Fotopoulos v 4160 Realty Corp.
2018 NY Slip Op 31418(U)
June 25, 2018
Supreme Court, New York County
Docket Number: 654491/15
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CONSTANTINE FOTOPOULOS and ALEXANDER FOTOPOULOS,

Plaintiffs,

-against-

4160 REALTY CORP., 4126 REALTY CORP, MIGUELINA HERASME, and DIMITRIOS FOTOPOULOS,

Defendants.

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Index No.: 654491/15
Motion Seq. No. 002

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a case involving a lease and a familial dispute, defendants 4160 Realty Corp (4160 Corp), 4126 Realty Corp (4126 Realty), Miguelina Herasme (Herasme), and Dimitrios Fotopoulos (defendant Fotopoulos) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

One thing all sides agree on is that they share a tortured history. Plaintiffs Constantine Fotopoulos (Constantine) and Alexander Fotopoulos (Alexander) (together, the Fotopoulos plaintiffs) are the adult sons of defendant Fotopoulos. All three are practicing attorneys. Herasme is married to defendant Fotopoulos, although she is not the mother of the Fotopoulos plaintiffs. Defendants 4160 Realty and 4126 Realty are corporations with their primary assets being single properties located, respectively, at 4160 Broadway and 4126 Broadway in the Washington Heights section of Manhattan.

Defendant Fotopoulos was the principal of a law firm called Fotopoulos, Rosenblatt &

Green (the Fotopoulos firm) that operated from the building on 4160 Realty's property for many years. Both of the Fotopoulos plaintiffs worked, at some point, for the Fotopoulos firm. However, Alexander was allegedly forced out of the Fotopoulos firm by defendant Fotopoulos, at defendant Herasme's urging, because he is gay. Constantine still worked at the Fotopoulos firm when, on February 2, 2015, notice of dissolution of the firm was sent to him. The day before, February 1, 2015, on which the Super Bowl was played that year, Herasme and Fotopoulos defendant allegedly went to the office at 4160 Broadway and took all of the Fotopoulos firm files. The Fotopoulos plaintiffs refer to this as the "Super Bowl Heist."

The Fotopoulos plaintiffs allege that they, along with their nonparty sister, Helena Fotopoulos Adams (Helena), are the beneficial owners of 50% of both 4160 Realty and 4126 Realty pursuant to transfers of stock and beneficial interest effectuated by documents signed by defendant Fotopoulos on May 18, 2010. Those documents purport to grant 20% of the shares of the respective corporations to Constantine and Helena, and 10% to Alexander. The Fotopoulos plaintiffs allege that defendant Fotopoulos granted a smaller share to Alexander because he is gay.

Despite the dissolution of the Fotopoulos firm, the Fotopoulos plaintiffs still practice law from the building owned by 4160 Realty. The Fotopoulos plaintiffs have entered into a number of leases with 4160 Realty, but the most recent one was signed in July 2009 (the 2009 Lease), and sets a 15-year term. The 2009 Lease calls for the Fotopoulos plaintiffs to pay $1500 a month. Defendant Fotopoulos alleges, and his sons do not deny, that the Fotopoulos plaintiffs have not paid any rent since 2009.

The Fotopoulos plaintiffs have received multiple notices to cure relating to their

nonpayment of rent, starting in December 2015. In May 2015, 4160 Realty commenced a commercial nonpayment summary proceeding against the Fotopoulos plaintiffs in Civil Court (index No. 064570/15). The Fotopoulos plaintiffs, or the Fotopoulos respondents, as they are known in that action, moved in the Civil Court action for summary judgment dismissing the petition. 4160 Realty, the petitioner in that action, cross-moved for summary judgment on the petition, which seeks a judgment of possession, warrant of eviction, and a money judgment in the amount of $155,222.40. Judge Alexander M. Tisch, by a decision and order dated April 11, 2018, denied the motion and cross motion, finding that issues of fact remained.

The Fotopoulos plaintiffs filed the Complaint in this action in December 2010. The Complaint alleges seven causes of action. The first cause of action is for a declaratory judgment declaring that the initial notice to terminate, dated December 1, 2015, is defective and void. The second cause of action is for a *Yellowstone* injunction to stay the pending termination period. This cause of action was the subject of motion seq. No. 001, in which the Fotopoulos plaintiffs sought the *Yellowstone* injunction by order to show cause. The application was resolved by a court-ordered stipulation, dated February 1, 2016, that provided that "all notices to terminate in this matter are withdrawn without prejudice" and withdrew the order to show cause without prejudice.

The third cause of action alleges that defendant Fotopoulos breached fiduciary duties owed to the Fotopoulos plaintiffs in their role as "tenants, children and shareholder" (Complaint, ¶ 41). While the Fotopoulos plaintiffs challenge Herasme's alleged status as an officer of 4160 Realty in the Civil Court action, they allege that, if she is indeed an officer, then she has fiduciary responsibilities to them related to their status as shareholders. They allege that to the

extent that such a fiduciary relationship exists, Herasme has breached it.

The fourth cause of action alleges that Herasme aided and abetted defendant Fotopoulos in breaching his fiduciary duties to plaintiffs, while the fifth cause of action alleges that Herasme induced 4160 Realty, 4126 Realty and defendant Fotopoulos to breach various agreements with the Fotopoulos plaintiffs. Specifically, this cause of action references the 2009 Lease, another lease signed in 2006, as well as "modifications and representations" made by defendant Fotopoulos (Complaint, ¶ 49). Among the "modifications and representations" alleged in the fifth cause of action is an alleged assurance, not included in the 2009 Lease, that any obligations under the 2009 lease, such as the obligation to pay rent, would not go into effect until defendant Fotopoulos stopped the practice of law. The sixth cause of action involves the "Super Bowl Heist," and related alleged actions by Herasme and defendant Fotopoulos, and alleges that these actions "interfered with Plaintiffs' prospective economic advantage" and "interfered with Plaintiffs' business relations" (*id.*, ¶¶ 53, 57). Finally, in the seventh cause of action the Fotopoulos plaintiffs, who are represented by Alexander, seek attorney's fees, "in no event less than Ten Thousand Dollars" (*id.*, ¶ 63).

In this motion, defendants argue, essentially, that the 2009 lease is clear and unambiguous and forecloses all of plaintiffs' causes of action. Plaintiffs argue, on the other hand, that issues of fact remain as to whether defendant Fotopoulos effectively conveyed stock and ownership of 4160 Realty, which creates questions of fact that pervade through all of the causes of action. Unfortunately, the plaintiffs do not specifically refer to each of their causes of action and leave it to the court to match their general arguments to each of them. Equally unfortunate is that both sides lard their papers with intrafamilial invective that has no relevance to the claims at

issue.[1]

DISCUSSION

It is well settled that the proponent of a motion for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413

[1] For example, defendant Fotopoulos submits an affidavit in which, among other things, he complains that, "[s]ince my divorce from their mother, my sons have addressed me as 'Jimmy' never Dad or Pop or any other term of endearment" and that "[m]y sons are under some deluded belief that my marriage to their mother was perfect, that we were all blissfully happy and content until this 'happy' home was disrupted by [defendant Herasme]" (defendant Fotopoulos aff, ¶ 7). Defendant Fotopoulos also complains that his son Alexander did not visit him at the hospital after his heart surgery, although he does not contest, or even broach, plaintiffs' allegations that he effectively discriminated against his son Alexander for being gay.

NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

First Cause of Action for Declaratory Judgment

The first cause of action seeks a declaratory judgment declaring that the initial notice to terminate, dated December 1, 2015, is defective and void. Defendants refer to the 2009 Lease, which provides that: "within fifteen business days following the 'Term Commencement Date' and on the first day of each month thereafter, tenant shall pay Landlord or to anyone Landlord designates, the monthly sum of $1,500.00, an annual sum of $18,000.00" (2009 Lease at ¶ 4). Defendants also note that the 2009 Lease contains a provision that requires any modification to be in writing (*id.* at ¶ 18 [a]), and cites to *Chimart Assoc. v Paul* (66 NY2d 570 [1986]), among others, which held that "[w]here a written agreement between sophisticated, counseled businessmen is unambiguous on its face, one party cannot defeat summary judgment by a conclusory assertion that, owing to mutual mistake or fraud, the writing did not express his own understanding of the oral agreement reached during negotiations" (*id.* at 571). *Chimart* also held that "there is a heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties" (*id.* at 574).

The court, however, need not reach these arguments as the notice to terminate, which is the subject of the first cause of action for declaratory judgment has been withdrawn by stipulation. Thus, the application for dismissal of the first cause of action must be granted.

While plaintiffs, in opposition, maintain that the seek a declaratory judgment regarding their rights and ownership interests in the 4126 Realty and 4160 Realty following the putative *inter vivos* gifts made to them by their father, there is no mention of this relief in the first cause of action in the Complaint. Thus, if plaintiffs truly seek such relief, they would need to amend their complaint.

Second Cause of Action for a *Yellowstone* Injunction

Defendants argue that the second cause of action must be similarly dismissed, as the notices to terminate, which are the subject matter of the *Yellowstone* injunction, were withdrawn pursuant to a so-ordered stipulation. As defendants' entitlement to dismissal of this claim is plain, the second cause of action for a *Yellowstone* injunction must be dismissed.

Third Cause of Action for Breach of Fiduciary Duties

The third cause of action argues that defendant Fotopoulos and Herasme breached their fiduciary duty to the Fotopoulos plaintiffs. The elements of a claim for breach of fiduciary duty are: "(1) defendant owed [plaintiffs] a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2009]). A cause of action for breach of fiduciary duty must be pled with sufficient detail pursuant to CPLR 3016 (b) (*see Chiu v Man Choi Chiu*, 71 AD3d 621 [2d Dept 2010]).

Defendants argue that plaintiffs' claimed shareholder status in the corporate defendants has no bearing or relevance to their obligation to pay rent to 4160 Realty. Here, the third cause of action does not allege any misconduct. Instead, it merely alleges that the filing the action in Civil Court was a breach of fiduciary duty. Assuming that Herasme and defendant Fotopoulos owed plaintiffs a fiduciary duty, as putative shareholders of 4160 Realty, that duty related to the protection of their interest as shareholders in that corporation. An attempt to collect rent and evict the Fotopoulos plaintiffs is not in any way harmful to the corporate entity. While it may be harmful to the Fotopoulos plaintiffs individually, it does them no harm with regard to their status as putative shareholders of 4160 Realty (*see generally Alpert v 28 Williams St. Corp.*, 63 NY2d 557 [1984]). Thus, as defendants have made an unrebutted showing that plaintiffs cannot satisfy the second element of a cause of action for breach of fiduciary duty, the third cause of action must be dismissed.

Fourth Cause of Action for Aiding and Abetting a Breach of Fiduciary Duty

As a claim for aiding and abetting a breach of fiduciary duty cannot withstand the dismissal of the underlying claim of breach, the fourth cause of action must be dismissed.

Fifth Cause of Action for 'Malicious Inducement of Breach'

The sixth cause of action alleges that Herasme maliciously induced defendant Fotopolous to breach various agreements, including what they refer to as the "condition precedent" to the various leases between themselves and 4160 Realty, which refers to defendant Fotopoulos's retirement. The sixth cause of action also alleges that defendant Herasme induced defendant Fotopoulos to breach the transfer of stock agreements he made with the Fotopolous plaintiffs.

Defendants, in their moving papers, argue that the breach of contract, with respect to the alleged condition precedent relating to defendant Fotopoulos fails as they conclusively show that the 2009 Lease governed and contained no conditions precedent. Defendants make scant mention of the alleged breach with respect to the transfer of stock, simply arguing that plaintiffs' alleged shareholder status has "no bearing on Plaintiffs' obligation to pay the corporation rent under the Lease" (Agambila aff, ¶ 72). The Fotopoulos plaintiffs, in opposition, argue that the summary dismissal would be premature as these issues have not yet been resolved in the Civil Court matter.

Inducement of breach of contract, "now more broadly known as interference with contractual relations," consists of the following elements: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). "Failure to plead in nonconclusory language establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 [1st Dept 2002] [internal quotation marks and citation omitted]).

Here, defendants make a *prima facie* showing of entitlement to judgment by proffering the 2009 Lease, which lacks the putative condition precedent relating to retirement and provides that all modifications must be in writing. Plaintiffs fail to provide a written modification of this agreement that would raise a question as to whether defendants breached the 2009 Lease by seeking to enforce its rental provisions. Moreover, plaintiffs fail to specifically articulate what

their theory of contractual interference is with respect to the putative stock transfers. Accordingly, they fail to raise a triable issue of fact with respect to their "malicious inducement of breach" claim. Accordingly, the branch of defendants' motion that seeks summary judgment dismissing the fifth cause of action must be granted.

Sixth Cause of Action for Tortious Interference

The sixth cause of action relates to the "Super Bowl Heist" of legal files, as well as the removal of signage announcing legal services at 4160 Realty's building.

"The Court of Appeals has held that "[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). These requirements are essentially coterminous with the requirements of "interference with contractual relations," as described above. "[H]owever," the Court of Appeals has also held that tortious interference "can take many forms" (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]).

With specific reference to tortious interference with prospective economic advantage, the Court of Appeals have held that "inducing breach of a binding agreement and interfering with a nonbinding 'economic relation' can both be torts" and that "the elements of the two torts are not the same" (*Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004]). The Court of Appeals elaborated that:

> "[T]he degree of protection available to a plaintiff for a competitor's tortious interference with contract is defined by the nature of the plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a

> defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant"

(*id.* at 189-190 [internal quotation marks and citation omitted]).

In moving for summary judgment, defendants rely on the affidavit of defendant Fotopoulos, who states that his sons "falsely claim that I tortuously (*sic*.) interfered with their business" (defendant Fotopoulos aff, ¶ 27). Defendant Fotopoulos goes on to state that removal of the file and removal of the signage lacked any culpability, as the files all belonged to the firm and the signage was not part of the lease" (*id.*).

In opposition, the Fotopolous plaintiffs submit a supplemental affirmation from Constantine in which he states that Herasme interfered with the partnership agreement between himself and his father "by effectuating removal of all files from the law office on or about February 1, 2015" (Constantine aff, ¶ 20). Moreover, Constantine states that "[t]he signs at 4160 Broadway simply said Law Offices with small phone numbers and names underneath that we constantly changed as attorneys came and left the office over the years. The other sign said Abogados Consulta Gratis and listed a phone number that could be changed. There was no need to remove the signs but rather simply to remove Fotopoulos, Greenblatt and Green" (*id.* at 21). The Fotopoulos plaintiffs also allege that Herasme interfered with their business relations by phoning clients and speaking ill of them (Alexander aff, ¶ 18).

Here, there are questions of fact as to both prongs of *Carvel Corp.* divide. That is, there is a question of fact as to whether Herasme interfered with the partnership agreement and whether defendant Fotopoulos and Herasme, through culpable conduct, interfered with the Fotopoulos

plaintiffs' prospective business relations. Accordingly, the branch of defendants' motion seeking dismissal of plaintiff's sixth cause of action must be dismissed.

Seventh Cause of Action for Attorney's Fees

In New York "attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*A.G. Ship Maintenance v Lezak*, 69 NY2d 1, 5 [1986]). As there is a preference for parties bearing their own costs, courts do infer an intention to shift attorney's fees "unless the intention to do so is unmistakeably clear" (74 NY2d 487, 491).

Defendants submit the subject lease, which does not contain a provision entitling either party to attorney's fees. This is a *prima facie* showing of entitlement to judgment dismissing the seventh cause of action. In opposition, plaintiffs fail to marshal any evidence that would suggest that they would be entitled to attorney's fees. Thus, the seventh cause of action must be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted as to the first, second, third, fourth, fifth, and seventh causes of action; however, the branch seeking dismissal of the sixth cause of action is denied; and it is further

ORDERED that counsel for defendants serve, on all parties, a copy of this order and decision, along with notice of entry, within 10 days of entry.

DATE: June 25, 2018

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.