IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALLEN FAMILY FOODS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N10C-10-313 JRS CCLD
	)	
CAPITOL CARBONIC CORPORATION,	)	
	)	
	)	
Defendant.	)	

Date Submitted: February 9, 2011
Date Decided: March 31, 2011

MEMORANDUM OPINION.

Upon Consideration of Defendant's Motion to Dismiss Count II of the Amended Complaint.
GRANTED.

Mark D. Olson, Esquire and Corrine E. Amato, Esquire, MORRIS JAMES, LLP, Wilmington, Delaware. Attorneys for Plaintiff.

James S. Green, Sr., Esquire and Kevin A. Guerke, Esquire, SEITZ VAN OGTROP & GREEN, P.A., Wilmington, Delaware. Attorneys for Defendant.

SLIGHTS, J.

I.

In this opinion, the Court considers whether the plaintiff, Allen Family Foods, Inc. ("Allen"), has stated a viable claim for tortious interference with contract against defendant, Capitol Carbonic Corporation ("Capitol"). Capitol has moved to dismiss the claim (Count II of the Amended Complaint) pursuant to Delaware Superior Court Civil Rule 12(b)(6) on the ground that Delaware law does not recognize tortious interference with contract as alleged by Allen. According to Capitol, Delaware recognizes claims for tortious interference with contract only in those instances where the defendant's alleged wrongful conduct causes a *third party* to breach its contract with the plaintiff. Here, Allen alleges that Capitol has interfered with *Allen's* performance of a contract with a third party. In response to Capitol's motion, Allen urges the Court to adopt Restatement (Second) of Torts § 766A, which recognizes a claim for "intentional interference with another's performance of his own contract."[1]

For the reasons that follow, the Court finds that Section 766A is or should be the law of Delaware. Nevertheless, Allen has failed to plead a viable claim for tortious interference with contract under Section 766A or otherwise. Accordingly, Capitol's motion to dismiss must be **GRANTED.**

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[1]Restatement (Second) of Torts § 766A (1979) (hereinafter "Section 766A").

II.

Allen operates a poultry processing facility in Harbeson, Delaware and Cordova, Maryland.[2] Carbonic is a supplier of dry ice operating out of Baltimore, Maryland.[3] On or about September 27, 2002, Allen and Carbonic entered into a Product Agreement ("the Agreement") pursuant to which Carbonic was to supply all of Allen's dry ice requirements for its Delaware and Maryland facilities.[4] In September, 2010, believing that the Agreement had terminated by its terms, Allen entered into a supply contract with Praxair Distribution, Inc. ("Praxair") pursuant to which Praxair was to supply all of Allen's dry ice requirements (hereinafter the "Praxair Contract").[5] Three days later, on September 30, 2010, Carbonic, through counsel, sent a letter to Praxair "threatening Praxair with a lawsuit for alleged interference with the [Agreement]" (the "Praxair letter").[6] Specifically, Carbonic advised Praxair that the Agreement had not terminated and that it was operative until September 27, 2012.[7] Carbonic further advised Praxair that it believed the Praxair

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[2]Amended Complaint, ¶ 5 (hereinafter "Am. Compl. ___).

[3]*Id.* at ¶ 6.

[4]*Id.* at ¶¶ 1, 9.

[5]*Id.* at ¶ 23.

[6]*Id.* at ¶ 27.

[7]*Id.* at ¶ 26.

Contract improperly interfered with the Agreement in that Allen could not perform both.[8]

In response to the Praxair letter, Allen ceased performance of the Praxair Contract and committed to Carbonic that it would accept and pay for dry ice from Carbonic pursuant to the Agreement (with addenda) through September 27, 2011, reserving its rights to challenge the ongoing validity of the Agreement.[9] According to Allen, it ceased performance of the Praxair Contract "[i]n order to avoid supply disruptions and litigation costs" that likely would have ensued as a result of the Praxair letter.[10] Allen now seeks damages *inter alia* for Carbonic's tortious interference with the Praxair Contract.

III.

Carbonic contends that Allen cannot make out a viable tortious interference with contract claim under circumstances where it voluntarily stopped performing its contract with Praxair, even if the decision to stop performance was prompted by Allen's belief that its performance of the Praxair Contract would be more burdensome in light of the Praxair letter. According to Carbonic, the only claim for tortious

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[8] *Id.*

[9] *Id.* at ¶ 28.

[10] *Id.*

interference with contract recognized in Delaware is the claim codified in Restatement (Second) of Torts § 766 which addresses instances where a defendant's wrongful conduct causes a third party to breach its agreement with the plaintiff.[11] Since Allen has not pled that Praxair breached the Praxair Contract, Carbonic contends that Section 766 is not implicated here and the claim must fail as a matter of law. With respect to Allen's claim that Section 766A creates a new cause of action in Delaware, Carbonic argues that at least one federal court, interpreting Delaware law, has predicted that Section 766A would be rejected by the Supreme Court of Delaware because it sanctions an inherently speculative claim. Allen argues that this Court likewise should decline to adopt Section 766A and should reject Allen's claim thereunder.

In response, Allen argues that Carbonic has cast the claim of tortious interference with contract too narrowly. It points to Section 766A and argues that the facts pled in its Amended Complaint fit squarely within the cause of action set forth therein. Specifically, Allen argues that its allegation that it was forced to cease performance of the Praxair Contract "[i]n order to avoid supply disruptions and litigation costs" is precisely the sort of "burden" and/or "expense" in the performance

[11] *See* Restatement (Second) of Torts § 766 (1979) (hereinafter "Section 766").

of a contract that is contemplated by Section 766A.[12] Although not yet adopted in Delaware, Allen urges the Court to endorse Section 766A as a logical extension of the existing Delaware law on tortious interference with contract.

IV.

When evaluating a motion to dismiss under Rule 12(b)(6), the Court must read the complaint generously, accept all of the well-pled allegations contained therein as true, and construe them in a light most favorable to the plaintiff.[13] In the context of a Rule 12 motion to dismiss, a complaint is "well-pled" if it puts the opposing party on notice of the claim being brought against it.[14] A complaint will not be dismissed unless the plaintiff would not be entitled to recover under any reasonable set of circumstances susceptible of proof.[15] Stated differently, a complaint may not be dismissed unless it is clearly without merit, which may be determined as a matter of

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[12]Section 766A provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be *more expensive or burdensome*, is subject to liability to the other for the pecuniary loss resulting to him." (emphasis supplied).

[13] *See In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993) (holding that the reviewing court must accept the allegations of the complaint as true); *Browne v. Robb*, 583 A.2d 949, 950 (Del. 1990) ("The complaint sufficiently states a cause of action when a plaintiff can recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.") (internal citation omitted). *See also Johnson v. Gullen*, 925 F. Supp. 244, 247 (D. Del. 1996) (same).

[14] *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995).

[15] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).

law or fact.[16]

V.

The Court already has determined in an oral ruling that Allen has failed to state a cause of action under Section 766, as adopted in Delaware, because that provision recognizes a claim for tortious interference with contract only in those instances where the defendant's conduct "induces a *third party* to terminate a contract with the plaintiff unlawfully . . . ."[17] Since Allen has not alleged that Praxair breached its contract with Allen at all, much less as a result of Capitol's allegedly wrongful conduct, Allen has failed to state a claim under Section 766. The question remains, however, whether Allen has stated a claim under another viable theory of tortious interference with contract. To answer this question, the Court must consider two issues: (1) whether Delaware recognizes a cause of action under Section 766A; and (2) if so, whether Allen has stated a viable claim under that provision. The Court will address these issues in turn.

A. Section 766A Sets Forth A Valid Cause of Action For Tortious Interference of Contract

"Delaware generally follows the Restatement with respect to tortious

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[16] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[17] *ASDI, Inc. v. Beard Research, Inc.,* 11 A.3d 749, 750 (Del. 2010) (citing Section 766) (emphasis supplied).

interference."[18] This includes recognition of Section 766 (tortious interference with a third party's performance of a contract)[19] and Section 766B (tortious interference with prospective contractual relations).[20] It does not appear, however, that any Delaware state court has addressed whether Section 766A codifies a viable cause of action for instances where a defendant's conduct allegedly interferes with plaintiff's performance of a third party contract. Having said this, the United States District Court for the District of Delaware has predicted that our Supreme Court would reject Section 766A because "causing the [plaintiff's] performance of a contract to be more costly 'as an element of proof is too speculative and subject to abuse to provide a meaningful basis for a cause of action.'"[21] Capitol urges this Court to follow *Anderson*'s lead and conclude that the cause of action set forth in Section 766A is too speculative and inconsistent with the law of Delaware.

In *Anderson,* the court addressed plaintiffs' claim that a mortgage lender had tortiously interfered with their contracts with a home seller by adding inappropriate

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[18] *Grunstein v. Silva*, 2009 WL 4698541, at *16 (Del. Ch. Dec. 8, 2010).

[19] *ASDI, Inc.*, 11 A.3d at 750.

[20] *Empire Fin. Serv., Inc. v. Bank of New York (Del.)*, 900 A.2d 92, 98 (Del. 2006).

[21] *Anderson v. Wachovia Mort. Corp.,* 497 F.Supp.2d 572, 583 (D.Del 2007), *aff'd,* 621 F.3d 261, 281 (3d Cir. 2010). *But see Nelson v. Fleet Nat'l Bank*, 949 F.Supp 254, 260 (D. Del. 1996) (assuming without deciding that Section 766A was the law of Delaware).

conditions to the approval of their mortgages.[22] The court began its tortious interference analysis by noting that the seller had not breached its contracts with the plaintiffs. Thus, plaintiffs' tortious interference claim necessarily was premised upon the notion that the lender's actions had made their performance of the purchase contracts "more expensive or burdensome."[23] As stated, the court concluded that the claim was too speculative and that the Supreme Court of Delaware would decline to allow it.[24] In so holding, the court relied heavily upon a decision of the Third Circuit Court of Appeals, *Gemini Physical Therapy & Rehab., Inc. v. State Farm Mutual Auto. Ins. Co.*, in which the court, predicting a ruling of the Pennsylvania Supreme Court, affirmed the lower court's dismissal of a claim based on Section 766A because the claim was "too speculative."[25] *Gemini,* in turn, offered little analysis of the issue but did cite to two other decisions for support - - one an earlier decision of the Third

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[22] *Id.* at 574-65.

[23] *Id.* 583-84.

[24] *Id.*

[25] *Id.* (citing *Gemini Physical Therapy & Rehab., Inc. v. State Farm Mutual Auto. Ins. Co.,* 40 F.3d 63, 66 (3d Cir. 1994)). *But see P.V.C. Realty v. Weis Markets, Inc.,* 2000 WL 33406981, at * 17 (Pa. Ct. Com. Pl. 2000) (declining to follow *Gemini* after noting: "It seems irrational to recognize a cause of action for a party's conduct directed at a third party designed to prevent that party from performing a contract with another and not recognize a similar cause of action for that other party where the actor's conduct is instead directed at the other to prevent them from performing. In either case an actor's improper conduct is preventing the performance of a valid contract to which it is not a party.").

Circuit Court of Appeals, *Windsor Securities, Inc. v. Hartford Life Ins. Co.,*[26] and the other a decision of the Supreme Court of Wyoming, *Price v. Sorrell*.[27] Both *Windsor* and *Price* do address the *bona fides* of a Section 766A claim in detail and warrant consideration here.

In *Windsor,* the court, interpreting Pennsylvania law, began its analysis of plaintiff's tortious interference claim by observing that Pennsylvania had long recognized a claim under Section 766 for improperly interfering with a third person's performance of his existing contract with the plaintiff.[28] The court characterized claims of this nature as "inducement torts" in that the defendant "induces" a third party to act in a manner detrimental to the plaintiff.[29] In contrast, the court characterized claims based on Section 766A as "hindrance torts" in that the defendant hinders the plaintiff in the performance of its own obligation to a third party.

With respect to claims of interference based on "inducement," the court noted that the "justification" for the tort is the "encourage[ment] [of] voluntary transactions" by forcing "the inducer [to] bargain directly with the promisee

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[26]986 F.2d 655 (3d Cir. 1993).

[27]784 P.2d 614 (Wyo. 1989).

[28]*Windsor Securities, Inc.*, 986 F.2d at 660.

[29]*Id.*

[plaintiff]."[30] This, in turn, "protects the security of transactions, reduces monitoring costs, encourages consensual rearrangements of contractual obligations, and avoids the negotiation and litigation costs that arise where an inducer causes a promisor to breach its contract with its promisee."[31] With respect to claims of interference based on "hindrance," however, the court observed that "this 'bargain-forcing' justification appears absent" because it "does not encourage the third party to bargain with the promisee."[32] Rather, in instances where the defendant does not prevent the plaintiff's performance but simply renders it more expensive, "[t]he question becomes not whether plaintiff will perform but rather at what cost."[33] The court observed that allowing for a cause of action in tort under such circumstances might well "hamper commercial activity" and "undermine the integrity of contract remedies."[34] Moreover, the court noted that a defendant who affects a plaintiff's ability to perform its own contract by "force, fraud or other actionable conduct" will face exposure to claims of "an independent tort" (depending on the nature of the conduct) in which case the

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[30] *Id.* at 661.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 661-62.

[34] *Id.* at 663 (citations omitted).

"adverse effect on contract rights will become an element of damages."[35]

After considering the "different effects and justifications" of Section 766 and Section 766A, the court in *Windsor* expressed real concern regarding the "expan[sion] of tortious interference liability" to the extent called for in Section 766A. The court declined to decide the ultimate question of whether Pennsylvania would adopt Section 766A, however, because it determined that plaintiff had not developed facts to support a viable Section 766A claim in any event.[36]

The court in *Price* shared many of the concerns regarding Section 766A expressed in *Windsor* but, ultimately, rested its decision to reject the cause of action on the simple view that a claim based on interference that renders a plaintiff's performance of its own contract "more expensive or burdensome" as an element of proof "is too speculative and subject to abuse to provide a meaningful basis for a cause of action."[37] The court pointed to Section 766's requirement that a defendant's conduct improperly induce a third party to *breach* or, at least, fail to perform its contract with the plaintiff and characterized this element of *prima facie* proof as a "bright line that reduces the potential for abuse of the causes of action [for tortious

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[35] *Id.*

[36] *Id.*

[37] *Price,* 784 P.2d at 616.

interference with contract]."[38] The court then definitively held "that an action for tortious interference with a contract requires 'an actual breach, failure to perform or termination of the contract.'"[39]

In a thoughtful concurring opinion, Justice Thomas wrote that the majority went too far by rejecting Section 766A outright.[40] According to Justice Thomas, Section 766A does not present "a new legal theory" which the court must determine to adopt or not adopt, but rather presents a means to "flesh out in a consistent manner a legal theory that already has been adopted."[41] Given that Wyoming had already adopted Section 766 and Section 766B (interference with prospective contractual relations), "[t]he trial bench and bar would have every reason to assume that ... the court would adopt § 766A."[42] In this regard, Justice Thomas noted that the majority had drawn a distinction without a difference: "If, as we have said, we permit recovery for the tort of wrongful interference with a contract, or potential contract, when the wrongful acts are directed toward the other party to the contract, or potential contract, no logical reason can be advanced for refusing recovery when the wrongful acts are

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[38] *Id.*

[39] *Id.* (citation omitted).

[40] *Id.* at 617-18.

[41] *Id.*

[42] *Id.*

directed toward the party who thereby is prevented from performing his duties under the contract or whose performance is rendered more onerous by the wrongful act of the tortfeasor."[43] The so-called "bright line" of breach is artificial in the tortious interference context, Justice Thomas wrote, "because that requirement obviously is not an element of proof when the tort of wrongful interference with a potential contract is addressed under [Section] 766B."[44] He addressed the supposed "economic implications" of adopting Section 766A by noting that Restatement (Second) of Torts § 768, which clearly distinguishes "proper competition" from "improper competition" and informs the analysis under Section 766A, would more than adequately prevent the competitive abuses about which the majority expressed concern.[45]

After pointing out the purported flaws in the majority's analysis, Justice Thomas' concurrence went on to conclude that plaintiff had not made out a claim under Section 766A in any event because the defendant's conduct at issue had been directed at the third party with whom the plaintiff had contracted, not the plaintiff himself.[46] Under such circumstances, "a claim could have been presented under §

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[43] *Id.* at 618.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 617-18.

766" had the third party failed to perform the contract.[47]

Having reviewed the case law carefully, the Court finds the views of those judges who have endorsed Section 766A as a valid expansion of the law of tortious interference of contract to be most persuasive. As noted, our Supreme Court has already endorsed Sections 766 and 766B as the law of Delaware.[48] The courts that have rejected Section 766A have expressed most concern over the "speculative" nature of a claim that a defendant's interference has caused the plaintiff's performance of a contract to be "more costly."[49] But, as noted in *P.V.C. Realty,* the fact that some claims brought under Section 766A may present speculative damages "does not mean that Section 766A in its entirety is flawed."[50] Not all claims under Section 766A will present speculative damages [51] and those that do can be dealt with under our Rules of Civil Procedure in the same manner as any claim that rests upon

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[47]*Id.* at 618.

[48]*See ASDI, Inc.,* 11 A.3d at 750 (applying Section 766); *Empire Fin. Serv., Inc.,* 900 A.2d at 98 (applying Section 766B).

[49]*See Anderson,* 621 F.3d at 281; *Gemini*, 40 F.3d at 66; *Price*, 784 P.2d at 616.

[50]*P.V.C. Realty,* 2000 WL 33406981, at *17.

[51]*See e.g. Rinaldi v. Tana*, 250 A.2d 533 (Md. 1969) (relying upon Section 766A, court found tortious interference when plaintiff's subcontractor failed to perform its part of a contract thereby rendering plaintiff's performance more costly); *L&H Investments, Ltd. V. Belvey Corp.,* 444 F.Supp. 1321 (W.D.N.C. 1978) (relying upon Section 766A, court found tortious interference when lessor wrongfully refused to consent to tenant's sublease thereby causing tenant to breach the sublease).

inherently speculative damages.[52] Moreover, "[i]t seems irrational to recognize a cause of action for a party's conduct directed at a third party designed to prevent that third party from performing a contract with another and not recognize a similar cause of action for that other party where the actor's conduct is instead directed at the other to prevent them (sic) from performing."[53] Such a distinction would encourage outsiders (without fear of sanction) to target their wrongful interference against the party to a contract they know would most likely be harmed by their interference and, therefore, most likely to seek redress in the courts should the contract collapse under the weight of the interference.[54] The Court can think of no rational basis to encourage behavior which would be tantamount to targeted tortious interference. Finally, the Court is satisfied that Section 768, which delineates proper versus improper interference and is incorporated into the Section 766A analysis, adequately addresses the concern that Section 766A somehow chills proper "commercial activity" or "undermines the integrity of contract remedies."[55]

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[52]*See e.g. Villare v. Katz,* 2010 WL 2125462 (Del. Super. May 10, 2010) (granting summary judgment upon concluding that plaintiff's damages claim was too speculative as a matter of law to proceed to trial).

[53]*P.V.C. Realty,* 2000 WL 33406981, at *17.

[54]*Id.*

[55]*See*, *Windsor*, 986 F.2d at 663.

Having concluded that Delaware would not reject Section 766A, the Court must now consider whether Allen has stated a viable claim of tortious interference against Capitol under that section or otherwise. As discussed below, the Court is satisfied that no such claim has been pled in this case.

B. Allen Has Not Pled A Viable Claim Under Section 766A

The factual predicate of Allen's tortious interference claim is the Praxair letter - a letter sent by Capitol to Praxair, not Allen.[56] Capitol's alleged wrongful conduct, therefore, was directed at a "third party," not the plaintiff. At its essence, then, Allen's claim misses the mark set by Section 766A.[57]

Moreover, Section 766A is intended to address situations where "the plaintiff is unable to obtain performance of the contract by the third person because he has been prevented from performing his part of the contract and thus from assuring himself of receiving the performance by the third person."[58] Here, Allen does not allege that Praxair was prevented from performing the Praxair Contract, nor does it allege that it has been forced to breach the Praxair Contract as a result of the Praxair

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[56]Am. Compl. ¶¶ 37-44.

[57]*Windsor*, 986 F.2d at 660 (explaining that Section 766 addresses situations where defendant directs interfering conduct at a third party whereas Section 766A addresses conduct directed at the plaintiff - "[t]hus, the sections focus on different targets of interfering conduct.").

[58]Restatement (Second) of Torts § 766A, cmt. c.

letter (or, for that matter, that it has breached the Praxair Contract at all).[59] Rather, Allen alleges simply that "[t]he Praxair Letter was a significant factor in causing Allen to continue to accept dry ice deliveries from Carbonic in contravention of the Praxair Contract."[60] This allegation neither states that Allen was "prevented from performing" the Praxair Contract nor does it state that its performance of the Praxair Contract was made "more expensive or burdensome" by Capitol's conduct.[61] In other words, Count II of the Amended Complaint fails to state a claim under Section 766A.

At oral argument, counsel for Allen explained that Allen intended to plead that it was forced to continue its performance under the Agreement for fear that Carbonic's threat of litigation against Praxair might prompt Praxair to refuse to perform under the Praxair Contract and thereby disrupt Allen's supply of dry ice. Allen's fear of what Praxair *might* have done in response to the Praxair letter is precisely the sort of speculation about which those who criticize Section 766A have commented. If Praxair had breached the Praxair Contract as a result of Capitol's wrongful interference, then Allen would have had a claim against Capitol under Section 766. The fact that Allen feared a Praxair breach, without more, does not rise

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[59] Am. Compl. ¶¶ 37-44.

[60] *Id.* at ¶ 40.

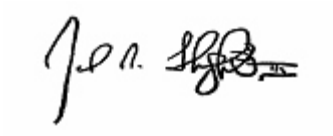
[61] *See* Section 766A.

to the level of actionable tortious interference with contract under Section 766A or otherwise. At best, Allen possesses a not-yet-ripe claim of tortious interference under Section 766.

VI.

Based on the foregoing, Capitol's Motion to Dismiss Count II of Allen's complaint, alleging tortious interference with contract, must be **GRANTED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III