

**New York Packaging Corp. v Southeastern Paper Group**

2015 NY Slip Op 32786(U)

December 4, 2015

Supreme Court, Nassau County

Docket Number: 601704-15

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**NEW YORK PACKAGING CORP.,**

**Plaintiff,**

**-against-**

**SOUTHEASTERN PAPER GROUP,**  
**Defendant.**

**TRIAL/IAS PART: 14  
NASSAU COUNTY**

**Index No: 601704-15  
Motion Seq. No. 2  
Submission Date: 10/20/15**

-----X  
**Papers Read on this Motion:**

- Notice of Motion. Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Exhibits.....X**
- Reply Affirmation and Exhibit.....X**

This matter is before the court on the motion by Defendant Southeastern Paper Group (“SE Paper” or “Defendant”) filed on October 19, 2015 and submitted on October 20, 2015. For the reasons set forth below, the Court denies the motion.

**BACKGROUND**

**A. Relief Sought**

Defendant moves for an Order, pursuant to CPLR § 2221, granting leave to reargue the Court’s prior decision (“Prior Decision”) dated September 9, 2015 (Ex. 3 to Fogel Aff. in Supp.) to the extent that the Prior Decision did not dismiss the first cause of action in the Complaint for tortious interference with contract for failure to state a cause of action pursuant to CPLR § 3211(a)(7) and, upon reargument, modifying the Prior Decision to the extent of dismissing the first cause of action.

Plaintiff New York Packaging Corp. (“NYP” or “Plaintiff”) opposes the motion.

### B. The Parties' History

The parties' history is outlined in detail in the Prior Decision and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, the Complaint (Ex. 1 to Fogel Aff. in Supp.) alleges as follows:

Plaintiff is a Nassau County-based distributor of plastic bags nationwide. In March of 2006, Plaintiff established a relationship with Food Depot which, in turn, contracted with Fulton Paper. Pursuant to the agreement, Fulton Paper would purchase plastic bags from Plaintiff based on instructions from Food Depot. Fulton Paper interacted with Plaintiff in the context of this arrangement. To meet Food Depot's needs, Plaintiff invested approximately \$100,000 for racking and shipping to all Food Depot stores. In or about January 2008, Defendant assumed the role previously held by Fulton Paper in connection with meeting the distribution needs of Food Depot and Food Depot directed Defendant to interact with Plaintiff regarding Food Depot's needs.

In 2014, Plaintiff and Defendant had an unrelated dispute regarding Defendant's alleged non-payment of product manufactured by Plaintiff for Defendant. Notwithstanding that dispute, Defendant continued to act for and on behalf of Plaintiff in connection with Food Depot's needs. On or about March 11, 2015, Plaintiff received an email from Defendant which advised Plaintiff that Food Depot would be discontinuing its relationship with Plaintiff regarding the manufacture and distribution of plastic bags, and would be returning plastic bag racks already distributed by Plaintiff for Food Depot. In response, Plaintiff contacted Food Depot which advised Plaintiff that Defendant, while still representing Plaintiff's products at Food Depot, "tortiously interfered with the relationship between plaintiff and Food Depot in order to supplant the plaintiff in that role" (Comp. at ¶ 13). When Plaintiff's principal contacted Defendant, Defendant's sales representative advised Plaintiff that it was Ben Miller, Defendant's vice president, who "was directly responsible for orchestrating such tortious conduct" (Comp. at ¶ 14). Plaintiff alleges that Defendant's conduct caused Plaintiff to lose a valuable business relationship and suffer substantial damages.

As noted in the Prior Decision, the Complaint contains four (4) causes of action: 1) tortious interference with contract, 2) breach of fiduciary duty by Defendant in inducing Food Depot to terminate its relationship with Plaintiff which resulted in Defendant assuming Plaintiff's role for itself; 3) unfair business practice and unfair competition by Defendant which allegedly used information provided by Plaintiff to harm Plaintiff, and 4) fraud by Defendant

which, in an effort to deceive Plaintiff into believing that Defendant would promote Plaintiff's best interests regarding the Food Depot account, misrepresented to Plaintiff in 2014 that Defendant, notwithstanding the parties' dispute, would continue to promote Plaintiff's best interests.

In the Prior Decision, the Court granted Defendant's prior motion ("Prior Motion") to dismiss the Complaint to the extent that the Court dismissed the second, third and fourth causes of action but denied Defendant's Prior Motion to dismiss the first cause of action. The Court denied the Prior Motion to dismiss the first cause of action based on the Court's conclusion that, according to Plaintiff the benefit of every possible favorable inference, Plaintiff had sufficiently pleaded this cause of action by alleging the existence of a contractual relationship between Plaintiff and Food Depot, alleging that Defendant communicated with Food Depot which led to Food Depot terminating its relationship with Plaintiff, and alleging that Defendant acted out of malice stemming from an unrelated dispute between Plaintiff and Defendant.

The first cause of action (Comp. at ¶¶ 16-21) alleges that 1) at all relevant times, Defendant knew of the existence of a valid, subsisting and long time relationship between Plaintiff and Food Depot; 2) with knowledge of the existence of such valid contract, Defendant undertook to and did undermine that contract by inducing Food Depot to cease its relationship with Plaintiff; 3) Defendant not only undermined and tortiously interfered with the contract between Plaintiff and Food Depot, but "managed to assume the role" (Comp. at ¶ 18) previously held by Plaintiff as it related to production for Food Depot; 4) but for the actions taken by Defendant, the relationship between Plaintiff and Food Depot would still be ongoing; 5) the conduct engaged in by Defendant constitutes tortious interference with contract; and 6) by reason of the foregoing, Plaintiff is entitled to a money judgment against Defendant in an amount to be proven at trial.

### C. The Parties' Positions

Defendant submits that the Court overlooked and/or misapprehended relevant facts or law by denying the Prior Motion to dismiss the first cause of action in light of Plaintiff's failure to allege that Food Depot did not have the right to terminate the alleged relationship with Plaintiff and that, by doing so, Food Depot breached a contract with Plaintiff. Defendant contends that, because there is no allegation that Food Depot breached the alleged contract with Plaintiff by terminating it, the claim for tortious interference with contract does not allege all of the required elements and should be dismissed.

Plaintiff opposes the motion submitting that Plaintiff has pleaded a viable claim for tortious interference with contract by alleging that 1) Defendant had knowledge of the existence of the contract between Plaintiff and Food Depot; 2) Defendant procured a breach of that contract so that Plaintiff no longer had the Food Depot account because Defendant diverted that account to itself, at the expense of Plaintiff, all causing substantial damage to Plaintiff; and 3) but for the interference by Defendant, Plaintiff would still have the account in its roster of customers. Plaintiff submits that Defendant made the same argument to the Court in its Prior Motion, and that Defendant has not demonstrated that the Court overlooked any controlling principle of law or misapprehended any material facts in denying the Prior Motion to dismiss the first cause of action. Plaintiff also submits that it was improper for Defendant to submit the affidavit of Kenneth Love in support of its Prior Motion.

In reply, Defendant submits that Plaintiff's opposition fails to address the alleged defect in its first cause of action, specifically Plaintiff's failure to include the required allegation that Defendant procured Food Depot to breach a contract with Plaintiff. Defendant also contends that the submission of Kenneth Love's affidavit in support of the Prior Motion was appropriate.

#### RULING OF THE COURT

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 18 N.Y.3d 803 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

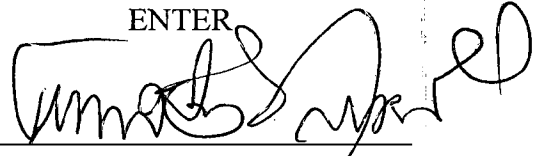
The Court denies the motion based on the Court's conclusion that Defendant has not demonstrated that the Court overlooked or misapprehended matters of fact or law in determining the Prior Motion. The Court reaffirms its conclusion, as set forth in the Prior Decision, that Plaintiff has alleged a viable cause of action for tortious interference with contract.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on February 2, 2016 at 9:30 a.m.

DATED: Mineola, NY  
December 4, 2015

ENTER  
  
HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
DEC 14 2015  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE