USC-NYCON, LLC v Prime Mix Corp.
2020 NY Slip Op 33796(U)
October 23, 2020
Supreme Court, Kings County
Docket Number: 501467/2019
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 23rd day of October 2020.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

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USC-NYCON, LLC and FERRARA BROS., LLC,

Plaintiffs,

-against-

PRIME MIX CORP., PRIME MIX CORP., d/b/a BROOKLYN READY MIX, PRIME MIX GC II, INC., PRIME MIX GC II INC., d/b/a BROOKLYN READY MIX, PRIME MIX GC, LLC, and PRIME MIX GC, LLC d/b/a BROOKLYN READY MIX,

Defendants.

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Index No.: 501467/2019

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	20-28, 32-41,
Opposing Affidavits (Affirmations)	43-46,
Reply Affidavits (Affirmations)	

Introduction

Plaintiffs, USC-NYCON, LLC AND Ferrara Bros., LLC, move by notice of motion, sequence number one, pursuant to CPLR § 3211(a)(7) to dismiss defendant's counterclaims, or in the alternative, pursuant to CPLR 3024(b) to strike the allegations "as scandalous and prejudicial". Defendant, Prime Mix Corp., opposes plaintiff's motion

and cross-moves, sequence number two, for an order staying discovery pending the court's decision on the motion to dismiss, and pursuant to 22 NYCRR § 130-1.1 for attorney's fees and expenses.[1]

Background

The parties were retained on a construction project for the Virgin Hotel, in New York, New York. Plaintiff was hired by general contractor Flintock Construction Services, LLC (Flintock) and concrete subcontractor BMNY Contracting Corp., (BMNY) to provide concrete for the construction project (*see* NYSCEF Doc. # 23, Complaint at p 3). Issues arose with the concrete, which plaintiff contributed to BMNY's poor workmanship. Plaintiffs allege that defendants tortuously interfered with plaintiff's contract to supply ready-mixed concrete to the project, induced BMNY and Flintock to breach their contract, and tortuously interfered with plaintiff's business relationship with BMNY and Flintock. The parties entered into a contract dated January 16, 2018, which addressed past due balances owed to plaintiff and future production and delivery of ready-mixed concrete for the project (*see id.* at 3-4). Plaintiff alleges that defendant, Prime Mix, another concrete supply company, knowingly solicited business from BMNY and Flintock, causing them to breach their contract with plaintiff (*see id.*).

[1] In an e-mail to this Court, the parties agreed that that portion of motion sequence number two which seeks to stay discovery pending the hearing and determination of motion sequence one is moot. At oral argument, the parties consented to amend the language utilized in the counterclaim to reflect the allegation that there was a degree of economic pressure due to the existence of a parent company, thereby rendering that portion of motion sequence one moot. That portion of the motion to dismiss the counterclaims remains at issue.

Defendant, Prime Mix alleges that it was retained by BMNY and Flintlock to provide concrete for the project, after plaintiffs were terminated from the project (*see* NYSCEF Doc. # 24, Amended Answer). Prime Mix alleges that plaintiffs were terminated from the project by BMNY and Flintock after multiple industry required concrete tests revealed that the ready mixed concrete supplied by plaintiff was substandard (*see id.* at ¶ 9-10). Defendant avers that BMNY and Flintock approached a new supplier, but the supplier was allegedly intimidated by the plaintiffs, who threatened "to undercut its jobs throughout New York, and caus[e] trouble with its suppliers of materials required to manufacture concrete", causing them to refuse the job (*id.* at ¶ 14). Prime Mix maintains that at this time, it was approached by BMNY and Flintock, and agreed to supply concrete to the project (*see id.* at ¶ 15).

Prime Mix further alleges that plaintiffs learned of this new contract and "embarked on the same brazen scheme to force Prime Mix to withdraw from supplying concrete to the project" (*id.*). A representative of plaintiff allegedly met with the principal of Prime Mix.

> Similar to his conversations with the previous supplier, Ferrara said to Cholowsky that there should be an arrangement whereby if a US Concrete controlled concrete supplier has a dispute with a general contractor, then Prime Mix should agree not to take on that job, and US Concrete/ Ferrara (or NYCON) will offer the same "courtesy" to Prime Mix. Further, Ferrara advised Cholowsky that, if Cholowsky refused his proposal, and did not remove Prime Mix from the Project, Ferrara would use US Concrete's influence and market share to cause Prime Mix's materials suppliers to breach their agreements with Prime Mix, and otherwise not supply materials to Prime Mix, essentially shuttering its business.... Cholowsky did not bow to this unlawful pressure,

> and Prime Mix continued to deliver concrete to the Project - concrete that fully complied with, and indeed exceeded, the required concrete specifications for the Project.
>
> US Concrete/Ferrara, true to its unlawful threat, contacted Prime Mix's suppliers and informed them, among other statements harmful to Prime Mix, that if they continued to supply to Prime Mix, they would also lose the US Concrete/Ferrara business. Prime Mix discovered these improper statements, and US Concrete/Ferrara was successful in causing Prime Mix to suffer supply issues along with the suppliers altering the payment terms of its supply. This resulted in substantial damages to Prime Mix, which has been able to struggle through these difficulties and remain in business. For a time, Ferrara was successful. Prime Mix's suppliers refused to provide the materials Prime Mix required in order to manufacture concrete and altered payment terms away from the industry standard terms. While they ultimately agreed to resume supplying Prime Mix, the damage had been done, and continues as the supply terms were altered based on US Concrete/Ferrara's conduct. Prime Mix suffered substantial economic damages as well as reputational damage.

(*id.* at ¶ 16-19).

Prime Mix maintains that plaintiffs' parent company US Concrete and its subsidiaries have approximately 50% market share of New York City concrete market and have attempted to "corner the market" of providing concrete to construction companies (*id.* at ¶ 3).

Procedural History

Plaintiff commenced the instant action by e-filing a summons and verified complaint on January 22, 2019. Defendants appeared in this action by filing a notice of appearance on March 21, 2019. The parties stipulated to extend the time to answer. Issue was joined by service of an answer on or about April 3, 2019. On April 23, 2019,

defendants filed an amended answer with Counterclaims. Plaintiffs rejected the counterclaims pursuant to CPLR §§ 3013 and 3014 as "so indefinite, overly-broad and rambling that Plaintiff's counsel could not formulate any meaningful response thereto" (NYSCEF Doc. # 21, Affirmation in Support, quoting NYSCEF Doc. # 25). Defendant's counterclaims allege:

> **FIRST CAUSE OF ACTION**
> **Tortious Interference With Contract**
>
> 21. Prime Mix repeats and realleges the foregoing allegations as if set forth at length herein.
>
> 22. Plaintiffs were aware of Prime Mix's contracts with suppliers of sand, stone, and cement among others.
>
> 23. Plaintiffs wrongfully interfered with Prime Mix's contracts with its suppliers and otherwise assisted and encouraged Prime Mix's suppliers to breach their agreements with Prime Mix and refuse to provide materials that Prime Mix requires in order to make concrete.
>
> 24. As a result of Plaintiffs' interference with Prime Mix's suppliers, Prime Mix was unable to make concrete and defaulted on certain of its obligations to its customers and its reputation in the highly competitive construction industry has been damaged.
>
> 25. By reason of the foregoing, Prime Mix is entitled to have judgment against Plaintiffs in an amount to be determined at trial together with interest, costs and disbursements of this action.
>
> **SECOND CAUSE OF ACTION**
> **Tortious Interference With Prospective Economic Advantage**
>
> 26. Prime Mix repeats and realleges the foregoing allegations as if set forth at length herein.

> 27. The aforementioned conduct of Plaintiffs, including wrongfully interfering with Prime Mix's contracts with its suppliers otherwise assisting and encouraging Prime Mix's suppliers to breach their agreements with Prime Mix and refuse to provide materials that Prime Mix requires in order to make concrete, constitutes, inter alia, tortious interference with Prime Mix's prospective economic advantage.
>
> 28. As a result of Ferrara's interference with Prime Mix's suppliers, among other things Prime Mix was unable to make concrete and defaulted on certain of its obligations to its customers and its reputation in the highly competitive construction industry has been damaged.
>
> 29. The actions of Plaintiffs were willful, wanton, malicious and/or in reckless disregard of Prime Mix's rights.
>
> 30. By reason of the foregoing, Prime Mix is entitled to have judgment against Ferrara in an amount to be determined at trial together with interest, costs and disbursements of this action.

(NYSCF Doc. # 24, Amended Answer with Counterclaims).

Thereafter, plaintiff filed a reply to counterclaims (*see* NYSCEF Doc. # 26).

After a preliminary conference, the parties stipulated to a briefing schedule with respect to the counterclaims, wherein defendants had until June 14, 2019 to decide whether they were going to amend their counterclaims. On June 17, 2019, defense counsel wrote that they would not amend their counterclaims. Thereafter, plaintiff made the instant motion to dismiss the counterclaims or to strike them.

Discussion

Motion to Dismiss Counterclaims

Plaintiff first moves pursuant to CPLR § 3211(a)(7) to dismiss defendants' counter claims. "When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the

standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Bennett v. State Farm Fire & Cas. Co.*, 161 A.D.3d 926, 78 N.Y.S.3d 169 [2 Dept., 2018], quoting *Sokol v Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 [2 Dept., 2010]). "[T]he pleading must be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, 78 N.Y.S.3d 129 [2 Dept., 2018], citing *Leon v Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972 [1994]; *see also Mirro v. City of New York,* 159 A.D.3d 964, 74 N.Y.S.3d 356 [2 Dept., 2018]). "[T]he sole criterion is whether factual allegations are discerned from the four corners of the complaint which, taken together, manifest any cause of action cognizable at law" (*Law Offices of Thomas F. Liotti v. Felix,* 129 A.D.3d 783, 9 N.Y.S.3d 888 [2 Dept., 2015], citing *Cohen v. Kings Point Tenant Corporation,* 126 A.D.3d 843, 6 N.Y.S.3d 93 [2 Dept., 2015]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, *supra,* quoting *EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 799 N.Y.S.2d 170 [2005]).

"In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Garcia v. Polsky, Shouldice & Rosen, P.C.,* 161 A.D.3d 828, 77 N.Y.S.3d 424 [2 Dept., 2018], quoting *Cron v. Hargro Fabrics,* 91 N.Y.2d 362, 670 N.Y.S.2d 973 [1998]; *see also Rad & D'Aprile, Inc. v. Arnell Constr. Corp.*, 159 A.D.3d 971, 74

N.Y.S.3d 266 [2 Dept., 2018]). "A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action" (*Kaplan v. New York City Dep't of Health & Mental Hygiene*, 142 A.D.3d 1050, 38 N.Y.S.3d 563 [2 Dept., 2016]).

Tortious Interference with Contract

Defendants first counterclaim alleges that plaintiff tortuously interfered with Prime Mix's contract with its suppliers. "The elements of a cause of action to recover damages for tortious interference with contract are the existence of a valid contract between it and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of that contract without justification, and damages" (*MVB Collision, Inc. v. Allstate Ins. Co.,* 129 A.D.3d 1041, 13 N.Y.S.3d 137 [2 Dept., 2015], citing *White Plains Coat & Apron Co., Inc. v. Cintas Corp.,* 8 N.Y.3d 422, 835 N.Y.S.2d 530 [2007]).

Affording the counterclaims liberal construction, presuming the facts alleged to be true, and affording defendant the benefit of every favorable inference, the facts alleged herein in the counterclaim by Prime Mix fit within any cognizable legal theory of tortious interference with contract. In its answer, Prime Mix alleged that plaintiff approached suppliers, knowing that they do existing business with Prime Mix's, "informed" them of "harmful statements", which caused them to refuse to provide materials to prime Mix and alter payment terms away from industry standards. At this stage, this Court need not determine the merit of any of these allegations but must merely address the adequacy of

the pleadings. Accordingly, that branch of plaintiff's motion to dismiss defendant's first counterclaim is denied.

Tortious Interference with Prospective Economic Advantage

Defendant's second counterclaim is for tortious interference with prospective economic advantage. "To establish a claim of 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 defendant acted for the sole purpose of harming the plaintiff" (*Moulton Paving, LLC v. Town of Poughkeepsie*, 98 A.D.3d 1009, 950 N.Y.S.2d 762 [2 Dept., 2012], quoting *Caprer v. Nussbaum,* 36 A.D.3d 176, 825 N.Y.S.2d 55 [2 Dept., 2006]; *see also Carvel Corp. v. Noonan,* 3 N.Y.3d 182, 785 N.Y.S.2d 359 [2004]). "The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently "culpable" to create liability for interference with prospective contracts or other nonbinding economic relations" (*Carvel Corp. v. Noonan*, 3 N.Y.3d 182, *supra*).

"[K]nowledge of the prospective economic relation is an implicit element of interference" (*Caprer v. Nussbaum,* 36 A.D.3d 176, *supra*). "A claim for tortious interference with prospective business relations requires more culpable conduct on the part of the interferer as compared to a defendant in tortious interference with a contract, ... because courts are more protective of existing contractual relationships than prospective business relationships [internal citations and quotation marks omitted]" (*Nirvana, Inc. v. Nestle Waters N. Am. Inc.*, 123 F. Supp. 3d 357 [NDNY 2015]).

Affording the counterclaims liberal construction, presuming the facts alleged to be true, and affording defendant the benefit of every favorable inference, the facts alleged herein in the counterclaim by Prime Mix fit are too vague to sustain a cause of action for tortious interference with prospective economic advantage. Here, Prime Mix alleged in its counterclaims that plaintiff interfered with its business relationships with existing materials suppliers by "informing" them of "harmful statements" for the sole purpose of harming Prime Mix. In *Nirvana v. Nestle Waters North America;* when considering the New York common law cause of action of tortious interference with business relations in the context of a motion to dismiss for failure to state a cause of action, the court, citing the Second Circuit, held that "mere suspicions are inadequate to support a claim for tortious interference with business relations" [123 F.Supp3d 357, quoting *Scutti Enters., LLC v. Park Place Entm't Corp.,* 322 F.3d 211 [2 Cir., 2003].

> Claims for speculative future economic advantage should be dismissed ... A plaintiff must specify some particular, existing relationship through which plaintiff would have done business but for the allegedly tortious behavior ... A general allegation of interference with customers without any sufficiently particular allegation of interference with a specific contract or business relationship does not state a claim [internal citations and quotation marks omitted]

(*id.*).

In opposition, Prime Mix's argument is focused on whether the conduct alleged is sufficiently "wrongful" within the meaning of the caselaw. Prime Mix fails to address plaintiff's argument that the allegations are vague and speculative, and failed to remedy

the defect by supplementing the pleading with affidavits. Accordingly, that branch of plaintiff's motion to dismiss Prime Mix's second cause of action is granted.

Conclusion

Accordingly, the plaintiff's motion to dismiss defendant's counter claims is granted to the extent that the second counterclaim for tortious interference with prospective economic advantage is dismissed. Defendant's motion to stay discovery pending the determination of the motion to dismiss is denied as moot. Any relief not specifically addressed herein is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.