SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 152421/2012
ENOTECA, INC.
vs.
NEW YORK UNIVERSITY
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/6/13

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

ENOTECA, INC., AND 129 MACDOUGAL STREET ASSOCIATES, INC.,

Plaintiff,

- v -

NEW YORK UNIVERSITY,

Defendants.

INDEX NO. 152421/2012

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answer — Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: X Yes No

Plaintiff Enoteca, Inc. ("Enoteca") operates a restaurant called La Lanterna di Vittorio (the "Café"), located at 129 MacDougal Street, New York, NY, as well as The Bar Next Door (the "Bar"), a jazz club located at 131 MacDougal Street, New York, NY. Plaintiff 129 MacDougal Street owns the building in which the restaurant is located. The jazz club is leased from the owner of 131 MacDougal Street.

According to the complaint, in 2008 and 2009, Defendant New York University ("NYU") performed construction work at 133-139 MacDougal Street, as part of larger plan to expand its facilities in Greenwich Village. To effect this plan, NYU formulated a program known as "NYU 2031". The NYU 2031 program was allegedly formulated "to ease the concerns of the residents of Greenwich Village that the major construction plans contemplated by NYU would not disrupt the community or change the character of the neighborhood."

The complaint asserts that the NYU 2031 plan made representations that it would be "sensitive to placing undue stress on its cultural and physical environments"; "consider the community, the neighborhoods, and the city that it depends on"; and that it would "proceed with openness, transparency, dialogue and reflection."

Plaintiff alleges that NYU's construction project has caused property damage: "cracks in the floors and walls of the Café and the Club," "door frames and other framing in the Café and Club to shift," "general damage to the walls, floors, and ceilings and other structures at 129 and 131 MacDougal Street."

The complaint further asserts that to facilitate construction, a street barrier was erected which was unreasonably long and caused a host of problems, such as, but not limited to, loud noise and odors, blockage of street cleaning trucks and residential garbage pickups, and sidewalk obstruction.

The complaint alleges the following causes of actions:(1) property damage; (2) tortious interference with business relationships; (3) prima facie tort; (4) third-party beneficiary; and (5) nuisance.

NYU now moves to dismiss the second, third, fourth and fifth causes of action. Plaintiff, by way of a cross motion, moves to amend its pleadings, if the defendant's motion to dismiss is granted. However, plaintiff fails to provide a proposed amended pleading.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

> Interference with a business relationship or business expectancy is a tort recognized under state law. Tortious interference with business relations occurs when one unlawfully diverts prospective customers away from another's business. The elements of a claim for intentional interference with business expectancy are: (1) a valid business relationship or expectancy but not necessarily a contract; (2) the defendant's knowledge of the relationship; (3) intentional interference by the defendant inducing or causing a breach of the relationship; (4) the absence of justification; and (5) damages, resulting from the defendant's conduct. . . . The tort requires some independent illegal action. (44B Am Jur 2d Interference § 48).

To state a claim for tortious interference with business relationships, a plaintiff must allege that: 1) the plaintiff had business relations with a third party; 2) the defendant interfered with those business relations; 3) the defendant acted either with the sole purpose of harming the plaintiff or interfered by using means amounting either to a crime or an independent tort; and 4) damages (*Amaranth LLC v. JP Morgan Chase*, 71 AD3d 40, 888 NYS2d 489 [1st Dept 2009]). Defendant must direct its wrongful conduct at the third party with whom a plaintiff has or has sought a business relationship, and not against the plaintiff itself. (*Carvel Corp. V. Noonan*, 3 NY3d 182, 818 NE2d 1100, 785 NYS2d 359 [2004]).

Here, Plaintiff alleges that "the Café and Club enjoyed the highest reputation for service and ambiance," and "as a result of the reputation . . . and the high quality service provided by the Café and the Club to its regular customers, as well as customers who walked by or were visiting New York as tourists, such customers would visit the Café and the Club to enjoy said amenities." The complaint alleges that because of NYU's "misconduct," "the Café and the Club were inundated with noise, odors, vermin and other conditions which rendered it impossible for customers . . . to enjoy the amenities." Thus, plaintiff claims NYU interfered with the relationships that the Café and the Club enjoyed with its customers.

Plaintiff fails to allege that NYU acted with the sole purpose of harming plaintiff or interfered using means that were criminal or tortious. The complaint claims that "NYU engaged in construction work on the Project in a negligent manner, in violation of the applicable laws, rules and regulations and in complete disregard fo the rights of the plaintiffs." The complaint cites to various building department and Environmental Control Board violations issued regarding the construction on the Project. Such violations "specifically pertain to such issues as 'failure to provide protection at sides of excavation', 'no sheeting, shoring, bracing', 'failure to protect adjoining roof [&] skylights & outlets affected by construction or demolition operations', 'failure to safeguard all persons and property affected by construction', and 'failure to provide protection at sides of excavation'." However, these violations do not relate to the noise, odors, vermin and other conditions which allegedly interfered with customers' enjoyment of the amenities offered by the Café and the Club.

The complaint states that "NYU's major concern was to avoid delays on the Project and avoid compensating the plaintiffs and other neighboring businesses and residence for loss of business, property damage and other damages." Plaintiff fails to allege facts to show that defendant acted either for the sole purpose of harming the plaintiff or interfered by using means amounting either to a crime or an independent tort.

The motion to dismiss the Second cause of action is granted.

PRIMA FACIE TORT

Prima facie tort affords a remedy for "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful." To state a cognizable claim for prima facie tort, a plaintiff must allege "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." (*Freihofer v. Hearst Corp.*, 65 NY2d 135 [1985]).

There can be no recovery under this theory "unless malevolence is the sole motive for defendant's otherwise lawful act." (*Burns Jackson Miller Summit &*

Spitzer v. Lindner, 59 NY2d 314 [1983]. Where defendant's actions are supported by a proper motive such as the maintenance of appropriate professional standards or the resolution of grievances, there is no recovery under a theory of prima facie tort. (*Amodei v. New York State Chiropractic Ass'n*, 160 AD2d 279, aff'd 77 NY2d 891.) Motives of profit, economic self-interest, or business advantage also bar recovery. (*Squire Records, Inc. V. Vanguard Recording Soc., Inc.*, 25 AD2d 190, aff'd 19 NY2d 797).

Additionally, a critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of specific damages. (*Friehofer v. Hearst Corp.*, 65 NY2d 135 [1985]). General allegations of lost sales from unidentified customers are insufficient. (*Drug Research Corp. v. Curtis Publishing Co.*, 7 NY2d 435). Damage set forth without particularization is deemed an allegation of general rather than special damage. (*Leather Dev. Corp. v. Dun & Bradstreet, Inc.*, 15 AD2d 761, aff'd, 12 NY2d 909).

Here, the complaint alleges that "NYU did nothing concrete to address the concerns of [plaintiff] regarding the construction on the Project. NYU made promises to ameliorate conditions but never actually took any meaningful actions to do so." The complaint alleges taht plaintiff made efforts to resolve the issues, but "NYU's response was that the Project needed to be completed on time within budget." While the complaint concludes that NYU "acted with complete disregard for the businesses of the plaintiffs, in bad faith and with a disinterested malevolence bordering on intentional misconduct," it states no malevolent acts or intentional misconduct such as to demonstrate that a **sole** motive was malevolence.

Plaintiff fails to plead special damages. The complaint states "the Café an Club suffered a loss of income because both regular customers, passersby and tourists who had become informed of the high quality of the Café and the Club, ceased coming to enjoy the amenities offered by the Café and the Club. As a result . . .the plaintiffs suffered damages in an amount to be determined by the Court, but in no event less than $1,000,000.00."

The motion to dismiss the Third cause of action is granted.

THIRD PARTY BENEFICIARY

One seeking to maintain an action for breach of contract as a third party beneficiary must establish that: (1) there is an existing valid and binding contract between the signatories; (2) the contract was intended for the third party's benefit; and (3) the benefit to the third party is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate that party if the benefit is lost. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173 [2011]; *Mendel v. Henry Phipps Plaza W., Inc.*, 6 NY3d 783 [2006]).

In the instant action, plaintiff pleads that there is a binding agreement between NYU and the Community Board for the direct benefit of the local community, which plaintiff identifies as the NYU Community Board Agreement. Plaintiff asserts that the businesses and residents in the Community Board No. 2 area were intended to be the direct beneficiaries of the Agreement. Further, plaintiffs allege that, being neighbors of NYU, they were included as the direct and intended beneficiaries of the Agreement. The minutes of the May 28, 2008 meeting which produced the Agreement are attached to the complaint.

The full minutes make clear that the main focus and concern of the Community Board at the May 28, 2008 meeting was in preserving the Provincetown Theater, which NYU originally proposed demolishing. "After very strong community advocacy to save the original theater, NYU, responding to these concerns created new plans to preserve the original theater." Critical issues discussed included:

> concerns about construction protocol and safety measures during both demolition and construction, the need to do extensive engineering surveying of the subsurface as it is know [sic] that the building sits on loose rubble and possibly under a substrata creek, the need to shore up and take extraordinary measures to insure that the preserved Provincetown Theater and the adjoining **and nearby historic buildings to the south and west** are not damaged in any way whatsoever during the demolition and construction and that both the Theater exterior brick facade and interior space of the Theater be restored and any historic elements that still exist be included into that restoration. [emphasis added]

The resolution states: "NYU as [sic] has agreed to adopt the recommendation and the concerns expressed in those meetings." The meeting concludes: "NYU should be commended for its outreach to the community and for treating the proposal not as an 'as of right' project which they could have, but to work within the guidelines and principles established by the Stringer Community Task Force (which NYU has formally signed onto) and to bring the proposal to the Community Board for support and guidance."

Plaintiff contends that NYU breached the Community Board Agreement by causing damage to neighboring properties, failing to monitor construction, failing to adhere to the Community Board No. 2 construction protocols, ignoring the reasonable requests of the plaintiff to comply with the applicable rules and regulations governing construction, and failing to work with plaintiffs over light, air and design issues.

Plaintiff owns 129 MacDougal Street, which is two buildings North of the proposed construction, and not included among those historic buildings about which concern was expressed at the meeting. NYU argues 129 and 131 MacDougal Street owners were not the intended beneficiaries of any agreement which may have been made as a consequence of the May 28, 2008 meeting. Indeed, they are to the North of the project, as opposed to those building to the South and West of the project. Additionally, NYU argues that there was no express agreement signed by NYU as a result of the meeting. The minutes themselves characterize the meeting as "outreach" for "support and guidance," and reveals no formalized written agreement which NYU executed.

The motion to dismiss the fourth cause of action is granted.

NUISANCE

Plaintiff clarifies in its opposition papers that it is only alleging a private nuisance, and not a public nuisance. The elements of private nuisance are: (1) an interference, substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) it interferes with plaintiff's right to use and enjoy land; and (5) it is caused by defendant's conduct.

An invasion of another's interest in the use and enjoyment of land may be intentional when defendant knows that it is resulting or is substantially certain to result from defendant's conduct. The issue is whether defendant's conduct is unreasonable. The law of private nuisance is a matter of degree and involves a balancing of interest.

Here, plaintiff alleges that: NYU erected illegal barriers preventing persons from entering the Café and the Club; NYU erected porta-potties outside the Café and Club; construction workers trespassed onto Plaintiff's property; construction debris was repeatedly and continually left outside the Café and Club; NYU used equipment which violated NYC decibel limits at unreasonable hours; and NYU parked construction trucks directly in front of the Café at peak restaurant hours causing loud noise and odors. Plaintiff asserts that it met with representatives of NYU to negotiate and resolve disputes, but that "for the most part, NYU did nothing but pay lip service to addressing the problems."

Plaintiff has stated a cause of action for private Nuisance, and the motion to dismiss the fifth cause of action is denied.

Wherefore, it is hereby,

ORDERED that NYU's motion to dismiss is granted to the extent that the second cause of action for tortious interference with a business relationship, the third cause of action for prima facie tort; and the fourth cause of action for third party beneficiary are dimissed; and it is further,

ORDERED that the first cause of action for property damage, and the fifth cause of action for private nuisance remain; and it is further,

ORDERED that the cross motion to amend is denied; and it is further

ORDERED that the clerk enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 6, 2013

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE