1
2 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 54
3 --------------------------------------------------X
SUTTON 58 ASSOCIATES LLC,
4
Plaintiff,
5 Index No.
v. 654917/2017
6
PHILIP PILEVSKY, MICHAEL PILEVSKY, SETH
7 PILEVSKY,PRIME ALLIANCE GROUP, LTD.,
and SUTTON OPPORTUNITY LLC,
8
Defendants.
9 --------------------------------------------------X
MOTION 60 Centre Street
10 New York, New York
March 6, 2018
11 B E F O R E:
12 HONORABLE SHIRLEY WERNER KORNREICH,
JUSTICE
13
A P P E A R A N C E S:
14
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21 MARTIN GILMORE, ESQ.
22
23
24 CAROLYN BARNA
SENIOR COURT REPORTER
25
26

1 Proceedings
2 THE COURT: Good morning.
3 MR. GREENBERG: Good morning.
4 MR. HAMERMAN: Good morning.
5 MR. SCHUMAN: Good morning.
6 MR. MILLER: Good morning.
7 MR. GILMORE: Good morning.
8 THE COURT: You may be seated.
9 All right. What I have in front of me right
10 now is a summary judgment motion made by all of the
11 Defendants to dismiss the complaint. And the complaint
12 basically alleges one cause of action -- I think one is
13 tortious interference with contract. One or two.
14 MR. GREENBERG: It's two causes of action
15 because it is against two separate entities, but both --
16 and the individuals. They are both tortious
17 interference claims.
18 THE COURT: I read it yesterday, but my mind
19 is such a siv. Right. So, it includes two different
20 causes of actions, but they are both for tortious
21 interference.
22 Basically, what is raised here is the
23 Noerr-Pennington defense. That is a major defense in
24 this case.
25 I will hear from you, counsel.
26 MR. SCHUMAN: Your Honor, good morning. Adam

1 Proceedings
2 Schuman from Perkins Coie for Defendants. With me are my
3 colleagues Keith Miller and Martin Gilmore.
4 Your Honor, Plaintiffs seek to relitigate here
5 their disappointment about prior bankruptcy, the filing
6 of bankruptcy --
7 THE COURT: I'm not quite sure that is exactly
8 the issue. And, I mean, I understand Noerr-Pennington.
9 I can see where that would be an issue were it the party
10 who filed for bankruptcy in this case.
11 You know, this is a really strange case And I
12 usually lay out the facts and I didn't. Basically, what
13 this is is -- you can have a seat.
14 And I should probably lay out the facts. It is
15 always easier for the court reporter when I do.
16 What happened here is a land developer decided
17 to develop a property, three properties I think it was,
18 but it was several properties on the far East Side
19 around Sutton Place. And bought up, I guess they were in
20 the form of townhouses, but smaller buildings and was
21 going to build a very tall high-rise. They needed a
22 zoning change in order to do that and got the zoning
23 change;although, the community was not happy with it
24 because it was going to be one of those, almost like one
25 of those sliver buildings that was going to be very
26 tall.

1 Proceedings
2 The developer needed money. It borrowed
3 approximately, I think it was close to $150 million, if
4 I recall, from the Plaintiff.
5 Now, the papers, the loan papers are similar to
6 loan papers I see all the time And what happened is a
7 lender who is lending all that much money to an entity
8 which is really a single purpose entity, and the only
9 thing the entity has is the land and is going to develop
10 this land.
11 And it will often provide that if that entity
12 does go into bankruptcy or something similar to
13 bankruptcy, that is an event of default. But they also
14 do put in other things in the contract which was in this
15 contract as well. And I say it was about $150 million.
16 But, typically, there was the mortgage loan, the
17 mezzanine loan and build-out loan which was very
18 minimal, for little over a million.
19 Two major were the mortgage loan and that was
20 secured by the mortgage, and I'm sure there were UCC
21 filings, and then there was a mezzanine loan which was
22 for a lot less perhaps . I think it was for like maybe
23 one hundred twenty some odd dollars. The mezz loan was
24 the rest, whatever it was.
25 But what the contract usually provides is --
26 this contract, there was a separate mezzanine loan and a

1 Proceedings
2 separate mortgage loan. The mezzanine loan basically
3 said that -- that the borrower shall not directly or
4 indirectly create or incur or assume any indebtedness
5 more than $50,000, except for trade indebtedness that
6 had to be paid off basically within 30 days because they
7 didn't want creditors basically.
8 Also, it provided that for each of the loans,
9 the borrower would pay their own -- out of their own --
10 liabilities of their own funds and assets.
11 It also said that, and this is very important,
12 in terms of the mortgage loan, that the borrower would
13 remain an entity that just was -- the only business
14 would be developing the property, owning the property
15 and developing the property. And so a single purpose
16 entity. It would not enter into any other business . It
17 would not do anything else. And that it would be solely
18 organized for that purpose and wouldn't engage in
19 anything else.
20 And this is important to the lender and that
21 dealt with the mortgage borrower. There are other things
22 as to the mezzanine loan. It was also only to be
23 organized solely for the purpose of acting as member of
24 the limited liability company that owns the property.
25 And there are all of those other obligations in the
26 contract that had nothing really outwardly to do with

1 Proceedings
2 the bankruptcy, but would impact on a bankruptcy filing
3 if there were a bankruptcy, but it was --- did not have,
4 on its face, anything to do with the bankruptcy.
5 So, these were all obligations of the mezzanine
6 borrower, the mortgage borrower, borrower for the
7 building, building of the property as well. And,
8 basically, and even though -- you know, there's a
9 subtext here because, number one, if there were no other
10 creditors, then it's not likely that there would be a
11 bankruptcy committee, a trustee, other creditors. There
12 would not be a bankruptcy.
13 Further, if it was no other business, only a
14 single purpose entity, then the Bankruptcy Court would
15 probably not grant a bankruptcy. It would just not be a
16 viable bankruptcy action. Basically those were just
17 parts of the contract.
18 What happened here, and I'm not even going to
19 posit on the record why the Defendants in this case, and
20 the Defendants in this case are all related. It's Mr.
21 Philip Pilevsky, who owns a number of entities which --
22 some are which -- are named as entities as Defendants.
23 And that would be, I think it's Prime Alliance Group,
24 LTD is his entity.
25 He also owns Philip International. All of
26 these entities are related. His two sons, Michael

1 Proceedings
2 Pilevsky and Seth Pilevsky, who own Sutton Opportunity,
3 LLC which is a Delaware LLC, which was created after the
4 mezzanine bankruptcy, but before the mortgage borrower
5 went into bankruptcy, which was the property itself.
6 And, in any event, what happened here is Philip
7 Pilevsky, through one of its entities, sent the borrower
8 $50,000 in order to hire a lawyer, lawyer being his
9 nephew, in order to file a bankruptcy action.
10 That $50,000 then became a debt in the
11 bankruptcy for the mezzanine and the one who filed for
12 bankruptcy was the lender became a debt for the
13 mezzanine borrower, which was --which violated the
14 contract.
15 But, be that as it may, the person who arranged
16 all of this, the original lawyer, was the general
17 counsel for Philip International, Mr. Pilevsky's entity,
18 but not named, an unnamed entity. Plus, in an e-mail or
19 some note, Mr. Philip Pilevsky said he was sending the
20 $50,000 on behalf of his son Michael on behalf of Sutton
21 Opportunity, LLC which was a newly created, a brand new
22 entity which was -- which became a partial partner of
23 the borrower and that, again, was against the contract
24 clauses. They were not allowed to bring in someone
25 else.
26 And, on top of all of that, apartments, three

1 Proceedings
2 small Queens apartments, which had been sponsor
3 apartments, I assume, of a co-op that had belonged to
4 the Pilevskys, but was owned by an entity, another
5 entity not named, but by Philip Pilevsky, these three
6 small apartments were transferred to, I think the
7 mortgage borrower, and so that now there is a breach
8 because they are in a new business and now all of a
9 sudden it's not a single purpose entity.
10 These are worth a minimal amount of money, but,
11 but, somehow Philip Pilevsky, one of his entities
12 transferred these properties, but on behalf of Sutton
13 and his son so that Sutton could become a member of the
14 mortgage borrower.
15 I mean, then the mortgage borrower then files
16 for bankruptcy also and has all of the creditors and is
17 not a single purpose entity.
18 In any event, there were so many breaches of
19 the contract as a result. And that is the crux of the
20 complaint.
21 Let me hear from you.
22 MR. SCHUMAN: Your Honor, the breach of any
23 contract provision is only relevant here and only is in
24 the complaint insofar as it relates to the bankruptcy.
25 THE COURT: Why?
26 MR. SCHUMAN: Because --

1 Proceedings
2 THE COURT: Certainly for the Defendants, who
3 probably wanted a piece of this development, you are
4 right. But, if you look at the contract itself, it has
5 nothing to do with the bankruptcy. It deals only with
6 the contract.
7 What you are asking me to do is throw this
8 out, upend the way contracts are written here in New
9 York City and upend the whole development industry, land
10 development industry. Maybe I'm wrong.
11 MR. SCHUMAN: Respectfully, if you look at the
12 complaint, Plaintiff's complaint, if I may, I have a
13 handout I shared with Plaintiffs that summarizes their
14 own allegations.
15 THE COURT: This is summary judgment, not a
16 motion to dismiss.
17 MR. SCHUMAN: Yes.
18 It repeatedly alleges underlying the two
19 tortious interference counts that there was prohibition
20 of filing for bankruptcy under that contract you cite --
21 THE COURT: Because that would cause a
22 default. There was prohibition as well as all other
23 prohibitions. There was also a prohibition to file for
24 bankruptcy, only in the sense that if they did file for
25 bankruptcy, it caused a default.
26 MR. SCHUMAN: Those are --

1 Proceedings

2 THE COURT: It does not stop them from filing
3 for bankruptcy, but it causes default.
4 MR. SCHUMAN: In connection with the
5 complaints, allegations of tortious interference, these
6 provisions cited are only relevant insofar as the
7 Defendants allegedly caused the breach of those
8 provisions. That is relating to the bankruptcy,
9 reorganization.
10 Whether it's a $50,000 loan that hired
11 bankruptcy counsel or a transfer of three apartments
12 relating to whether it's a special purpose vehicle or
13 not, it is only relevant to the bankruptcy. All of the
14 issues were serviced, raised in the bankruptcy.
15 Your Honor, you noted the Noerr Pennington
16 doctrine. We believe that causes a basis for dismissal
17 here, but federal preemption, Bankruptcy Court had the
18 issues before it --
19 THE COURT: I'm not going to comment on the
20 bankruptcy judge. I have had him in front of me before.
21 I have made, unfortunately, comments about him. I will
22 not comment about him again.
23 Let's just -- I don't want to go into what the
24 bankruptcy judge did or did not do, but he did not
25 really have this in front of him. This is a totally
26 separate issue.

1 Proceedings
2 MR. SCHUMAN: Your Honor, respectfully,
3 Plaintiff -- respectfully, Plaintiff had formally
4 challenged the bankruptcy case filing in Bankruptcy
5 Court. They filed for a bad faith filing. They cited
6 the same contract provisions that you cite now in their
7 motion. This is in --
8 THE COURT: There was no decision on a motion
9 to dismiss. In fact, Justice Sherwood -- something that
10 was not brought to the bankruptcy judge's attention, had
11 denied a TRO in this case prior to bankruptcy.
12 MR. SCHUMAN: In the bankruptcy case,
13 Plaintiffs raised this issue. They raised whether it is
14 a special purpose vehicle . They raised the issue of
15 transfer of the three apartments. They ultimately
16 withdrew that motion and --
17 THE COURT: Right. It was not ultimately
18 decided. It was not decided.
19 MR. SCHUMAN: But it was before the Bankruptcy
20 Court. There was no secret. There was testimony taken
21 --
22 THE COURT: As I said, I'm not going to
23 comment on Judge Lane, okay.
24 MR. SCHUMAN: Your Honor, we're not asking you
25 to comment.
26 Our point is --

1 Proceedings
2 THE COURT: He did not --he made no decision
3 on this. He made -- chose not to make a decision on
4 this. And, in fact, it was withdrawn. It was not
5 before him. In that sense, he didn't rule. He didn't
6 rule.
7 MR. SCHUMAN: To the extent these issues were
8 available, briefed, whether he ruled or not, your Honor,
9 it is our position that that creates the basis for
10 federal preemption. We cited multiple cases -- -
11 THE COURT: Theres no federal preemption here.
12 I don't see it.
13 MR. SCHUMAN: Your Honor, we would ask --
14 THE COURT: When a judge decides not to rule
15 for whatever reason, he has not ruled.
16 MR. SCHUMAN: We're not asking you to find
17 collateral estoppel or res judicata, but preemption when
18 it comes to these issues having already been surfaced,
19 whether resolved directly or not, had been surfaced in
20 the bankruptcy case. That is not something this Court,
21 respectfully, should be --
22 THE COURT: I don't have to rule about the
23 bankruptcy. This case does not involve the bankruptcy
24 itself. It involves separate contractual agreements
25 which your clients clearly knew about and were involved
26 in.

1 Proceedings
2 I think, maybe there is -- on this record,
3 there is a good chance they aided and abetted in these
4 breaches and were involved in tortious interference. On
5 this record there is a good chance that is the case. I
6 don't know for sure because we have not even done any
7 discovery. We have to go forward with discovery. The
8 Plaintiffs have no discovery.
9 And that is another issue. It's a little early
10 for summary judgment. I think there is an interesting
11 issue of piercing the corporate veil. I think on this
12 record it appears to be here, but, there is certainly
13 enough here where all of these different entities were
14 acting on behalf of each other. It was like one big
15 piggy bank here.
16 MR. SCHUMAN: If I may, your Honor, I would
17 like to revisit the corporate veil issue, but first
18 still on Noerr-Pennington and preemption. With all
19 respect, your Honor, I don't think the contract alleged
20 violations can be divorced from the bankruptcy.
21 THE COURT: Why not?
22 MR. SCHUMAN: Because there is no claim. This
23 is not the type of case cited by Plaintiffs, American
24 Mortgage or otherwise, where there is actually a claim,
25 like a breach of contract claim or a breach of guarantee
26 claim if there wasn't a bankruptcy.

1 Proceedings
2 Here, the entire lawsuit turns on there having
3 been a bankruptcy. Nobody is saying we want $50,000 back
4 or there is something regarding the three properties
5 that was fraudulent or inappropriate.
6 It's only relevant insofar as it causes the
7 bankruptcy allegedly. And if you were to look --
8 THE COURT: Well, that's why they were put in,
9 the clauses were put in. But all of their complaints
10 stem from breaches of these clauses, not from the
11 bankruptcy, but from breaches of these clauses.
12 MR. SCHUMAN: Insofar as the breach allegedly,
13 for example, on the $50,000 funding for bankruptcy
14 counsel, your Honor, we cite the Baltimore Scrap case
15 which holds that Noerr-Pennington should apply to --
16 THE COURT: But those cases, all of those
17 cases dealt with the bankruptcy itself. They were not
18 dealing with other causes of -- other clauses of the
19 contract.
20 MR. SCHUMAN: The clauses, your Honor, this is
21 the Intervention Energy case, are all relevant only
22 insofar as they try to restrict the debtor from filing
23 for bankruptcy. Insofar as they try to do that, then
24 the debtor files for bankruptcy, that is protected under
25 Noerr-Pennington.
26 THE COURT: I don't think Noerr-Pennington is

1 Proceedings
2 that broad.
3 MR. SCHUMAN: I think if it's not that broad,
4 it's potentially a flood gate.
5 THE COURT: It is not at all a flood gate.
6 I think it's the opposite.
7 By arguing what you are arguing, I think that,
8 as I said earlier, would undermine the way business is
9 dealt with in New York City when it comes to lenders and
10 developers. It just upends all of these contracts and
11 the way business has been done for years.
12 MR. SCHUMAN: Your Honor, we also cite cases as
13 to whether these provisions are enforceable because you
14 cannot restrict filing for bankruptcy --
15 THE COURT: This does not restrict filing for
16 bankruptcy. Nowhere in that contract does it say you
17 cannot file for bankruptcy. Nowhere. In either
18 contract.
19 MR. SCHUMAN: It actually does. It's actually
20 cited in the complaint at paragraph 26 as well as 25, 4
21 and 3.
22 THE COURT: It says you are in default if you
23 do; is that what it says?
24 MR. SCHUMAN: It says -- yes. It talks --
25 THE COURT: Which is not quite the same thing.
26 MR. SCHUMAN: If you read -- in the context of

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2 the complaint in Plaintiff's own language repeatedly
3 they cite $50,000 and the three apartments transfer as
4 causing the bankruptcy. That is the basis for the
5 tortious interference.
6 So, whenever any potential Defendant in the
7 future is going to possibly lend some money that goes
8 toward filing of a bankruptcy they are exposed down the
9 road after the bankruptcy, after the plan is confirmed
10 to being sued for tortious interference
11 THE COURT: Are you advocating what your
12 clients did here as something good, is that what you are
13 arguing, that this should happen all the time?
14 MR. SCHUMAN: Your Honor, I'm not --
15 THE COURT: Is that your argument?. That the
16 Court should look kindly upon what your clients did?
17 That should happen in every case?
18 MR. SCHUMAN: I am saying it's --
19 THE COURT: That that should --
20 MR. SCHUMAN: Respectfully, it's a slippery
21 slope if all it takes is a $50,000 loan -- -
22 THE COURT: That was hardly all, number one.
23 I don't think it is a slippery slope at all. I think
24 there are separate breaches we're talking about here.
25 Totally separate breaches that don't say anything about
26 bankruptcy in any of those clauses. There is a number of

1 Proceedings
2 them. We can ignore the one or two bankruptcy clauses
3 that bankruptcy would be a default. Even ignoring that,
4 there are plenty of clauses in that contract that were
5 breached.
6 MR. SCHUMAN: Your Honor, this case is not
7 about the breach. If you look and re-read the complaint
8 which we ask, respectfully, you do after this argument,
9 even the preliminary statement repeatedly turns entirely
10 on the filing of bankruptcy and the alleged actions by
11 my clients that somehow promoted or caused that filing.
12 Caused the funding of the bankruptcy attorney. Caused
13 it not to be treated as a special purpose vehicle.
14 Those issues were also raised throughout the
15 bankruptcy. They weren't hidden. They were litigated.
16 Plaintiff itself had brought a motion on these issues --
17 THE COURT: The Plaintiff withdrew its motion
18 and did not go forward with any motions to dismiss and
19 the court didn't reach it.
20 MR. SCHUMAN: Your Honor, we don't believe that
21 is a material distinction under Noerr-Pennington or
22 preemption.
23 THE COURT: If it stated this was only about
24 the bankruptcy, you are right. This is different from
25 the cases cited in your brief. This is not based upon
26 the bankruptcy. It's based upon various clauses in the

1 Proceedings
2 contract that were breached.
3 MR. SCHUMAN: Your Honor, with all respect, I
4 don't think that's what the complaint alleges.
5 If you took the words bankruptcy out of the
6 complaint, there would be nothing left. There would not
7 be a claim and the complaint would be a fraction of its
8 size.
9 It's all alleged to turn on the filing of the
10 bankruptcy. It's all about the bankruptcy. Alleged
11 delay, changes in the real estate market during that
12 alleged delay.
13 There is no claim here if it's not because of
14 the alleged actions causing the bankruptcy and how the
15 bankruptcy was then monitored.
16 Your Honor, if I can turn to piercing the
17 corporate veil, there is no domination or abuse of the
18 corporate --
19 THE COURT: I think there are plenty of, you
20 know, there's plenty in the complaint that talks about
21 the interaction between all of the different entities
22 and the Pilevskys.
23 And, frankly, I think, there has been a very
24 recent case called Cortland Street Recovery Corporation
25 v. Bonderman, a Court of Appeals case, 2018 Westlaw
26 942335, and I think it is directly on point.

2 MR. SCHUMAN: Your Honor, you know, we had
3 cited Justice Freed in the Brown case where it's more
4 than conclusory allegations needed to move forward from
5 the pleading stage -- -
6 THE COURT: I think this is much more closely
7 related to Cortland which is a Court of Appeals case.
8 MR. SCHUMAN: Your Honor, we respectfully ask
9 that you revisit the complaint. Here, there is no abuse
10 of the corporate privilege alleged. There is nothing
11 inappropriate or illegal. These are family-owned
12 entities . They have appropriate books and records. The
13 transactions are --
14 THE COURT: We don't know that, number one;
15 although, from what's said already in the complaint it
16 appears that the apartments came from a Philip Pilevsky
17 entity. There was no consideration . It went from -- on
18 behalf of Sutton to the mortgage borrower, again, you
19 know, so Sutton got the credit for it. But they didn't
20 pay for it.
21 Philip Pilevsky gave the $50,000 on behalf of
22 Michael Pilevsky on behalf of Sutton. It just looks to
23 me that maybe this is not the case. They basically --
24 it was all coming out of the same pocket.
25 MR. SCHUMAN: Your Honor, obviously when you
26 have entities, and it's also the same on the Plaintiff's

1 Proceedings
2 side, the name Sutton in connection with a building
3 that's going to be on Sutton Place they create entities
4 relating to certain projects. There's nothing
5 inappropriate about that.
6 And they obviously need to provide assets to
7 the entities. That, in and of itself, does not create
8 any alleged wrongdoing.
9 THE COURT: However, you know, I think it is
10 just basic law that if any of the Defendants, and here,
11 Philip Pilevsky, exercised complete dominion and control
12 over several of the corporate entities and abused the
13 privilege of doing business in the corporate forum to
14 perpetrate a wrong or injustice as alleged here, you at
15 least have enough to make out a viable corporate
16 piercing, piercing of the corporate veil.
17 MR. SCHUMAN: Insofar as the complaint uses
18 those words alleged abuse, alleged domination, that's
19 conclusory.
20 THE COURT: I'm not looking at those words.
21 I'm looking at the facts they have alleged. The
22 apartments, the $50,000 going from one to the other.
23 Mr. Pilevsky's own words in the e-mail saying I am
24 giving you the $50,000 on behalf of Michael who, on
25 behalf of Sutton, an entity that was being formed. All
26 being formed and all done by one of Mr. Pivelsky's own

1 Proceedings
2 GC for one of his entities who was doing all of the
3 legal work for Michael Pilevsky and Seth Pilevsky and
4 Sutton Opportunity. It all seemed to be it was one big
5 enterprise.
6 MR. SCHUMAN: If I may, there is nothing
7 inappropriate about a lawyer having, where there is no
8 conflict, more than one client, even on this new
9 transaction.
10 THE COURT: But she was the GC for Philip
11 International which was one of Philip Pilevsky's
12 businesses. She took money from one of Philip
13 Pilevsky's entities.
14 She took apartments that belonged to another
15 one of Mr. Philip Pilevsky's entities and she
16 transferred those on behalf of Sutton Opportunity to a
17 mortgage buyer to give Sutton Opportunity a piece of
18 that mortgage -- I don't mean buyer. Borrower.
19 It seems to me it's all treated as one.
20 MR. SCHUMAN: Your Honor --
21 THE COURT: It may not be. But we're just at
22 the very beginning. There has not been discovery here.
23 MR. SCHUMAN: Whether one lawyer handled those
24 transactions or two lawyer, that should not make a
25 difference, we submit, in whether this withstands a
26 motion for summary judgment on this point.

1 Proceedings
2 Also, this was all transparent.
3 Piercing the corporate veil requires domination
4 and abuse of the corporate privilege. As you see in the
5 bankruptcy, again coming back to the bankruptcy, these
6 issues were aired there. They are in affidavit --
7 THE COURT: That is the important thing.
8 We're not dealing with bankruptcy here. I emphasized
9 that again. We're dealing with a separate contract.
10 Separate breaches. Not the bankruptcy.
11 Let me hear from the other side.
12 MR. GREENBERG: Thank you, your Honor.
13 Ronald Greenberg. With me are my colleagues
14 Natan Hamerman and Dan Leonard from the Kramer firm.
15 Your Honor, candidly, I had a 25-minute
16 argument prepared. I was going to walk your Honor
17 through the facts which --
18 THE COURT: Well, go ahead.
19 MR. GREENBERG: No. I'm going to distill my
20 argument really down to two points because it would be
21 wasteful, your Honor, to tell you facts the Court
22 already knows and the law that your Honor knows better
23 than we do.
24 I want to point to something that your Honor
25 said in a slightly different context. This argument
26 that, you know, these -- your Honor had it exactly right

1 Proceedings
2 that your Honor should change how business is done in
3 New York and that's exactly what they're asking.
4 And this argument that the contract event of
5 default provisions are somehow void against public
6 policy and these other loan covenants, these common
7 things that your Honor said you see a thousand times,
8 SPEs, et cetera, is astonishing, especially in this
9 context.
10 Nobody fell off the turnip truck yesterday. My
11 adversaries are sophisticated. We try to do okay. This
12 is a wonderful commercial court to be practicing in.
13 The clients on both sides are decades of lending and
14 borrowing. This is how business is done in this town,
15 your Honor.
16 And the most astonishing thing they said on
17 this point and in their reply, and a case that he just
18 cited here on page 7 of their reply, where they go
19 further than just addressing the event of the default
20 provision. And we've cited cases.
21 Your Honor had the distinction exactly right.
22 You cannot prohibit a bankruptcy. That would be against
23 public policy. You can certainly call a bankruptcy
24 event of default without prohibitibg it and the cases so
25 say.
26 They on reply, they didn't do this in their

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1 Proceedings
2 opening papers, but on reply they come back and say
3 those provisions, meaning not the event of default
4 provision, but the loan covenant that caused this to be
5 a special purpose entity, those provisions are classic
6 special purpose vehicle covenants whose use is simply a
7 disguised form of bankruptcy waiver. As such, they are
8 unenforceable as a covenant and not to file for
9 bankruptcy itself.
10 So, don't listen to them. Your Honor had it
11 exactly right when they're telling you that they're not
12 asking you to change how business is done in this town.
13 They are absolutely are. And that's right in the
14 Noerr-Pennington argument.
15 I think your Honor has it exactly right on
16 these other claims. This is a million miles away from
17 preemption. Nothing is preempted here. These are for
18 breaches that, under state law, that occurred prior to
19 the bankruptcy.
20 And, by the way, this is really their second
21 motion to dismiss. They are calling it a summary
22 judgment motion, but as you heard over and over, it's an
23 attack on the pleading. The reason is they had an
24 initial motion to dismiss, as your Honor I'm sure will
25 recall, was denied, that attacked our damages which he
26 now is attacking again on a motion for summary judgment.

1 Proceedings
2 The only other quick point I'll make on the
3 piercing claim, your Honor is, again, is exactly right.
4 Not only have we alleged way more than a complaint
5 usually does and they're attacking the pleading, but the
6 First Department has said more than once that these
7 types of claims attacking intent are exactly the type
8 that should not be granted on summary judgment
9 particularly before we've had any discovery.
10 The last thing I'll say, your Honor, is I heard
11 my adversary say that these transactions were
12 transparent. Your Honor, that's anything but the case.
13 In fact, they used the lawyer, as your Honor noted,
14 Pilevsky's lawyer, not only to represent the father and
15 son and son's entities, but also the borrower and the
16 borrower's principal and now they're telling us every
17 thing in this transaction is privileged and we can't
18 have it. And we'll fight that fight, your Honor. But
19 this is the opposite of transparent.
20 So, unless the Court has any questions.
21 THE COURT: I don't.
22 I am going to deny this summary judgment from
23 the bench. I think that it's, even though it is a
24 summary judgment motion, there has been no discovery
25 here.
26 I think there is clearly on it's face an action

1 Proceedings
2 alleged as to tortious interference as to the piercing
3 of the corporate veil. I cited the Cortland Street case
4 and as that court said, whether Plaintiff can ultimately
5 prove its allegations is not a consideration in
6 determining a motion to dismiss. And this is, in a
7 sense, a motion to dismiss because there has been no
8 discovery.
9 Furthermore, a fact latent claim to pierce,
10 there are plenty of facts here I think on their face
11 make out a valid claim, a fact latent claim to pierce a
12 corporate veil is unsuited for resolution on a
13 pre-answer pre-discovery motion to dismiss. Again, this
14 is a vsummary judgment motion, but there has been no
15 discovery here yet. It's very similar to that, this
16 Cortland case.
17
18 (Transcript continues on the next page.)
19
20
21
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26

1 Proceedings
2 I believe that there is plenty here in terms of
3 an argument regarding the veil piercing.
4 So, I am denying summary judgment in total for
5 all of these reasons. I think there is, perhaps, a good
6 claim here and it needs discovery.
7 This shall constitute the Decision and Order of
8 the Court.
9 MR. GREENBERG: Thank you, your Honor.
10 (Record is closed.)
11
12 ** ** **
13 This is certified to be a true and accurate
14 transcription of my stenographic notes.
15
16
17
CAROLYN BARNA
18 SENIOR COURT REPORTER
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**$**

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