Simon v Kyrejko
2017 NY Slip Op 31155(U)
May 30, 2017
Supreme Court, New York County
Docket Number: 156277/2014
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; IAS PART 45

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PETER SIMON, as a minority shareholder in The City Foundry Inc. and Industry City Distillery, Inc., and DR. DOUGLAS SIMON and RICHARD WATTS,

Plaintiffs,

-against-

DAVID KYREJKO, ZACHARY BRUNER, together, majority shareholders in The City Foundry Inc. and Industry City Distillery, Inc., THE CITY FOUNDRY INC., INDUSTRY CITY DISTILLERY, INC., ANDREW KYREJKO, KEN GREENE, and JAY BIRNBAUM,

Defendants.

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Index No. 156277/2014

Motion Seq. No. 003-004

ORDER AND DECISION

HONORABLE ANIL C. SINGH, J.:

In this action, plaintiffs seek to hold defendants liable for their alleged scheme to eliminate plaintiffs' minority shareholder interests in The City Foundry Inc. (Foundry) and Industry City Distillery, Inc. (Distillery), corporations that are engaged in the manufacturing and selling of various lines of distilled spirits. By this motion (mot. seq. 003), plaintiffs move for partial summary judgment, pursuant to CPLR 3212, with respect to the seventh cause of action stated in their Second Amended Complaint -- breach of contract and breach of the duty of good faith and fair dealing -- against Foundry and Distillery. The corporate defendants oppose the motion.[1] In addition, defendants Jay Birnbaum ("Birnbaum") and Ken Greene ("Greene") seek to dismiss plaintiffs'

[1] The individual defendants, David Kyrejko and Zachary Bruner, assert that, to the extent the seventh cause of action could be deemed to extend to them, they join the arguments of the corporate defendants in opposing this motion.

eleventh, twelfth and thirteenth causes of action pursuant to CPLR 3211(a)(1) and (a)(8). (mot. seq. 004). Plaintiffs' oppose.

Background

In early 2011, David Kyrejko (Kyrejko) and Peter Simon (Simon) met through mutual friends, and Kyrejko told Simon about his idea for a "technologically innovative" and "environmentally responsible" method of liquor distillery. Second Amended Complaint ("Complaint"), ¶ 23. After further discussions, they agreed to become partners, and Foundry was formed in March 2011 whereupon Simon was responsible for business operations and investor relationships, and Kyrejko's duty was to distill and bottle vodka and improve upon the recipe. *Id.*, ¶ 26. In June 2011, they signed the Foundry's shareholders agreement wherein Simon agreed to be a minority shareholder, even though he had committed $120,000 to the business. *Id.*, ¶ 27. In August 2011, Kyrejko included two friends in the business: Richard Watts (Watts) was brought in to design the company's website and Zachary Bruner (Bruner) was to be the head machinist. *Id.*, ¶ 29. At first, all four members of the team pitched in to get the work done, and by March 2012, the business was on the verge of making its first sale of the vodka. *Id.*

In or about March 2012, the parties decided to restructure the business such that Foundry would be reconfigured as a research and development entity, and Distillery would be a subsidiary of Foundry. *Id.*, ¶ 30. On March 9, 2012, shareholders agreements known as "Founders Agreements" for Distillery and Foundry, the terms of which were substantially similar, were signed by Simon, Kyrejko, Bruner and Watts (collectively, the four Founders), and each was named a founder and board member with equal voting power. *Id.*, ¶ 31. On the same day, the Founders Agreement for Foundry superseded its earlier 2011 shareholders agreement. *Id.* ¶ 33. While the

terms of both Founders Agreements were similar, the primary distinction was that Foundry did not own any of the intellectual property that Distillery did. *Id.* On August 28, 2013, the Founders Agreements were amended, and the only significant amendment was made to section 2(a) of the Agreements with respect to the vesting of shares. NYSCEF #113.

In the fall of 2012, while Distillery was initially positioned to meet its demand for vodka production, Kyreiko's "tyrannical personality" spiraled out of control, which affected employee morale and resulted in his failure to produce enough vodka to meet market demand. Complaint, ¶¶ 43-45. In response, Simon increased his duties by beginning to blend and bottle the vodka himself, but Kyrejko refused to disclose to Simon the entire manufacturing process, in fear that the business might succeed with Kyrejko's diminished role in the company. *Id.* ¶ 46.

In December 2013, Kyrejko and Bruner forced Watts out of the business; Kyrejko also threatened to leave the business with aspects of his secret vodka-making process, as well as physical destruction of the manufacturing equipment. *Id.*, ¶¶ 3, 51. Because Kyrejko and Bruner collectively hold a majority of the voting rights under the Founders Agreements, they believed that they were permitted to disregard the rights of minority shareholders, sabotage the business, and wrestle control of the business from Simon and other plaintiffs. *Id.*, ¶ 5. To further the power-grabbing scheme, at a special board meeting called by Kyrejko and Bruner on June 24, 2014, they, as the only two founders of Distillery and Foundry in attendance at that meeting, purportedly terminated Simon's employment in both corporations, thus "completing their disloyal scheme." *Id.*, ¶ 9.

Allegedly, in early 2014, Simon, Kyrejko and Bruner engaged in settlement discussions. These discussions resulted in an agreement that was never put in writing (the Settlement Agreement). During these negotiations, Birnbaum and Greene, who were friends of Kyrejko and Bruner, allegedly

began to advocate ways to "set up" Simon to Bruner and Kyrejko. *See* Complaint, ¶ 67. Among other things, Simon alleges that Birnbaum and Greene persuaded Bruner and Kyrejko to disavow their alleged agreement to settle their dispute; Birnbaum and Greene convinced Kyrejko to destroy an email that credited Simon with building the Distillery and Foundry businesses and that Birnbaum and Greene improperly convinced Bruner and Kyrejko that settling the case was riskier than litigating it. *Id.* ¶ 7. According to Simon, these actions taken by Birnbaum and Greene directly led to Bruner and Kyrejko to back out of the proposed Settlement Agreement.

On June 26, 2014, Simon commenced the instant action. *Id.*, ¶ 56. On September 12 and October 20, 2014, defendants sent letters to Simon's counsel entitled "Notice of Termination and Repurchase Notice" and "Stock Purchase Agreement," which purported to terminate Simon's employment in Distillery, and repurchase his unvested shares of stock in Foundry and Distillery. *Id.*, ¶¶ 58-61. Simon contested the validity of the termination and the attempt to repurchase his shares. *Id.* On May 15, 2015, after conducting some discovery, plaintiffs moved to amend their original complaint to add Watts as a party as well as several causes of action, including, breach of the Founders Agreements.

In a memorandum opinion dated August 7, 2015, this court granted the motion to amend, in part, based on the reasons stated therein. NYSCEF #34. Thereafter, at the conclusion of additional discovery, plaintiffs moved for partial summary judgment, on September 13, 2016, with respect to the Complaint's seventh cause of action, for breach of contract and breach of good faith and fair dealing, against the defendant corporations. Additionally, Birnbaum, joined by Greene seek to dismiss plaintiffs eleventh, twelfth and thirteenth causes of action pursuant to CPLR 3211(a)(1) and (a)(8).

Applicable Legal Standards

In setting forth the standards for considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hosp.*, the following:

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

68 NY2d 320, 324 (1986) (citations omitted); *Gammons v City of New York*, 24 NY3d 562, 569 (2014) (movant must tender sufficient evidence to show the absence of any disputed material issues of fact to warrant the court, as a matter of law, in directing summary judgment).

The courts routinely scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Andre v Pomeroy,* 35 NY2d 361, 364 (1974) (because entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion"). Moreover, the courts have held that bare allegations or conclusory assertions in pleadings are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion. *Zuckerman v City of New York,* 49 NY2d 557 (1980); *Rotuba Extruders, Inc., v Ceppos*, 46 NY2d 223, 231 (1978). Furthermore, "[w]here different conclusions can reasonably be drawn

from the evidence, the motion should be denied." *Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 (1992); a*ccord Jaffe v Davis*, 214 AD2d 330 (1st Dept 1995) (conflicting inferences required denial of summary judgment motion).

Discussion

Plaintiffs' Motion for Partial Summary Judgment

In their moving brief, plaintiffs assert that, in connection with the termination of Simon's employment, Foundry and Distillery violated section 9 of the Founders Agreements because, according to plaintiffs, "the businesses were always required to include at least three original founders." NYSCEF 88 at 6. Section 9 of the Agreements (captioned "management") states, in relevant part, that "[t]he Distillery shall not, without the prior written consent of at least three out of four Founders . . . and in the event that a Founder is no longer employed . . . then the Distillery shall not, without the prior written consent of at least two out of three Founders, approve any of the following . . . terminate the employment of any Founder . . . ." Founders Agreement, §9 (b).

Thus, the plain language of section 9 permits two of the three Founders to terminate the employment of the third Founder, when there are three Founders left. Notably, plaintiffs have not cited to any contractual provisions which explicitly support their assertion that the business is "always required" to be managed by at least three original Founders. In fact, the answers given in his deposition testimony, on July 21, 2016, by Nigel Austin (Austin), the attorney who drafted the Founders Agreements for the four Founders, stated the following:

> Q. Why did you include a provision that stated that two out of three founders could terminate the employment of a third founder?
>
> A. So when I was discussing the founders agreement with the [four] founders, when we discussed this provision ***I asked them what should happen if there is no longer four and when there is three.***

I asked should you have a requirement of three out of three unanimity or two out of three. And I explained [if] it's three out three, how that would be a deadlock if you needed to or wanted to remove a founder. And it was agreed by all four founders in a meeting to have this construct.

Q. And in the circumstance that two out of three founders consented to the termination of the third factor, how many founders would be left with the company?

A. There would be two.

Q. In the circumstance where two founders have consented to the termination of the third founder and one remains – I'm sorry and two remains, as you have written the agreement, how many founders are to run the company?

A. Clearly in that situation the founders agreement would need to be amended ***or*** it would be two based on your facts. There would be two founders left.

Q. Well, if two out of three founders vote to terminate the third and therefore as you noted two would be left, how is the company to be run in view of the agreement that you prepared?

A. The expectation would be that you would have to amend the founders agreement or you . . . you would normally expect to amend this agreement to deal with the changed situation.

Q. Until the amendment, how would the company operate?

A. I don't know.

Q. Would the two founders be able to make decisions for the company pending the amendment?

MR. BERG: Objection, leading.

A. I am not in a position – I am not going to provide an opinion. That's more like a legal –

Q. What did you contemplate would happen if two out of the three founders voted to terminate a third, pending any amendment?

A. ***At the time that this was drafted and we discussed it as a group, I don't recall any discussion on that scenario.***

Q. What did you contemplate?

A. I don't recall.

NYSCEF #75; Berg affirmation in support of motion, exhibit 7 (Austin deposition transcript), at 213-216 (emphasis added). Plaintiffs also allege that Bruner's testimony confirmed Austin's position that it was never contemplated by the Founders that the business would be run with just two Founders. NYSCEF #88 at 4, referencing exhibit 8 (Bruner deposition transcript), at 101.[2]

In light of such testimony, plaintiffs argue that Simon's termination required the Founders Agreements be contemporaneously amended, and that because defendants' actions following Simon's termination violated section 20 of the Founders Agreements, such actions were ultra vires.[3] NYSCEF #88, at 6-7. In sum, plaintiffs argue that the foregoing testimony "conclusively establishes plaintiffs' allegations and entitlement to judgment as a matter of law." *Id.*

However, Austin's testimony reveals, or may be interpreted to mean, that he was of the opinion that the Founders Agreements should be amended when two of the Founders decided to terminate the third, or, the business could be run by the two remaining Founders pending an amendment, and that there was no contemplation by the four Founders as to how the business would be managed when only two Founders remained, as it was agreed by the four Founders at the formative meeting held in March 2012 to leave the Founders Agreements "in this construct." Significantly, plaintiffs have conceded that "[w]hile section 9 permits the termination of a co-founder

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[2] In fact, Bruner testified that: "[t]here were a great many possibilities that we, in retrospect, should have written into our documents and didn't. That was one of them." *Id.*

[3] Section 20 is discussed more fully below.

by a vote of two out of three co-founders, the Founders Agreement do not dictate how the business ought to be run with the remaining two co-founders because the parties never contemplated it." NYSCEF #88 at 2. Thus, the foregoing debunks plaintiffs' assertion that section 9 of the Agreements "always required" the business to include at least three Founders.

Nonetheless, plaintiffs assert that "sections 9 and 20 must be read together to preclude running the businesses with less than three founders." NYSCEF at 6-7. Section 20 of both Founders Agreement states, in relevant part: "This Agreement may not be modified, amended . . . except by an agreement signed by the Distillery, the Foundry and Founders holding at least 75% of the Vested Shares issued to the Founders hereunder; provided, however, that in the event that such amendment would materially and adversely affect a Founder in a manner different than any other Founder, then such amendment will require the consent of such Founder." It is undisputed that any amendment of the Founders Agreements would have been ineffective, as defendants Kyrejko and Bruner do not collectively hold more than 75% of the vested shares. In any event, there was never, in connection with Simon's termination, any amendment of the Founders Agreements, as both parties have acknowledged.

Construing section 20 as requiring that the business cannot be run with "less than three Founders," as plaintiffs assert, seemingly contradicts the plain language in section 9, which permits termination of a third Founder when two of the three Founders approve of such termination, and renders section 9 meaningless. Arguably, since section 9 allows two of the three Founders to terminate the employment of the third Founder, the Founders Agreement implicitly permits the two remaining Founders to run the business. NYSCEF #88 at 2. Moreover, Bruner has testified that "[t]here were a great many possibilities that we, in retrospect, should have written into our

documents," but the four Founders never contemplated in such documents how the business would be run when there are only two Founders. Bruner deposition testimony, at 101. The foregoing contradicts plaintiffs' unsupported assertion that it was "the parties' mutual intention" to require a contemporaneous amendment of the Agreements when there are two Founders left. NYSCEF #88 at 8. Indeed, requiring the court to construe sections 9 and 20 together to preclude the running of business with less than three founders, as urged by plaintiffs, is a contract construction not supported by applicable caselaw. "A court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, and it may not construe the language in such a way as would distort the contract's apparent meaning." *Cohen-Davidson v Davidson*, 291 AD2d 474, 475 (2d Dept 2002). Had the fours Founders wanted to require a contemporaneous amendment of the Agreements when only two Founders are left, they should have added this specific requirement into the Agreements. Yet, they agreed at the contract drafting meeting to have the Agreements "in this construct," as testified by Austin. Further, it is axiomatic that "a court cannot reform an agreement to conform to what it thinks is proper, if the parties have not assented to such a reformation." *Id.*

In addition, even though not explicitly asserted, plaintiffs appear to also argue that defendants breached section 3 of the Founders Agreements (governing stock repurchases) when defendants requested Simon to tender his shares of unvested stock, by sending the Repurchase Notice and Stock Purchase Agreement to his counsel. NYSCEF #88 at 9-10. Yet, plaintiffs have conceded that Simon never signed the Stock Assignment or the Repurchase Agreement, and that he returned the check to defendants. *Id.* at 10. Under such a scenario, even agreeing with plaintiffs' assertion that "the attempted repurchase of Simon's shares did not comport with Section 3 of the Founders

Agreements" (NYSCEF #88 at 10) , they failed to show that Simon suffered any resulting damages (as it is undisputed that Simon continues to own the shares), which is an essential element for a breach of contract claim. *See e.g., Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010) (stating that "resulting damages" is one of the four required elements of a breach of contract claim).

Finally, plaintiffs assert that, if this court finds ambiguity in the Founders Agreements, the ambiguity should be construed against the corporate defendants, as drafter of the Agreements. NYSCEF #130 at 5-6. This court does not find the terms of the Agreements ambiguous, in particular with respect to section 9 that deals with termination of the third Founder when two of the three Founders agreed. Instead, as discussed, the Founders Agreements failed to set forth the terms and conditions for amending the Agreements and managing the companies in the scenario when only two of the Founders are left. As also explained, this court cannot add or delete or otherwise reform, the terms of a contract when the parties have not assented to the reformation. Indeed, although Austin testified that "you would normally expect to amend this agreement to deal with the changed situation," he also testified that "at the time that this [agreement] was drafted and we discussed it as a group, I don't recall any discussion on that scenario." Austin deposition transcript at 215- 216.

Plaintiffs' assertion that the corporate defendants be deemed the drafter of the Agreements is also unpersuasive. As testified by Austin: "This [agreement] was drafted as a result of a discussion among the [four] founders when I raised what should happen if there were no longer four founders." *Id.* at 213 This testimony reflects that the four Founders, including plaintiffs, retained Austin as their common counsel in drafting the Founders Agreements. Therefore, plaintiffs' allegation that Austin was serving only as the corporate defendants' counsel in drafting the

Agreements is disingenuous. In any event and as explained above, there is no ambiguity in the Agreements, but rather the lack of distinct provisions that set forth the terms and conditions requiring amendment of the Agreements and the manner of managing the corporations when there are only two Founders left.

Based on all of the foregoing, plaintiffs have failed to make a prima facie showing, by tendering sufficient evidence, that there is an absence of any disputed material issues of fact, particularly regarding the terms and conditions triggering amendment of the Agreements and the management of the corporations with only two Founders, which would entitle them to summary judgment as a matter of law.

Birnbaum and Greene's Motion to Dismiss

Birnbaum's motion to dismiss plaintiffs' eleventh, twelfth, and thirteenth causes of action is granted. Under CPLR 3211(a)(8) a party may move for judgment dismissing one or more causes of action asserted against him or her on the ground that the court has no jurisdiction of the person. The central issue is whether jurisdiction exists, and if the court determines that it lacks jurisdiction, the action must be dismissed without condition. *See Foley v. Roche*, 68 A.D.2d 558 (1st Dept 1979). The plaintiffs' failure to obtain leave of court to serve a supplemental summons and an amended complaint to add a party as an additional defendant constitutes a jurisdictional defect and requires dismissal of the action against that party on the ground of lack of jurisdiction of the person of the defendant. *See Schmidt v. Schmidt*, 99 A.D.2d 775 (2d Dept 1984); *Brown v. Marine Midland Bank, N.A.*, 224 A.D.2d 1016 (4th Dept 1996).

In order for Birnbaum to be properly joined in this action, plaintiffs' must comply with CPLR 305(a). Pursuant to CPLR 305(a), "where, upon order of the court or by stipulation of all parties or

as or right pursuant to section 1003, a new party is joined in the action and the joinder is not made upon the new party's motion, a supplemental summons specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon such party." A supplemental summons is necessary when a new defendant is joined. *Patrician Plastic Corp. v. Bernadel Realty Corp.*, 25 N.Y.2d 599 (1970).

The documentary evidence shows that Birnbaum was only served with the Second Amended Complaint and not the supplemental summons. *See* Affirmation of Abbie Eliasberg Fuchs ("Fuchs Aff."), Ex. E. The failure to serve a supplemental summons pursuant to CPLR 305 is a jurisdictional defect and requires the dismissal of plaintiffs' eleventh, twelfth and thirteenth causes of action against Birnbaum without prejudice. However, both the second amended complaint and the supplemental summons was properly served upon Greene. *See* Reply Affirmation of Abbie Eliasberg Fuchs, Ex. B. Therefore, the eleventh, twelfth and thirteenth causes of action are not dismissed as jurisdictionally defective against Greene.

Greene's Motion to Dismiss Plaintiffs' Eleventh Cause of Action

Greene's motion to dismiss plaintiffs' eleventh cause of action for tortious interference with a contract is granted. In order to state a cause of action for tortious interference with a contract, a party must plead: (1) the existence of a valid contract between the plaintiff and a third party, (2) defendants' knowledge of that contract, (3) defendant's intentional procurment of the third-party's breach of the contract without justification, (4) actual breach of the contract, and (5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413 (1996).

The principles of contract formation are 1) capacity of two or more parties to enter into a contract; 2) mutual assent or meeting of the minds to the essential terms of the contract; and 3)

consideration. *See* Restatement, Second Contracts, §9, 12, 23; *Express Industries and Terminal Corp. v. New York Dept. of Transportation*, 93 N.Y.2d 584 (1993). A stipulation is subject to these principals governing contracts and "must embody offered terms and arise from a valid acceptance of that offer." *Kleinberg v. Ambassador Associates*, 103 A.D.2d 347, 347-48 (1st Dept 1984).

Plaintiffs' concur that the Settlement Agreement was not reduced to a writing but they allege that the parties entered into a valid oral agreement. In order to determine whether an oral agreement is enforceable, the courts will consider whether "there [is] an express reservation of the right not to be bound in the absence of a writing; there has been partial performance of the contract; all of the terms of the alleged contract had been agreed upon and the agreement at issue is the type of contract that is usually committed to writing." *Elizabeth Street Inc. v. 217 Elizabeth Street Corp.*, 276 A.D.2d 295, 296 (1st Dept 2000). Additionally,

> [W]hen the parties have agreed on all contractual terms and have only to commit them to writing...the contract is effective at the time the oral agreement is made, although the contract is never reduced to writing and signed. Where all the substantial terms of a contract have been agreed on, and there is nothing left for future settlement, the fact, alone, that it was the understanding that the contract should be formally drawn up and put in writing, did not leave the transaction incomplete and without binding force, in the absence of a positive agreement that it should not be binding until so reduced to writing and formally executed.

Matter of Municipal Consultants & Publishers v. Town of Ramapo, 47 N.Y.2d 144, 148-49 (1979); *see also Schwartz v. Greenberg*, 304 N.Y.250, 254 (1952) ("if the parties intended to be bound by an oral agreement, a mere failure to reduce their promises to writing would be immaterial.")

Plaintiffs' allege that all of the material terms of the Settlement Agreement had been agreed upon. *See* Berg Aff. Ex. 2, 62:6-9; 64:24-65:5 (Simon testified "I can recall at the end of the meeting all of the material aspects of the settlement agreement were agreed upon, handshakes were done...Mr.

Greene, from my understanding, was to write up the settlement agreement that included all of the material aspects that we had agreed upon. And as far as I was concerned, we had a settlement. We shook on it."). However, the alleged settlement agreement that was circulated in mid-May was sent with a condition by plaintiffs' lawyer that the "drafts are being sent subject to further review and comment by my clients." Fuchs Aff., Ex. H. Therefore, the parties had not agreed to the material terms of the Settlement Agreement such that all that was left was to reduce the contract into writing. *See Municipal Consultants*, 47 N.Y.2d 144.

Additionally, the Settlement Agreement states that the agreement is not binding, or effective, until executed by the parties. *See Id.*.[4] Neither party disputes that the Settlement Agreement was not executed. Where a party "communicates an intent not to be bound until he achieves a fully executed document, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract." *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80 (2d Cir. 1985).There is no clearer language of the intent of the parties than the language of the Settlement Agreement itself, which clearly states that the parties are not bound until both parties execute the document.

As the Settlement Agreement is not executed, there is no contract and Greene's motion to dismiss plaintiffs' eleventh cause of action for tortious interference with a contract is granted.

Greene's Motion to Dismiss Plaintiffs' Twelfth and Thirteenth Causes of Action

[4] "For the purposes hereof, "Effective Date" means the date on which the last of the following occurs: (i) the Companies and KB parties execute and deliver this Agreement to the Simons, (ii) the KB parties execute and deliver the Settlement Note to P. Simon; (iii) ICD shall execute and deliver the Amended Note to D. Simon; (iv) TCF and ICD shall execute and deliver the Security Agreements described in Section 4 hereof to D. Simon and P. Simon, respectively; (v) TCF shall pay to P. Simon the amounts due under Section 1(a) hereof; and (vi) the KB Parties shall pay to P. Simon $325,000 due upon execution of this Agreement."

Greene's motion to dismiss plaintiffs' twelfth and thirteenth causes of action for tortious interference with prospective business advantage and tortious interference with the Founders Agreement is denied.

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." *Quatrochi v. Citibank, N.A.*, 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

Here, Greene joined Birnbaum's motion to dismiss. *See* Notice of Motion by Jay Greene (NYSCEF Doc. 135). However, Birnbaum's motion to dismiss relies almost exclusively on Birnbaum's conduct. Relating to the argument that the claims are precluded by the Restatement (Second) of Torts § 772, many of the allegations that Birnbaum's lawyers argue are contained in the complaint and are statements made about Birnbaum's, not Greene's, conduct. *See* Memo of Law,

pp. 8-10. Similarly, Greene has not pled sufficient facts to dismiss plaintiffs' claim for tortious interference with the Founders Agreement. The crux of Birnbaum's argument is that plaintiffs' cannot show that 'but for' his conduct, the contract would not have been breached. *Id.* p. 15. However, it is only Birnbaum's conduct that is mentioned. *Id.* p. 16 ("Plaintiffs' Thirteenth Cause of Action alleges that Mr. Birnbaum tortuously interfered with the Founders Agreements despite Plaintiffs' alleging that Defendant A. Kyrejko also independently interfered with the Founders Agreement...Mr. Birnbaum and A. Kyrejko cannot possibly both independently be the "but for" cause of the alleged breach of the Founders Agreement."). Nowhere is Greene's conduct mentioned as being the 'but for' cause of the contract being breached.

Finally, Greene does not allege any facts to dismiss plaintiffs' claim for plaintiffs' twelfth cause of action for tortious interference with prospective economic advantage. In order to sustain a cause of action for tortious interference with prospective economic advantage, the party must allege wrongful conduct motivated solely by a desire to harm plaintiffs. *See Sustainable PTE Ltd., v. Peak Venture Partners LLC*, 2017 WL 2231227 (1st Dept, May 23, 2017). Greene does not allege any facts supporting the claim that he did not act with the sole motivation to harm plaintiffs'. The only allegations contained in the moving papers relate to Birnbaum's conduct and whether Birnbaum acted with the requisite motivation. *See* Memo. of Law, p. 17. Therefore, Greene has failed to articulate how any of his actions refute the allegations in the complaint under CPLR 3211(a)(7) and his motion to dismiss plaintiffs' twelfth and thirteenth causes of action for tortious interference with prospective business advantage and tortious interference with the Founders Agreement is denied.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment (motion sequence number

003) with respect to the seventh cause of action asserted in their complaint is denied; and it is further

ORDERED that Birnbaum's motion to dismiss plaintiffs' eleventh, twelfth and thirteenth causes of action is granted without prejudice; and it is further

ORDERED that Greene's motion to dismiss plaintiffs' eleventh cause of action is granted; and it is further

ORDERED that Greene's motion to dismiss plaintiffs' twelfth and thirteenth causes of action is denied.

Dated: May 30, 2017

ENTER:

J.S.C.
ANIL C. SINGH