group and politicians zealously lobbied to rezone the area where the Project is located and to stop its construction. These efforts achieved their objective. On November 30, 2017, the City amended the zoning applicable to the Property, and, on the same day, the Department of Buildings issued a stop-work order. As a result, work on the Project was indefinitely suspended. (R. 1340).

H. <u>This Action</u>

On September 16, 2016, plaintiff commenced this action. On November 21, 2016, defendants filed a motion to dismiss, claiming that plaintiff's damages were unrecoverable. (Dkt. No. 13). On March 16, 2017, with the motion fully briefed and awaiting argument, defendants changed counsel for the first time. (Dkt. No. 24). Shortly thereafter, new counsel requested that plaintiff stipulate to

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[3] Since January 2016, numerous articles have commented on the declining prices and troubles in the market for luxury high-rise apartments in Manhattan and developments like the Project. *See, e.g.,* (R. 1334) ("These projects are in limbo just as the ultraluxury market weakens and there are warnings of a coming downturn across the board."); (R. 1206) ("New York City's ultraluxury real estate frenzy . . . has finally come to an end"); (R. 1148) (noting "slowing luxury market").

defendants' withdrawal of the pending motion to dismiss and to permit them to bring a second such motion on the same grounds of their subsequent summary judgment motion, the denial of which is the subject of this appeal. Citing CPLR 3211(e)'s "single motion to dismiss" rule, plaintiff's counsel declined. In a call with the IAS Court on March 24, 2017, after hearing defendants' *Noerr-Pennington* and preemption theories, the court discouraged defendants from attempting to file the proposed motion to dismiss, and defendants accepted that guidance at the time. After oral argument, on April 25, 2017, Justice Kornreich denied defendants' motion to dismiss from the Bench. (Dkt. No. 28).

Discovery in the case is underway but incomplete. Plaintiff requested that defendants produce documents and communications concerning, among other things, the motives, purposes, and goals of the Pilevsky Apartments Transfer; the consideration paid for the steps in that transfer; the negotiation, drafting, and terms of the Pilevsky Loan; the formation of Sutton Opportunity; the relationship between defendants and the principals of Borrowers (including Mr. Beninati); and the Bankruptcy Cases. (R. 1359-66). At the time defendants filed their motion for summary judgment, document discovery was ongoing and no depositions had occurred.

I. **The Decision Below**

On October 23, 2017, defendants moved for summary judgment, asserting that plaintiff's claims should be dismissed: (i) under the *Noerr-Pennington* doctrine; (ii) as preempted by the Bankruptcy Code; (iii) because they are based on an unenforceable restriction on filing for bankruptcy; and (iv) as against the individual defendants, because there is no basis to pierce the corporate veil. On March 6, 2018, after full briefing and argument, the IAS Court denied defendants' motion from the Bench.

After summarizing the key facts of the case, Justice Kornreich repeatedly stated that adopting defendants' arguments would "upend the way contracts are written here in New York City and upend the whole [land] development industry." (R. 15); s*ee also* (R. 21) (defendants' position "would undermine the way business is dealt with in New York City when it comes to lenders and developers" and "upend[] all of these contracts and the way business has been done for years"). The IAS Court further observed that the Loan Agreements were "similar to loan papers I see all the time," in which a lender provides a loan to "an entity which is really a single purpose entity, and the only thing the entity has is the land and is going to develop this land." (R. 10). Specifically, the lower court recognized that it was "important" to plaintiff that the Mortgage Borrower remain a special purpose entity that "would not enter into any other business" aside from the Project

and that Mezz Borrower was "organized solely for the purpose of acting as member of the limited liability company that owns the property." (R. 11).

The IAS Court then soundly rejected defendants' (then-primary) *Noerr-Pennington* argument, finding that the case is "not based upon the bankruptcy" of Borrowers but, rather, is "based upon various clauses in the contract[s] that were breached." (R. 23-24). Justice Kornreich further expressly found that the Loan Agreements did "not restrict filing for bankruptcy," since "[n]owhere in that contract does it say you cannot file for bankruptcy." (R. 21); *see also* (R. 15-16) (an event of default "does not stop [Borrowers] from filing for bankruptcy"). Moreover, even "ignor[ing] the one or two bankruptcy clauses [stating] that bankruptcy would [cause] a default . . . there are plenty of clauses in that contract that were breached" (R. 23), including breaches of clauses "that don't say anything about bankruptcy." (R. 22).

The lower court rejected defendants' preemption arguments for similar reasons, recognizing that Borrowers' "many breaches" of the Loan Agreements form "the crux of the complaint." (R. 14). Justice Kornreich repeatedly stressed that these contractual breaches were distinct from anything concerning the Bankruptcy Cases. *See, e.g.,* (R. 15) ("if you look at the contract itself, it has nothing to do with the bankruptcy"); (R. 18) ("I don't have to rule about the bankruptcy. This case does not involve the bankruptcy itself. It involves separate

contractual agreements."); (R. 20) (plaintiff's claims "stem from breaches of these clauses, not from the bankruptcy"); (R. 28) ("We're not dealing with the bankruptcy here. . . . We're dealing with a separate contract. Separate breaches. Not the bankruptcy."). In light of the foregoing, Justice Kornreich held that "[t]here's no federal preemption here." (R. 18).

With respect to the piercing claim against the individual defendants, the lower court found that the complaint contained "plenty of facts" that "on their face make out a valid claim." (R. 32). The court stated there is "plenty in the complaint that talks about the interaction between all of the different entities and the Pilevskys" and cited as "directly on point" *Cortlandt Street Recovery Corp. v. Bonderman,* 31 N.Y.3d 30 (2018), in which the Court of Appeals recently declined to dismiss a piercing claim. (R. 24). The IAS Court further observed: that defendants' "different entities were acting on behalf of each other" and "[i]t was like one big piggy bank here" (R. 19); that the Prime Alliance Loan and the Pilevsky Apartment Transfer "was all coming out of the same pocket" (R. 25); that a lawyer for one of Philip Pilevsky's entities "was doing all of the legal work for Michael Pilevsky and Seth Pilevsky and Sutton Opportunity" (R. 27); and that "[i]t all seemed to be . . . one big enterprise." (*Id.*). Moreover, defendants "clearly knew about and were involved in" the contractual breaches and, "on this record, there is a good chance [defendants] aided and abetted in these breaches and were

involved in tortious interference." (R. 18-19). Accordingly, Justice Kornreich denied summary dismissal of the piercing claims.

In the wake of the lower court's decision, defendants changed counsel again and this appeal followed. Defendants now make federal preemption, rather than *Noerr-Pennington*, their primary argument, and abandon altogether their previous claim that the Loan Agreements are unenforceable. Although discovery is incomplete and the motion preceded even the first deposition, defendants continue to assert that the well-pleaded and amply supported piercing claims are ripe for dismissal. As we now demonstrate, the appeal is meritless, and the decision below should therefore be affirmed in its entirety.

ARGUMENT

"The drastic remedy of summary judgment, which deprives a party of his day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable.' " *De Paris v. Women's Nat'l Republican Club, Inc.*, 148 A.D.3d 401, 403-04 (1st Dep't 2017). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986) (internal citations

omitted). Moreover, "[s]ummary judgment should not be granted where there are likely to be defenses that depend upon knowledge in the possession of the party moving for summary judgment which may be disclosed by discovery." *Aubrey Equities, Inc. v. SMZH 73rd Assocs.*, 212 A.D.2d 397, 398 (1st Dep't 1995); *see also Belziti v. Langford,* 105 A.D.3d 649, 649 (1st Dep't 2013) (same). Under these familiar standards, Supreme Court's denial of defendants' motion should be affirmed.

Point I

THE BANKRUPTCY CODE DOES NOT PREEMPT PLAINTIFF'S CLAIMS

A. The Governing Principles

The IAS Court correctly ruled that no theory of preemption bars plaintiff's claims. While the Supremacy Clause gives Congress the power to preempt state law, *Arizona v. United States*, 567 U.S. 387, 399 (2012), courts "start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Here, defendants do not argue for "express" preemption – *i.e.*, that the "manifest purpose" of the Bankruptcy Code is to preempt plaintiff's state law claims. They only argue for "implied" preemption, of which there are two types: (i) "field preemption," where "the depth and breadth of a congressional scheme [] occupies the legislative field";

and (ii) "conflict preemption," which arises "by implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citations omitted). "It is firmly settled that a party contending that a federal law preempts state law has the burden of establishing preemption." *Stratton v. Wallace*, 2016 WL 3552147, at *4 (W.D.N.Y. Apr. 5, 2016).

Defendants cannot carry this burden because plaintiff's claims involve state law, not bankruptcy law. Since the Court need not apply any principles of bankruptcy law to determine defendants' liability or plaintiff's damages, plaintiff's claims present no "conflict" with bankruptcy law. Nor does bankruptcy law "thoroughly occup[y] a legislative field" (Def. Br. at 17), where one non-debtor alleges only state law claims for tortious interference with contract against other non-debtors based on conduct that occurred prior to the breaching party's bankruptcy filing.[4] Accordingly, neither implied preemption doctrine is applicable. *See, e.g., Davis v. Yageo Corp.*, 481 F.3d 661, 679 (9th Cir. 2007) (no preemption of claims regarding corporate fiduciary duties where "state corporate governance law, not federal bankruptcy law, governs [those] duties"); *F.D.I.C. v. Barton*, 1998 WL 169696, at *4 (E.D. La. Apr. 8, 1998) (same).

[4] Tellingly, defendants cite nothing to support their proposition that field preemption bars claims requiring state courts to address "what is or is not lawful assistance to an entity that wants to file for bankruptcy." (Def. Br. at 17).

B. The Relevant Authorities Provide No Basis for Preemption

In analyzing the federal preemption doctrine, courts distinguish between claims based on filings or conduct within bankruptcy proceedings and claims concerning contracts that are to be performed outside of bankruptcy proceedings, such as the ones at issue here. *See, e.g., In re Extended Stay Inc.*, 435 B.R. 139, 149 (S.D.N.Y. 2010) (denying preemption because plaintiff sought "recovery pursuant to contracts," not to "punish[] the exercise of rights under the Bankruptcy Code, nor [to] question the legal validity or propriety of the Debtors' filings"); *BGC Partners, Inc. v. Avison Young (Canada), Inc.*, 919 F. Supp. 2d 310, 318 (S.D.N.Y. 2013) (denying dismissal of tortious interference claims on preemption grounds because plaintiffs' claims were not based on "events taking place within the bankruptcy"; they were "for interference with contracts and certain duties of loyalty").

Tort claims – including for tortious interference with contract, and even for " '*inducing*' . . . *[d]ebtors into bankruptcy*" – should not be preempted where, as here, the claims allege violation of contractual breaches outside of the bankruptcy. *In re Extended Stay Inc.*, 435 B.R. at 151 (emphasis added); *see also id.* ("There is no claim that the filing of the bankruptcies was wrongful under the Bankruptcy Code. Rather, the gravamen of [the creditors'] tort claims is the alleged violation of contractual and state law duties to continue or consummate arrangements

outside of bankruptcy."). This is especially so here, where the claims "concern conduct that occurred *prior to* bankruptcy." *Davis*, 481 F.3d at 678 (emphasis in original); *see also In re Extended Stay Inc.*, 435 B.R. at 152 (denying preemption where claim that actions taken "prior to the bankruptcy filings violated contractual or common-law duties . . . does nothing to demonstrate a connection with the bankruptcy process").[5]

Faced with these dispositive authorities, defendants resort to misstating plaintiff's claims. But contrary to defendants' repeated assertions, *plaintiff does not* "suggest[] that the Borrowers were abusing the bankruptcy process" (Def. Br. at 13), "challenge[] . . . the validity or legitimacy of the Borrowers' bankruptcy

[5] Defendants argue that claims based on pre-filing conduct can be preempted. But the two cases they cite for this proposition addressed claims that a bankruptcy filing had been made for an improper purpose. *See* Def. Br. at 21-22, citing *Nat'l Hockey League v. Moyes*, 2015 WL 7008213, at *5-6 (D. Ariz. Nov. 12, 2015) (preempting claims involving "tortious conduct relating to an attempted unauthorized sale . . . by means of filing bankruptcy," which "amounts to an assertion that the bankruptcy filing was for an improper purpose or in bad faith"); *Casden v. Burns*, 504 F. Supp. 2d 272, 281-82 (N.D. Ohio 2007) (preempting shareholder's claim against directors based on their decision to file for bankruptcy "[b]ecause it is distinctly the province of bankruptcy law to determine liability for improper actions relating to bankruptcy filings"). Here, unlike these cases, plaintiff alleges neither that Borrowers' decision to file for bankruptcy was improper nor that it was damaged by anything that happened in the Bankruptcy Cases. Rather, the alleged improper conduct is defendants' tortious interference with Borrowers' loan covenants, and the principal damages to plaintiff are the loss in value of the Property and legal fees incurred in exercising its contractual remedies due to the breached loan covenants. Notably, it is the law of this case that those damages are recoverable. (Dkt. No. 28).

filings," (*id.* at 14), or "base [its] claim on [those] filings." (*Id.*).[6] In fact, plaintiff, a non-debtor, has brought state law claims against other non-debtors for causing third parties to breach loan covenants. Specifically, Justice Kornreich recognized Borrowers' breaches of the Loan Agreements form the "crux of the complaint" and plaintiff's claims "stem from [contractual] breaches . . . not from the bankruptcy." (R. 14; R. 20); *see also* (R. 18) ("This case does not involve the bankruptcy itself. It involves separate contractual agreements.").

Having mischaracterized plaintiff's claims, it is no surprise that defendants then discuss at length four inapposite cases, which preempted claims that were based solely on conduct within bankruptcy proceedings. *See* Def. Br. at 17-21 (and cases cited therein). For example, as defendants acknowledge, *Astor Holdings, Inc. v. Roski*, 325 F. Supp. 2d 251 (S.D.N.Y. 2003), merely held that certain claims were preempted "insofar as they were based on [the debtor's] bankruptcy filing." (Def. Br. at 18). Indeed, *Astor* only barred claims "requiring a finding that [debtor] filed for bankruptcy or filed certain papers in the bankruptcy proceedings in bad faith or for an improper purpose." *Astor,* 325 F. Supp. 2d at 263. And *Astor* relied heavily on *Choy v. Redland Ins. Co.*, 103 Cal. App. 4th 789

[6] In response to defendants' *Noerr-Pennington* argument, plaintiff does claim that the Bankruptcy Cases were shams (*see infra* pp. 38-39), but this assertion is irrelevant to plaintiff's tortious interference claim and, thus, to defendant's preemption argument.

(2002), where the outcome "depend[ed] upon [plaintiff's] right to litigate in state court, the question of [defendant's] alleged 'bad faith' bankruptcy petition." (*Id*. at 796 (emphasis omitted)). Similarly, *Gonzales v. Parks*, 830 F.2d 1033, 1033-36 (9th Cir. 1987), addressed whether a "bankruptcy filing constituted an abuse of process," and held that a state court claim "based on the filing of a bankruptcy petition" was preempted. *See also MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 912 (9th Cir. 1995) ("The major issue in this case is whether state malicious prosecution actions *for events taking place within the bankruptcy court proceedings* are completely preempted by federal law.") (emphasis added).

These cases involving bad faith and abuse of process claims *in a bankruptcy proceeding* all concern conduct that is entirely distinguishable from defendants' pre-petition tortious interference here. As Supreme Court recognized, "[t]his case does not involve the bankruptcy itself," but, rather, pre-filing conduct that caused Borrowers' to breach numerous loan covenants with plaintiff. (R. 18). Accordingly, the relevant authorities provide no basis for federal preemption of plaintiff's state law tort claims.[7]

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[7] In the same vein, and as defendants themselves concede, all of the cases string-cited at pages 22-24 of their brief "arose out of bankruptcy filings" or conduct within bankruptcy proceedings. *See, e.g., In re Repository Techs., Inc.*, 601 F.3d 710, 723-24 (7th Cir. 2010) (claims concerned misuse of the bankruptcy process); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 426 (6th Cir. 2000) (claims "presuppose[d] a violation of the Bankruptcy Code"); *Cox v. Zale Del., Inc.*, 1998

(footnote continued . . .)

C. <u>Defendants' "Policy Argument" Fails</u>

Defendants' policy argument in favor of preemption is merely a strained attempt to whitewash their tortious conduct. Citing nothing, defendants cavalierly assert that "many, probably most, bankruptcies entail breaches of contract" (Def. Br. at 1), and that Supreme Court's decision imperils "anyone who facilitates a bankruptcy, where that bankruptcy entails the breach by the debtor." (*Id.* at 16). Although defendants claim they "did nothing more than facilitate or encourage a bankruptcy filing" (*id.* at 15), to give debtors "an opportunity to clean up their

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(. . . footnote continued)
WL 397841 at *5 (N.D. Ill. July 13, 1998) (claims "depend[ed] solely upon and thus [were] intricately related to alleged violations of the [Bankruptcy] Code"); *Raymark Indus., Inc. v. Baron*, 1997 WL 359333, *9-10 (E.D. Pa. June 23, 1997) (claims based on bankruptcy filing); *Knox v. Sunstar Acceptance Corp. (In re Knox)*, 237 B.R. 687, 702 (Bankr. N.D. Ill. 1999) (claims sought remedies for violations of the Bankruptcy Code); *Holloway v. Household Auto. Fin. Corp.*, 227 B.R. 501, 508 (Bankr. N.D. Ill. 1998) (claim was "wholly dependent upon the Bankruptcy Code"); *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115, 123-25 (Bankr. D. Md. 1995) (claims for abuse of process and malicious prosecution allegedly violated the Bankruptcy Code); *Brandt v. Swisstronics, Inc. (In re Shape, Inc.)*, 135 B.R. 707, 708 (Bankr. D. Me. 1992) (claims "relie[d] on the Bankruptcy Code in order to obtain a state law remedy") (emphasis omitted); *Longnecker v. Deutsche Bank Nat. Tr. Co.*, 2013 WL 6700312, at *4 (Iowa Ct. App. 2013) (claims were "premised on litigants' conduct in bankruptcy court"); *PNH, Inc. v. Alfa Laval Flow, Inc.*, 130 Ohio St. 3d 278, 284-85 (2011) (claims were based on misconduct during a bankruptcy proceeding); *Lewis v. Chelsea G.C.A. Realty P'ship, L.P.*, 862 A.2d 368, 372-73 (Conn. App. Ct. 2004) (claim was based on bad faith filing of adversary proceedings during bankruptcy proceeding). These cases are entirely distinguishable because they are all based on the bankruptcy filings themselves, rather than, as here, on pre-petition misconduct that is not based on any actions within the Bankruptcy Cases.

debts and make a fresh start" (*id.* at 17), the facts are otherwise. In reality, Borrowers' only significant "debt" was their defaulted loans from plaintiff, and defendants engineered an elaborate scheme that went far beyond merely "facilitating or encouraging" bankruptcy filings. Indeed, they willfully caused Borrowers to breach numerous loan covenants by providing Mezz Borrower with an undocumented, interest-free loan (in return for nothing) while coordinating a corporate shell game to transfer virtually worthless apartments to Mortgage Borrower (in return for a stake in Borrowers' parent entity, rather than in Mortgage Borrower) – all in service of defendants' plan to take a nine-figure interest in the Project through a six-figure investment by frustrating plaintiff's contractual security rights. (*Supra* pp. 10-15). To be sure, the Bankruptcy Code does not provide non-debtors carte blanche to tortiously interfere with contracts for their own pecuniary gain, and no case or policy remotely supports such an outcome.

Precisely contrary to defendants' inequitable position, the real-world policy considerations recognized by the IAS Court counsel strongly against dismissing plaintiff's claims. Such a result would, in Supreme Court's words, "undermine the way business is dealt with in New York City when it comes to lenders and developers" and "upend the way contracts are written." (R. 15; R. 21). Defendants themselves acknowledge that plaintiff's claims are based on "very common" loan covenants (Def. Br. at 2) and, at least below, they forthrightly insisted that *all* of

those "very common" covenants "are as unenforceable as the covenant not to file for bankruptcy itself" (Dkt. No. 91 at 7) – which, after all, is the only logical conclusion their position permits. But these covenants provide crucial protection to lenders by ensuring that borrowers are only permitted to conduct business relating to specific real property that is the subject of their loans. Justice Kornreich correctly recognized that it was "important" to plaintiff that Mortgage Borrower remain a single-purpose entity that "would not enter into any other business" besides owning and developing the Property, and that Mezz Borrower was "organized solely for the purpose of acting as member of the limited liability company that owns the property." (R. 11). This Court should decline defendants' invitation to turn the Manhattan commercial real estate development industry upside down by scuttling a critical lending tool simply to shield them from their wrongdoing.

D. Preemption Would Deny Plaintiffs Any Forum for Their Claims

Finally, this lawsuit should not be preempted for the additional reason that it would leave plaintiff without a forum for its claims, a disfavored result. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."); *O'Neal v. Capital One Auto Fin., Inc.*, 2011 WL 4549148, at *3 (N.D.W. Va. Sept. 29, 2011) ("The presumption against

preemption is amplified when federal law does not address the subject regulated by state law and would leave a plaintiff without a remedy.").

Here, if it were found that the Bankruptcy Code preempted plaintiff's claims, plaintiff would be left without any forum at all. This is because the Bankruptcy Court would have no jurisdiction over plaintiff's state law claims, which are asserted against non-debtors and would not affect the administration of any bankruptcy estate. *See, e.g.*, *In re Curtina Intern.*, 15 B.R. 993, 995-96 (Bankr. S.D.N.Y. 1981) (bankruptcy court does not have jurisdiction over claim by and against non-debtors that "neither [seeks] to recover assets for the estate nor from the estate," and "does not relate to, or affect[,] the administration of this bankruptcy case"); *Schumacher v. White*, 429 B.R. 400, 406 (E.D.N.Y. 2010) (bankruptcy court "has no power to entertain collateral disputes between third parties that do not involve the bankrupt or its property, nor may it exercise jurisdiction over a private controversy which does not relate to matters pertaining to bankruptcy").

For all of these many reasons, preemption is unwarranted here.

Point II

THE *NOERR-PENNINGTON* DOCTRINE DOES NOT BAR PLAINTIFF'S CLAIMS

Understandably, defendants only half-heartedly continue their attempt to dismiss under the *Noerr-Pennington* doctrine, which is plainly inapplicable here.

"The crux of the *Noerr-Pennington* immunity is the need to protect efforts directed to government officials for the purpose of seeking redress. The doctrine has been applied only to situations involving direct actions made to influence governmental decisionmaking." *Welch v. Am. Psychoanalytic Ass'n*, 1986 WL 4537, at *8 (S.D.N.Y. Apr. 4, 1986) (citation omitted). "*Noerr-Pennington* immunity does not extend to actions occurring in an essentially private context." *Clark Consulting, Inc. v. Fin. Sols. Partners, LLC*, 2005 WL 3097892, at *2, *5 (S.D.N.Y. Nov. 17, 2005) (quotation omitted) (declining to extend *Noerr-Pennington* immunity to claims based on individual's "deceptive representations and omissions in commercial discussions with customers and potential customers" unrelated to his filing of a lawsuit); *see also Agritronics Corp. v. Nat'l Dairy Herd Ass'n, Inc.*, 914 F. Supp. 814, 823 (N.D.N.Y. 1996) (declining to extend *Noerr-Pennington* immunity to anticompetitive acts that did not involve petitioning the government). Moreover, there is an exception to the doctrine for "sham" litigation that is: (1) objectively baseless; and (2) intended to cause harm to the defendant through the use of government process. *T.F.T.F. Capital Corp. v. Marcus Dairy, Inc.*, 312 F.3d 90, 93 (2d Cir. 2002).

The *Noerr-Pennington* doctrine does not bar this lawsuit for at least two reasons. First, the doctrine does not apply to plaintiff's claims, which are not predicated on the fact of Borrowers' bankruptcy filings. Second, even if the

doctrine applied, it would be premature for the Court to conclude that the Bankruptcy Cases were not "mere shams," especially where the available evidence to date is to the contrary.

A. The *Noerr-Pennington* Doctrine Is Inapplicable Here

Noerr-Pennington does not apply to plaintiff's claims. Plaintiff does not allege that defendants are liable for tortious interference because they caused Borrowers to file for bankruptcy. Rather, plaintiff alleges that, separate and apart from Borrowers' bankruptcy filings, the Pilevsky Scheme caused Borrowers to violate numerous of their loan covenants to plaintiff prior to the bankruptcy filings.[8] Since plaintiff's claims are not based on the initiation of litigation, the *Noerr-Pennington* doctrine does not apply. *See Am. Mfg. Servs., Inc. v. Official Comm. of Unsecured Creditors of Match Elecs. Grp., Inc.*, 2006 WL 839550, at *5

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[8] As Supreme Court correctly stated when it rejected defendants' *Noerr-Pennington* argument, this case "is not based upon the bankruptcy. It's based upon various clauses in the contract[s] that were breached." (R. 23-24). Specifically, the Pilevsky Loan caused Mezz Borrower to breach the Loan Agreements by incurring debt other than "Permitted Indebtedness," as well as by violating its obligations to "pay its own liabilities . . . out of its own funds and assets" and to consider the interest of plaintiff in connection with all corporate, partnership, or limited liability actions. (*Supra* p. 7). Separately, the Pilevsky Apartments Transfer caused Mortgage Borrower to breach obligations under the Loan Agreements to not have assets or businesses unrelated to the Property and to not make, suffer, or permit the occurrence of a "Transfer" (as defined in the Loan Agreements). It also caused Mortgage Borrower to breach obligations "to pay its own liabilities . . . out of its own funds and assets" and to consider the interests of plaintiff in connection with all corporate, partnership, or limited liability actions. (*Id.*).

(N.D.N.Y. Mar. 28, 2006) (*Noerr-Pennington* inapplicable where plaintiff's claims, including for tortious interference, were "not solely limited to prior litigation" in bankruptcy court; "[e]ven eliminating the prior bankruptcy proceedings as a basis for liability, Plaintiff would still have stated a claim against Defendants based on the other alleged conduct, some of which pre-dated the bankruptcy case"); *see also Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1078-79 (W.D. Wis. 2012) (*Noerr-Pennington* inapplicable where plaintiff's tortious interference claim was not premised on litigation but, rather, on defendant's actions in relation to a third party); *eBay Inc. v. Bidder's Edge Inc.*, 2000 WL 1863564, at *2 (N.D. Cal. July 25, 2000) (*Noerr-Pennington* inapplicable where conduct forming the basis of tortious interference claim was "unrelated to any protected activity").

Defendants rely only on inapposite *Noerr-Pennington* cases addressing claims that directly relied on the invocation of the judicial process. (Def. Br. at 25-26). But as defendants themselves acknowledge, *I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 208 (1st Dep't 2005), concerned tortious interference claims "predicated on the commencement of litigation," while *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1133 (1990), merely set forth the general proposition that the *Noerr-Pennington* doctrine can shield litigants from tort liability "for bringing a lawsuit." Two other cases defendants

cite addressed alleged torts relating to lobbying government bodies – which is light years removed from defendants' misconduct here. *See* Def. Br. at 25-26, citing *Concourse Nursing Home v. Engelstein,* 278 A.D.2d 35 (1st Dep't 2000); *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 268 A.D.2d 101 (2nd Dep't 2000). Plaintiff's claims are based not on initiating a lawsuit or lobbying the government, but rather on defendants tortiously inducing pre-filing breaches of contract.[9]

Lacking any helpful case law, defendants simply assert that *Noerr-Pennington* should apply here because Borrowers' contractual breaches were "part and parcel of the bankruptcies" and that "[i]f there had been no bankruptcies this case would not exist." (Def. Br. at 28). This argument is wrong for two reasons. First, as discussed above, this case concerns various contractual breaches that occurred prior to and independent of anything that occurred in Bankruptcy Court.

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[9] Defendants argue that the *Noerr-Pennington* doctrine applies to an outside party's funding of litigation. However, the cases that they cite have no application here. *See* Def. Br. at 27, citing *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394 (4th Cir. 2001) and *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993). These cases merely protected economic actors who funded litigation against their competitors from liability for alleged antitrust law violations and/or misconduct in court proceedings. This is a far cry from immunizing defendants here from liability for their tortious interference with plaintiff's contractual loan covenants, particularly where the claims involved are not based on *anyone's* initiation of government action, and where the breached loan covenants were not limited to funding the bankruptcy in any case.

Second, while *Noerr-Pennington* might have protected Borrowers' First Amendment right to petition the government, this right does not extend to defendants' tortious scheme to buy, for several hundred thousand dollars in cash and apartments, a 49% interest in real property thought to be worth nearly $200 million at the time. Defendants simply cannot fit the square peg of their malicious conduct into the round hole of *Noerr-Pennington* – and no case they cite "immunizes" them from their wrongdoing.

B. Even if the *Noerr-Pennington* Doctrine Applies to Plaintiff's Claims, the Bankruptcy Cases Were Shams

Even if *Noerr-Pennington* could somehow apply here, there is a genuine dispute concerning whether the Bankruptcy Cases were shams. As discussed above, the sham litigation exception applies to litigation that is (1) objectively baseless, and (2) intended to cause harm to the defendant through the use of government process. (*Supra* p. 34).

The facts available at this stage of discovery strongly suggests that the Bankruptcy Cases were shams. The Bankruptcy Cases, including Borrowers' futile $100 million failed Adversary Proceeding, were intended solely to burden and harm plaintiff. Indeed, Mezz Borrower's president swore in an affidavit that the purpose of filing for bankruptcy was to prevent plaintiff from exercising its contractual right to conduct the UCC Sale. (R. 1077). And Borrowers' pursuit and abandonment of numerous claims in a hopeless bankruptcy makes clear that the

Bankruptcy Cases were pursued vexatiously, to achieve delay. Accordingly, there is ample basis to determine that the Bankruptcy Cases were objectively baseless and filed for the purpose of frustrating plaintiff's contractual remedies. At a minimum, there is a genuine factual dispute on this issue, which is therefore inappropriate for resolution on summary judgment, especially while discovery is ongoing. *See New York Jets LLC v. Cablevision Sys. Corp.*, 2005 WL 3454652, at *2 (S.D.N.Y. Dec. 19, 2005) (declining to determine "whether the 'sham' exception applies without the benefit of full discovery").

Point III

THE INDIVIDUAL DEFENDANTS MAY BE HELD LIABLE FOR THEIR TORTIOUS CONDUCT

Defendants' argument that Philip, Michael, and Seth Pilevsky (collectively, the "Individual Defendants") are not liable for their tortious conduct is, in essence, a challenge to the sufficiency of a pleading that has already withstood a motion to dismiss. As the IAS Court stated, defendants' motion "is, in a sense, a motion to dismiss" given the lack of meaningful discovery at the time of its filing. (R. 32). Without the benefit of discovery, including deposing the Individual Defendants, plaintiff has done more than enough to plead its claims.

Under choice of law principles, the law of an entity's state of organization is law applied to determine if veil-piercing is appropriate. *Stahlex-Interhandel Tr., Reg. v. W. Union Fin. Servs. E. Europe Ltd.*, 2002 WL 31359011, at *5 (S.D.N.Y.

Oct. 21, 2002). Although Sutton Opportunity is a Delaware limited liability company and Prime Alliance is a New York corporation, the applicable piercing standard is similar in both states. *See, e.g., Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 40 (1st Dep't 2012) (requiring showing that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury"); *NetJets Aviation, Inc. v. LHC Commc'ns*, *LLC*, 537 F.3d 168, 177 (2d Cir. 2008) (applying Delaware law) (inquiry is "(1) whether the entities in question operated as a single economic entity, and (2) whether there was an overall element of injustice or unfairness"). This fact-based inquiry typically involves evaluating various factors that would show an owner's domination of the entity.[10] The "fact-laden claim to pierce the corporate veil is particularly unsuited for resolution on summary judgment." *Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 A.D.2d 341, 342 (1st Dep't 1996); *see also Weiser & Assocs., P.C. v. Anthony C. Donofrio & Assocs., P.C.*, 2009 WL

[10] Among the factors considered are: absence of corporate formalities; inadequate capitalization; overlap in ownership and personnel; siphoning of corporate funds; common office space among entities; absence of arms-length dealings; intermingling of property between entities; and, generally, whether the corporation is simply functioning as a façade for the controlling shareholder. *See, e.g., Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991); *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *5 (Del. Ch. Dec. 23, 2008).

1905144 (Sup. Ct. N.Y. Co. June 19, 2009) (declining to dismiss claim because veil piercing "is fact-ridden, and the parties here have not completed discovery").

Moreover, the lower court correctly found that the Court of Appeals' recent decision in *Cortlandt Street Recovery Corp. v. Bonderman*, 31 N.Y. 3d 30 (2018), is "directly on point." (R. 24). *Cortlandt* held that plaintiffs had pled with specificity the conduct alleged against individual defendants. *Cortlandt*, 31 N.Y.3d 30 at 49. It was sufficient that the complaint "points to various individuals and entities" involved in a fraudulent scheme, "lists their titles and management positions," and identifies the proceeds of the scheme. (*Id.*) The complaint need only establish "the basic elements" of veil-piercing – namely, that individual defendants adopted a corporate scheme, created shells to further the scheme, misused the corporate form to commit a wrong, and distributed the proceeds to themselves. (*Id.*). Prior to discovery, "[i]t would be unreasonable to require greater detail from [plaintiff] as to each individual's daily conduct and involvement." (*Id.*).

Plaintiff's piercing allegations here are the virtual echo of those sustained in *Cortlandt*. Those allegations (both in the complaint and as amplified based on the facts learned in discovery to date) include the following details:

- Philip Pilevsky solely owned and dominated Prime Alliance, and Michael and Seth Pilevsky together owned and dominated Sutton Opportunity. (R. 1180).

- Defendant Philip Pilevsky has admitted in a sworn declaration that he used his entity Prime Alliance (of which he is the owner and sole shareholder), not for Prime Alliance's own corporate benefit, but for the benefit of Sutton Opportunity, and that he did so at the behest of his son Michael Pilevsky, who is not even a Prime Alliance shareholder. (R. 1176-78).

- Sutton Opportunity was a brand new corporate entity that was formed for the purposes of these transactions and appears to have no other operations. (R. 1341).

- Michael and Seth Pilevsky caused Sutton Opportunity to obtain the Pilevsky Apartments from Lynbrook Associates, a different family-affiliated entity. (R. 1085-90; R. 1091-1125).

- Sutton Opportunity then transferred the Pilevsky Apartments – not to Sutton Parent, the entity in which it was buying a share – but to Mortgage Borrower (*id.*), for no legitimate business purpose. (R. 1201-05). Mortgage Borrower filed for bankruptcy shortly thereafter. (R. 1126-29).

- These actions were undertaken for the sole purpose of furthering defendants' tortious interference scheme, and caused significant harm to plaintiff. (R. 1055-56; R. 1348 at ¶ 5).

- From February 24 forward, Ms. Tuerk, who was instrumental in arranging the Pilevsky Apartments Transfer (R. 1080; R. 1082-84), acted as counsel for Philips International (owned by Philip Pilevsky) (R. 1080), Lynbrook Associates (affiliated with Philips International) (R. 1092 at ¶ 1.4), Mortgage Borrower, and Mr. Beninati (a principal of Borrowers). (R. 1057-58).

These are precisely the types of specific factual allegations that support veil-piercing. As the lower court found, there is "plenty in the complaint that talks about the interaction between all of the different entities and the Pilevskys." (R. 24); *see also* (R. 19) ("all of these different entities were acting on behalf of each other" and "[i]t was like one big piggy bank here.") Moreover, Justice Kornreich,

citing *Cortlandt*, held that "whether Plaintiff can ultimately prove its allegations is not a consideration in determining a motion to dismiss," which defendants' motion effectively was "because there has been no discovery." (R. 32). With many facts still unknown and solely within defendants' knowledge, this Court should not allow the Individual Defendants to shield themselves behind corporate structures used as a façade to injure plaintiff. *See* CPLR 3212(f). Rather, the IAS Court's decision to sustain the piercing claim should be affirmed.[11]

[11] Defendants rely only on inapposite piercing cases. *See* Def. Br. at 29-30, citing *Maggio v. Becca Constr. Co.*, 229 A.D.2d 426, 428 (2d Dep't 1996) (granting summary judgment dismissing piercing claim – presumably after discovery – where plaintiffs set forth "no evidence" to support the claim); *Abelman v. Shoratlantic Dev. Co.*, 153 A.D.2d 821, 823 (2nd Dep't 1989) (dismissing "alter ego" claim where the allegation was comprised of a single sentence "couched in the most conclusory terms"); *Metro. Transp. Auth. v. Triumph Advert. Prods. Inc.*, 116 A.D.2d 526, 528 (1st Dep't 1986) (granting motion to dismiss where "amended complaint fail[ed] to allege facts upon which personal liability . . . can be predicated"). In stark contrast to these irrelevant cases, as demonstrated above, plaintiff has made detailed allegations backed by available evidence amply supporting their piercing claims, even though discovery is incomplete.

CONCLUSION

For all of the foregoing reasons, the decision below should be affirmed in its entirety, and plaintiff should be granted such other and further relief as the Court deems proper.

Dated: New York, New York
September 27, 2018

Respectfully submitted,

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