

**Paukman v Thomas**

2022 NY Slip Op 33489(U)

October 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 504529/2021

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6<sup>th</sup> day of OCTOBER, 2022

P R E S E N T:

HON. RICHARD VELASQUEZ

Justice.

-----X  
JOSEPH PAUKMAN,

Plaintiff,

-against-

Index No.: 504529/2021  
Decision and Order  
Mot. Seq. No. 1

IRA THOMAS, ESQ.,

Defendants,

-----X

The following papers NYSCEF Doc #'s to read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	3-24
Opposing Affidavits (Affirmations) _____	26
Reply Affidavits _____	28

After having come before the Court and the Court having heard Oral Argument on December 1, 2021 the court finds as follows:

Defendant moves for an Order pursuant to Rule 3211(a)(7) of the CPLR, dismissing plaintiff's action as failing to state a valid cause of action. Plaintiff opposes the same.

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We 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 (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **“The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **“[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion”** (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65). Although a court should sparingly grant a motion to dismiss for failure to state a cause of action, where the affidavits submitted in support of the motion establish conclusively that the plaintiff has no cause of action, the court should grant the motion. See *Doe v Ascend Charter Schs.*, 181 AD3d 648 [2d Dept 2020], citing *Sokol v Leader*, 74 AD3d at 1182 [2d Dept 2010], quoting *Lawrence v Graubard Miller*, 11 NY3d 588, 595, 901 N.E.2d 1268, 873 NYS2d 517 [2008], quoting *Rovello v Orofino RealtyCo.*, 40 NY2d at 636 [1976]. See also, *Porat v Rybina*, 177 AD3d 632 [2d Dept 2019].

In the present case, plaintiff alleges a cause of action sounding in tortious interference with contractual relation. Tortuous interference with contractual relations has been a viable cause of action in New York. E.g., *S.C. Posner Co. v. Jackson*, 223 N.Y. 325, 332 (1918); *Lamb v. Cheney & Son*, 227 N.Y. 418, 421 (1920). It occurs when

a business or individual who is not a party to a contract intentionally and without justifiable cause disrupts a business relationship formed by a contract. *Lama Holding v. Smith Barney*, 88 NY2d 413, 424 (1996). To establish tortious interference with a contract under New York law, a plaintiff must show four requisite elements, (1) the existence of a valid and enforceable contract between plaintiff and another; (2) defendant's awareness of the contractual relationship; (3) defendant's intentional inducement of a breach of the contract (and a subsequent breach by the other caused by defendant's wrongful conduct); and (4) damages. See, e.g., *Nero v Fiore*, 165 AD3d 823 [2d Dept 2018]; *Foster v Churchill*, 87 NY2d 744, 749-50 [1996]; *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]. See e.g., *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]) "there is no liability in tort with respect to an unenforceable contract--here a contract terminable at the will of either party unless the means employed by defendant-competitor were wrongful." *Id.* at 621.

In the present case, it is undisputed that due to a falling out between Plaintiff and his client at the time, Sunny Barkats, Plaintiff filed a "letter motion" with the Federal Court on August 20, 2019 seeking to withdraw as attorney or record (See SDNY CMECF Document 166, attached as "Exhibit D, NYSCEF, Doc 9" . on August 29, 2019, Plaintiff's motion to withdraw as Barkats counsel was granted by the Federal Court Judge (See SDNY CMECF Document 174, attached as "Exhibit G, NYSCEF Doc 12" . Said withdrawal "refutes the plaintiff's conclusory allegations, and conclusively disposes of the plaintiff's claims as a matter of law." *Nero v Fiore, supra*, at 826, citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 774 NE2d 1190, 746 NYS2d 858 [2002]; *Held v Kaufman*, 91 NY2d 425, 430-431, 694 NE2d 430, 671 NYS2d 429

[1998]).

Accordingly, the documentary proof establishes that there was no breach of contract. Instead, plaintiff took the initiative to terminate his contract with his client. Thus, the action fails to state a cause of action because an essential element of the cause is not satisfied there is no contract breach. Therefore, defendant's motion to dismiss for failure to state a cause of action is hereby granted. This matter is hereby dismissed.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York  
October 6, 2022

ENTER FORTHWITH:



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HON. RICHARD VELASQUEZ

Hon. Richard Velasquez, JSC

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