2012 WL 4867783
Supreme Court, Appellate Division,
First Department, New York.

NINETEEN EIGHTY–NINE,
LLC, Plaintiff–Respondent,
v.
ICAHN ENTERPRISES L.P.,
et al., Defendants–Appellants.
Carl C. Icahn, et al., Plaintiffs–Appellants,
v.
Geoffrey Raynor, et al., Defendants–Respondents.

Oct. 16, 2012.

Synopsis

Background: Plaintiff brought action alleging that defendants breached parties' agreements by transferring shares of corporation to affiliated company and causing that affiliate to institute bond offering without disclosing its interest in shares to potential investors, thereby encumbering shares and endangering its interest. Defendants filed action alleging that timing of plaintiff's lawsuit and its filing of beneficial ownership report with Securities and Exchange Commission (SEC) lowered demand for bonds that they were offering and negatively affected their revenue from bond sale. The Supreme Court, New York County, Eileen Bransten, J., denied defendants' motion to dismiss first complaint, and dismissed complaint in second action, 936 N.Y.S.2d 59, 2011 WL 3250417. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] filing of beneficial ownership report with Securities and Exchange Commission (SEC) was protected by *Noerr–Pennington* doctrine, and

[2] absolute privilege applied to statements made in beneficial ownership report.

Affirmed.

West Headnotes (3)

[1] Antitrust and Trade Regulation

Purported owner's filing of beneficial ownership report with Securities and Exchange Commission (SEC) was incidental to litigation regarding shares' ownership, and thus was protected by *Noerr–Pennington* doctrine, even if report was only glorified press release meant to frighten away investors.

[2] Libel and Slander

Absolute privilege applied to statements made in beneficial ownership report filing with Securities and Exchange Commission (SEC).

[3] Libel and Slander

Absolute privilege applies even in quasi-judicial hearings and administrative hearings, and privilege attaches not only to hearing stage, but to every step of proceeding even if it is preliminary and/or investigatory, and irrespective of whether formal charges are ever presented.

Attorneys and Law Firms

Herbert Beigel & Associates LLC, Tucson, AZ (Herbert Beigel of the bar of the State of Arizona, admitted pro hac vice, of counsel), and Robert R. Viducich, NY, for appellants.

Zeichner Ellman & Krause LLP, NY, (Jeff I. Ross of counsel), for respondents.

GONZALEZ, P.J., SWEENY, ACOSTA, RENWICK, MANZANET–DANIELS, JJ.

Opinion

***1** Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 6, 2012, which, upon reargument of defendants Icahn Enterprises L.P., Icahn Enterprises Finance Corp., Chelonian Subsidiary, LLC and Carl C. Icahn's (Icahn defendants) motion to dismiss, adhered to its prior order, entered June 2, 2011, which, inter alia, denied dismissal of plaintiff Nineteen Eighty–Nine, LLC's (1989) remaining two causes of action for breach of contract, unanimously affirmed, with costs. Order, same court and Justice, entered June 23, 2011, which granted the motion of defendants Geoffrey Raynor; R2 Investments, LDC; Nineteen Eighty–Nine, LLC; Amalgamated Gadget, LP; Sceptor Holdings, Inc.; Q Funding, LP; Acme Widget, LP and Brandon Teague (Raynor defendants) to dismiss the complaint of Carl C. Icahn, Icahn Enterprises, LP, Icahn Enterprises Finance Corp. and Icahn Enterprises Holdings, LP (Icahn plaintiffs), and denied the Icahn plaintiffs' request for leave to amend, unanimously affirmed, with costs.

1989's allegations that the Icahn defendants breached the parties' LLC and Side Letter Agreements by transferring shares of Federal Mogul Corporation to an Icahn affiliate and causing that affiliate to institute a bond offering without disclosing 1989's interest in the shares to potential investors, thereby encumbering the shares and endangering 1989's interest, were sufficient to withstand the Icahn defendants' motion to dismiss (*see Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 [1st Dept 2010], *Jericho Group, Ltd. v. Midtown Dev., L.P.*, 32 A.D.3d 294, 298, 820 N.Y.S.2d 241 [1st Dept 2006]).

[1] The Icahn plaintiffs offer no support for their assertion that 1989's filing of a Schedule 13D with the SEC in 2010 is not entitled to protection under the Noerr–Pennington doctrine because the document was simply a "disclosure document." The 13D was filed *because* the 2010 litigation was commenced, and thus, it was incidental to that litigation and falls squarely within the protection of the Noerr–Pennington doctrine (*see Aircapital Cablevision, Inc. v. Starlink Communication Group, Inc.*, 634 F.Supp. 316, 323–324 [D Kan 1986] [finding publicity that was "[c]learly ... bully-type conduct" that undoubtedly hurt defendant's business to be "incidental to the lawsuit"]). Here, as in *Aircapital*, the filing of the Schedule 13D amendment was incidental to the lawsuit, and thus protected, even if, as the Icahn plaintiffs argue, the 13D was only a glorified press release meant to frighten away investors, and even if the Raynor defendants would have been "better advised to have refrained from [so filing]" (*Aircapital Cablevision, Inc.*, 634 F.Supp. at 324). As such, the court properly dismissed both the tortious interference and prima facie tort claims as precluded by Noerr–Pennington (*see Concourse Nursing Home v. Engelstein*, 278 A.D.2d 35, 717 N.Y.S.2d 154 [1st Dept 2000] [dismissing tortious interference and prima facie tort claims as precluded by Noerr–Pennington]). Because these claims are precluded by Noerr–Pennington, this court need not consider whether they were otherwise well pled.

***2** The court also properly dismissed the remainder of the Icahn plaintiffs' claims.

[2] **[3]** The Icahn plaintiffs attempt to exclude from absolute immunity to claims of injurious falsehood, certain statements made by the Raynor defendants specifically in the Schedule 13D. As found by the lower court, however, the absolute privilege applies "even in quasi-judicial hearings and administrative hearings, and the privilege 'attaches not only to the hearing stage, but to every step of the proceeding even if it is preliminary and/or investigatory, and irrespective of whether formal charges are ever presented' " (quoting *Cicconi v. McGinn, Smith & Co., Inc.*, 27 A.D.3d 59, 62, 808 N.Y.S.2d 604 [1st Dept 2005], *appeal dismissed* 6 N.Y.3d 807 [2006]). Here, the Raynor defendants filed the Schedule 13D amendment as part of the broad regulatory scheme required by the SEC and kicked into gear by the Icahn plaintiffs' commencement of the bond offering process. The Icahn plaintiffs, thus, offer no basis to deny absolute privilege to the statements made in the Schedule 13D amendment, and the injurious falsehood claim was appropriately dismissed.

The gravamen of the Icahn plaintiffs' abuse of process claim is that the Raynor defendants abused the legal process by filing the 2010 lawsuit with malicious intent. This fact is borne out by review of the actual language of the cause of action, which states that "the conduct in the filing of the Lawsuit"-not the filing of the Schedule 13D-was the abuse of process. Such a claim cannot stand (*see I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 207, 793 N.Y.S.2d 379 [1st Dept 2005]).

Finally, the court properly denied the Icahn plaintiffs' motion to amend, as any amendment would be "palpably insufficient

or clearly devoid of merit" (*Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498, 918 N.Y.S.2d 423 [1st Dept 2011]), given that three of the claims at issue are barred by immunity doctrines and that no amendment can alter the fact that the filing of a complaint, alone, is not an abuse of process.

We have considered the parties' remaining arguments and find them unavailing.

Parallel Citations

2012 N.Y. Slip Op. 06869