

Jerrick Assoc., Inc. v Phoenix Owners Corp.

2020 NY Slip Op 33033(U)

September 15, 2020

Supreme Court, New York County

Docket Number: 653103/2016

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

-----X

JERRICK ASSOCIATES, INC.,

Plaintiff,

- v -

PHOENIX OWNERS CORP., SPIRITOS PROPERTIES,
LLC, JEFF SPIRITOS, ATLANTIC SPECIALTY INSURANCE
COMPANY

Defendant.

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INDEX NO. 653103/2016

MOTION DATE 10/04/2020

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 160, 161

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

ORDERED that Defendants Spiritos Properties LLC, and Jeff Spiritos' motion for summary judgment (Motion Seq. 004) is granted in its entirety; and it is further

ORDERED that the Clerk is to enter judgment accordingly and the action is severed and proceeds against the remaining defendants; and it is further

ORDERED that counsel for defendant Spiritos Properties LLC shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this breach of contract action, Defendants Spiritos Properties, LLC (“Spiritos”) and Jeff Spiritos (collectively, the Spiritos Defendants) move for an order pursuant to CPLR § 3212 granting dismissal of the complaint as against them (Motion Seq. 004). Should the Court not grant the motion in its entirety, the Spiritos Defendants seek an order dismissing the complaint as against Jeff Spiritos individually. Plaintiff opposes the motion.

BACKGROUND FACTS

This action arises out of a construction project involving renovations of the sidewalk and other exterior areas (the “subject project”) at a residential condominium building in Manhattan (the “subject premises”). Plaintiff Jerrick Associates, Inc. (“Jerrick”) as a general contractor, entered into an agreement with defendant Phoenix Owners Corp. (“Phoenix”), the owner of the subject premises, to perform the renovations in April 2015 (NYSCEF doc No. 153 at 1). In May 2015, Jerrick began work on the project, but the project quickly became delayed, and Phoenix was unsatisfied with the progress made as well as the manner in which Jerrick managed the project (*id.* at 2-3). The Phoenix Board of Directors (the “Phoenix Board”) retained defendant Jeff Spiritos, the principal of Spiritos, in December 2015 to act as the Board’s representative and assist Jerrick with completing the renovations (*id.*).

In February 2016, all parties met at the subject premises to walk through the site and update Phoenix’s board on the progress. The project’s architect, Gene Kaufman, prepared a list of all construction deficiencies (NYSCEF doc No. 148). In June 2016, Phoenix terminated Jerrick after none of the deficiencies in the February 2016 letter were cured and the project was still behind schedule (NYSCEF doc No. 149). Multiple Phoenix Board members testified that the

termination was due to a general lack of satisfaction with the quality and timeliness of Jerrick's work on the project (NYSCEF doc No. 153 at 4).

Shortly thereafter its termination, Jerrick commenced the present action before this Court against Phoenix and the Spiritos Defendants. Jerrick has asserted breach of contract and lien foreclosure claims against Phoenix. The complaint's cause of action against the Spiritos Defendants is for tortious interference with contract, and Jerrick alleges that the Spiritos Defendants intentionally disparaged their work on the subject project to have them terminated (NYSCEF do No. 109, ¶ 38).

The Spiritos Defendants now move for dismissal of Jerrick's tortious interference with contract claim as the evidentiary record reflects that the Phoenix Board independently made the decision to terminate Jerrick from the project. The Spiritos Defendants contend that this action was taken by the Phoenix Board due to the numerous construction deficiencies and incessant delays caused by Jerrick, and not due to any actions undertaken by the Spiritos Defendants. The Spiritos Defendants also contend that should the Court decline to grant their motion entirely at this juncture, Jeff Spiritos individually should still be dismissed as his role at during the subject project was merely that of an employee of Spiritos and he was not involved in the Board's decision to terminate Jerrick, nor did he try to influence the Board in any way into terminating Jerrick from the project.

Jerrick argues in opposition that there are numerous issues of fact that render summary judgment for the Spiritos Defendants improper. Jerrick points to a proposal sent by Mr. Spiritos to formally assist on the completion of the subject project in January 2016 for \$50,000 (NYSCEF doc No. 158), which was rejected by Jerrick and then ostensibly created the wrongful and improper motivation for tortious interference. Jerrick also argues the Spiritos Defendants have

failed to establish that they did not interfere with the subject contract in any way and have failed to show that they did not have an economic motivation and intent to benefit from the tortious interference of the subject contract. Jerrick also contends that dismissal against Mr. Spiritos individually is not warranted as Mr. Spiritos personally contributed to the delays on the subject project.

DISCUSSION

Summary Judgment

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, [Ct App 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [Ct App 1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [Ct App 1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [Ct App 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a *prima facie* showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [Ct App 2008] quoting *Alvarez*, 68 NY2d at 324).

Here, the Spiritos Defendants bear the burden of making a *prima facie* showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any material

issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217[A], 951 N.Y.S.2d 84, 2012 NY Slip Op 50729[U] [Sup. Ct., N.Y. County 2012], aff d, 102 AD3d 563 [1st Dept 2013], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra*, *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]). On a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421, [1st Dept 2013] [holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]).

Tortious Interference with Contract

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.” However, 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]). Plaintiff must also demonstrate that the defendant’s interference with its prospective business relations was accomplished by “wrongful means” or that defendant acted for the sole purpose of harming the plaintiff.” *Snyder v. Sony Music Entm’t, Inc.*, 252 A.D.2d 294, 299–300 (1st Dep’t 1999). “Wrongful means includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic

pressure, but more than simple persuasion is required.” (*Id.* at 300; see also, *Arnon Ltd v. Beierwaltes*, 125 A.D.3d 453, 454 [1st Dept 2015] [internal citations and quotations omitted]).

Here, the Court finds that Jerrick cannot sustain its claim for tortious interference with contract as Jerrick has not introduced any evidence demonstrating that the Spiritos Defendants induced Phoenix to terminate Jerrick from the subject project. Mr. Spiritos testified in deposition that at no point did Spiritos suggest that Phoenix terminate Jerrick (NYSCEF doc No. 153 at 10). His testimony is corroborated by the Phoenix Board president, Richard Benowitz, who testified in deposition that the entire Board was unhappy with Jerrick’s work and made the decision to terminate Jerrick with no input whatsoever from Spiritos (*id.*) Mr. Benowitz noted that the Board did ask Mr. Spiritos if he could complete the job prior to making the determination, but clearly reiterated that “it was not his decision to terminate. It was the Board’s decision” (*id.*).

Spiritos has also produced a plethora of email correspondence illustrating that the Phoenix Board was unhappy with Jerrick’s work in the fall of 2015, prior to Spiritos becoming involved with the subject project. For instance, an email from Board member Dr. Wendy Frankel to Jerrick representative Bradley Lewart dated October 30, 2015 states as follows: “The Phoenix job is at a crisis point. Jerrick’s delays, lack of oversight and misinformation are disappointing and unacceptable....” (NYSCEF doc No. 108, ¶ 35). Dr. Frankel later wrote that “The Phoenix sidewalk and plaza project is months late. There are defects in the new work. Details on every level are incomplete... Confidence in Jerrick’s ability to deliver the expected quality has been shaken” (*Id.* at ¶ 36). Dr. Frankel reiterated in her deposition that Spiritos was brought in as a consultant because Jerrick was unable to complete the project (*id.* at ¶ 39). This testimonial evidence underscores that the Phoenix Board was unhappy with Jerrick’s progress long before Spiritos became involved, and Spiritos’ involvement was a result of their desire to have the

subject project timely completed and not due to any malfeasance on the part of the Spiritos Defendants.

Jerrick alleges in its complaint that the Spiritos Defendants interfered with the contract with Phoenix “by disparaging Plaintiff’s work at the project” (NYSCEF dox No. 109, ¶ 38) and sending Phoenix an intentionally erroneous and misleading report of the project’s progress. However, Jerrick has offered no evidence in support of these assertions. A Jerrick project manager, Mr. John Fallon, also confirmed during his deposition that Mr. Spiritos never interfered or prevented Jerrick from carrying out its contractual obligations (NYSCEF doc No. 153 at 15). Jerrick’s representative, Bradley Lewart, even admitted during his deposition that he has no personal knowledge or information about any discussions held between Mr. Spiritos and the Board (NYSCEF doc No. 130 at 345, ¶ 19). Mr. Lewart did note that Mr. Spiritos was “critical” of Jerrick’s work and slowed down the process by making extensive document requests (*id.* at 339, ¶¶ 7-12).

These actions, however, certainly do not rise to the level of culpable conduct that is required from a defendant in a tortious interference action (See *Moulton Paving, LLC v. Town of Poughkeepsie*, 98 A.D.3d 1009 (2nd Dept 2012) (“Plaintiff must demonstrate that the defendant’s interference with its prospective business relations was accomplished by ‘wrongful means’ or that defendant acted for the sole purpose of harming the plaintiff As a general rule, such wrongful conduct must amount to a crime or an independent tort, and may consist of ‘physical violence, fraud or misrepresentation, civil suits and criminal prosecutions’ [internal citations and quotations omitted]). Even if this Court were to consider “voluminous requests for documents” and being critical of Jerrick’s work as interference, Jerrick has not provided a single case in support of his argument that either of these are sufficient to establish the “wrongful

means” necessary to support a claim for tortious interference (*See Snyder v. Sony Music Entm't, Inc.*, 252 A.D.2d 294, 299–300 (1st Dept 1999) (Plaintiff must demonstrate that the defendant’s interference with its prospective business relations was accomplished by “wrongful means” or that defendant acted for the sole purpose of harming the plaintiff.)).

Jerrick also points to a \$50,000 proposal sent by Spiritos in January 2016 that Jerrick argues was really a “disguised kickback request” that, when rejected by Jerrick, created the wrongful motivation for Phoenix’s termination of Jerrick (NYSCEF doc No. 156, ¶ 5). However, Jerrick has provided no documentary evidence or legal arguments in support of this conclusion. A review of the document itself reflects that the proposal outlined a plan for Spiritos to, *inter alia*, organize the remaining work, interface with subcontractors and consultants, and manage the engineering side of the job (NYSCEF doc No. 158). Mr. Spiritos testified in deposition that the Phoenix Board directed him to send the letter to Jerrick “in the interest of wanting to help get the project completed” (NYSCEF doc No. 161, ¶ 5). Dr. Frankel confirmed this account, and also clarified that the letter sought a \$50,000 fee because “[The Phoenix Board was] going to pay him [Spiritos] and we had hoped or asked that Jerrick pay him, because he was actually working to help Jerrick finish the job and it was felt that Jerrick should pay for that...” (*id.* at ¶ 7). Jerrick has thus provided no evidence demonstrating that the proposal in any way amounts to the wrongful means required of a defendant in a tortious interference action.

Based on the documentary evidence and deposition testimonies provided to the Court, Jerrick will not be able to meet its *prima facie* burden at the time of trial showing that the Spiritos Defendants used wrongful means to interfere with the contract and induce Jerrick’s termination. Therefore, the Spiritos Defendants have demonstrated that they are entitled to summary judgment and the underlying action is dismissed against them in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendants Spiritos Properties LLC, and Jeff Spiritos' motion for summary judgment (Motion Seq. 004) is granted in its entirety; and it is further

ORDERED that the Clerk is to enter judgment accordingly and the action is severed and proceeds against the remaining defendants; and it is further

ORDERED that counsel for defendants Spiritos Properties LLC and Jeff Spiritos shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



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9/15/2020

DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE