

**Success Academy Charter Schs., Inc. v Liberty  
Square Realty Corp.**

2020 NY Slip Op 32348(U)

July 15, 2020

Supreme Court, New York County

Docket Number: 654728/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM
Justice
INDEX NO. 654728/2018
MOTION DATE 01/22/2020
MOTION SEQ. NO. 002
SUCCESS ACADEMY CHARTER SCHOOLS, INC.
Plaintiff,
- v -
LIBERTY SQUARE REALTY CORP.,
Defendant.
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 33, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 were read on this motion to/for DISMISS

Masley, J:

In motion sequence number 002, plaintiff and counterclaim-defendant Success Academy Charter Schools, Inc. (Success Academy) moves, pursuant to CPLR 3211(a) (7), to partially dismiss defendant and counterclaim-plaintiff Liberty Square Realty Corp.'s (Liberty) counterclaims and to strike Liberty's request for treble damages. Liberty cross-moves for leave to amend its counterclaims for (1) breach of contract, (2) tortious interference with contractual relations, and (3) tortious interference with prospective economic advantage and requests punitive damages.

The Complaint and the Answer and Counterclaims

The facts recited below are taken from the amended complaint (NYSCEF Doc. No. [NYSCEF] 28, 1/17/2020 Amended Verified Complaint) and the answer and counterclaims (NYSCEF 29, 12/03/19 Answer and Counterclaims).

Success Academy is a not-for-profit corporation that manages Success Academy Charter School-NYC, an entity that operates forty-five public charter schools in

Manhattan, Brooklyn, Queens, and the Bronx (NYSCEF 28, Amended Complaint ¶¶ 12, 13). On May 3, 2017, Success Academy entered into a lease agreement with Liberty, whereby Liberty agreed to transform a Bronx Courthouse into a high school for Success Academy's use (*id.* ¶¶ 21-22). Under the lease, Liberty agreed to use its best efforts to complete specific work by December 1, 2017 (Landlord's Work<sup>1</sup>), and then deliver possession of the premises to Success Academy so it could open the high school for the 2018-2019 school year (*id.* ¶¶ 24, 30, 31).

Success Academy alleges that Liberty failed to substantially complete its work by December 1, 2017 (*id.* ¶ 50). Liberty, on the other hand, alleges that the lease does not contemplate the Landlord's Work being substantially complete by December 1, 2017; rather, the lease states that the Landlord's Work would not be substantially complete until after Success Academy provided Liberty with approved plans for construction (NYSCEF 29, Answer and Counterclaims ¶¶ 8, 18). Liberty further alleges that Success Academy repeatedly terminated and changed architects, never provided any approved plans, and otherwise delayed the project which rendered its performance of the Landlord's Work impossible (*id.* ¶ 19). Liberty also alleges that after Liberty denied Success Academy's request to extend the term of the lease, Success Academy acted intentionally to interfere with Liberty's ability to complete the Landlord's Work (*id.* ¶¶ 24, 26).

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<sup>1</sup> "Landlord's Work included work critical to the conversion of the building into a school that is safe and suitable for students. The work included (among other tasks): Completing all exterior work; Installing all windows and exterior doors; Installing a new roofing system; Installing structural steel and removing walls; Extending and modifying the grand staircase; Replacing all stairwell treads; Fire proofing; Installing a life safety system, including fire detection, fire alarms, and sprinklers; and Performing plumbing, HVAC, and electrical work" (NYSCEF 28, Amended Complaint ¶ 27).

### Procedural History

On September 24, 2018, Success Academy commenced this action for breach of contract. On December 3, 2019, Liberty filed its answer and two counterclaims, the first for breach of contract and the second for tortious interference with contractual relations with a request for treble damages. Success Academy now moves to partially dismiss Liberty's counterclaims and strike Liberty's request for treble damages. Liberty cross-moves for leave to amend its counterclaims, proposing amended counterclaims are for (1) breach of contract, (2) tortious interference with contractual relations, and (3) tortious interference with prospective economic advantage with a request for punitive damages.

### Discussion

#### **1. Success Academy's Motion to Dismiss Liberty's Counterclaims**

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; see also CPLR 3211 [a] [1]).

The elements of a tortious interference with contract are "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]). Here, Liberty does not sufficiently allege these elements.

Liberty asserts that Success Academy tortiously interfered with defendant's ability to complete Landlord's Work. However, under New York law, a party to a contract cannot be liable for tortious interference with the contract (*Mihalakis v Cabrini Medical Center*, 151 AD2d 345, 347 [1st Dept 1989] ["a party to a contract cannot be held liable in tort for breaching its own contract"]). A tortious interference claim must be made against a third party to the contract (*Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 157 [1st Dept 1990] ["[O]nly a stranger to a contract, such as a third party, can be liable for tortious interference with a contract"]).

Liberty alleges that, after it rejected Success Academy's request to extend the term of the lease, Success Academy "acted intentionally, purposefully, wrongfully and tortiously to interfere with defendant's ability to complete Landlord's Work" (NYSCEF 29, Answer and Counterclaims ¶ 26). Since the tortious interference claim is based only on the actions of Success Academy, a party to the contract, Liberty's counterclaim must be dismissed (*Mihalakis*, 151 AD2d at 347; *Koret, Inc.*, 161 AD2d at 157).

As the second counterclaim for tortious interference of contract is dismissed, the court declines to address Liberty's arguments concerning treble damages as academic.

## **2. Cross Motion to Amend Liberty's Counterclaims**

Leave to amend a pleading "shall be freely given absent prejudice or surprise" to the nonmoving party (*Tishman Constr. Corp. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001] [citations omitted]). Leave to amend will be denied, however, where the proposed claim is palpably insufficient as a matter of law or devoid of merit (*id.* [citation

omitted]). “On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [citations omitted]).

Liberty’s proposed amended counterclaims include claims for breach of contract, tortious interference with contractual relations, tortious interference with prospective economic advantage and a request for punitive damages

**a. Breach of Contract**

Liberty’s first proposed amended counterclaim for breach of contract would not prejudice or surprise Success Academy as this counterclaim was included in Liberty’s original answer. In addition, the breach of contract counterclaim is not palpably insufficient or clearly devoid of merit. “To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages” (*Vision China Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013] [citation omitted]).

Liberty alleges all four elements.

Liberty alleges (1) the parties had a valid agreement in the form of the lease, (2) Liberty performed substantially and completed all work under the lease<sup>2</sup>, (3) Success Academy failed to perform by not paying the required rent to Liberty and by failing to perform certain work as required under the lease, (4) and as a result Liberty incurred damages in an amount in excess of \$6,000,000.00 and has been otherwise damaged in

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<sup>2</sup> In Liberty’s Proposed Amended Counterclaims ¶ 37, Liberty writes “SUCCESS duly performed substantially and completely all work under the Lease . . .”. The Court assumes that Liberty mistakenly named Success here and meant to instead write that Liberty duly performed substantially and completed all work under the Lease.

an amount to be determined by the Court (NYSCEF 44, Proposed Amended Answer and Counterclaims ¶¶ 36-45). Accordingly, Liberty's motion for leave to amend the breach of contract counterclaim is granted.

**b. Tortious Interference with Contract**

Leave to amend a pleading will be denied where the proposed amended counterclaim is devoid of merit or palpably insufficient (*Tishman Constr. Corp.*, 280 AD2d at 377). Here, the tortious interference with contract counterclaim is devoid of merit for the reason stated above—a party to a contract cannot be held liable for tortious interference with its own contract (*Koret, Inc.*, 161 AD2d at 157).

**c. Tortious Interference with Prospective Economic Advantage**

Liberty's proposed amended counterclaims assert an additional counterclaim for tortious interference with prospective economic advantage. Although Liberty merges this counterclaim with its tortious interference with contract claim, these are two separate and distinct counterclaims.

To establish a claim for tortious interference with prospective economic advantage, "a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that the defendant acted for the sole purpose of harming the plaintiff" (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999] [citation omitted]). Under New York law, where the conduct underlying a tortious interference claim is grounded in the same conduct as the breach of contract claim, i.e., failing to perform contractual obligations, the tortious interference claim "should be dismissed as duplicative of the

contract based claims" (*JHH Pictures, Inc. v Rawkus Entertainment LLC*, 291 AD2d 356, 357 [1st Dept 2002] [citations omitted]).

Liberty alleges that Success Academy failed to perform its duties under the contract and that this failure to perform its duties amounts to tortious interference. Specifically, Liberty alleges that Success Academy, to push Liberty into financial distress, failed to cooperate with financing efforts and perform its work under the contract (NYSCEF 44, Proposed Amended Answer and Counterclaims ¶ 44). This conduct is rooted in Success Academy's alleged failure to perform its contractual obligations and is thus duplicative of Liberty's breach of contract counterclaim.

Thus, leave to amend this counterclaim is denied.

**d. Punitive Damages**

Liberty requests punitive damages for its proposed amended counterclaims for tortious interference with contract and tortious interference with prospective economic advantage. As these counterclaims are dismissed, this issue is moot.

Accordingly, it is

ORDERED that plaintiff and counterclaim-defendant Success Academy Charter Schools, Inc.'s motion to partially dismiss defendant and counterclaim-plaintiff Liberty Square Realty Corp.'s counterclaim for tortious interference with contract and to strike its request for treble damages is granted and this counterclaim is dismissed; and it is further

ORDERED that defendant and counterclaim-plaintiff Liberty Square Realty Corp.'s cross motion for leave to amend its counterclaims is granted, in part, as follows: leave is granted to amend the first counterclaim for breach of contract and to this extent



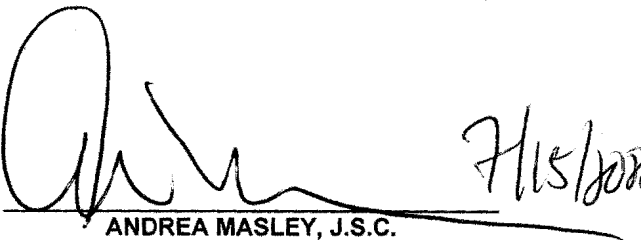
the proposed amended answer and counterclaims in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend is denied with respect to the proposed second counterclaim and that counterclaim is stricken; and it is further

ORDERED that plaintiff shall answer the counterclaims or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the parties shall update the court within 30 days of this decision's entry on NYSCEF by the court as to the status of ADR and discovery by emailing SFC-Part48@nycourts.gov .

7/15/2020  
DATE

  
ANDREA MASLEY, J.S.C.

|                       |                                     |                            |                                     |                       |
|-----------------------|-------------------------------------|----------------------------|-------------------------------------|-----------------------|
| CHECK ONE:            | <input type="checkbox"/>            | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| APPLICATION:          | <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | GRANTED IN PART       |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | SETTLE ORDER               | <input type="checkbox"/>            | OTHER                 |
|                       | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | REFERENCE             |
|                       |                                     |                            | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT |
|                       |                                     |                            | <input type="checkbox"/>            | DENIED                |