

Staples, Inc. v Ft. Hamilton Props., LLC

2009 NY Slip Op 32716(U)

November 16, 2009

Supreme Court, New York County

Docket Number: 108087/07

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 108087/2007
STAPLES, INC.
VS.
FT. HAMILTON PROPERTIES
SEQUENCE NUMBER : 011
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
NOV 19 2009
NEW YORK
COUNTY CLERKS OFFICE

Dated: 11/16/09

[Signature]
WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
STAPLES, INC., and STAPLES THE OFFICE
SUPERSTORE EAST, INC.

Plaintiffs,

Index No. 108087/07
Mtn Seq. 011

-against-

FT. HAMILTON PROPERTIES, LLC, HOWARD ABNER,
ALAN ABNER, CAROLYN ALTER, LESLIE BENNETT,
MARJORIE BRYNES-LAMPKE, KENNETH A. COHAN,
RONALD COHAN, DORIS KROOG, JULIAN MOSES,
MAURICE MOSES, JILL PINGAR, ARLENE ROER,
NORMAN THEIRER and ROBERT THEIRER,

Defendants.

FILED
NOV 19 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X
WALTER B. TOLUB, J.:

By this motion, Defendants seek an order dismissing Plaintiff's claim for tortious interference with prospective economic relations arguing that it is an impermissible "Strategic Lawsuit Against Public Participation" ("SLAPP" suit). Alternatively, Defendants' seek an order dismissing Plaintiff's third Cause of Action alleging tortious interference (CPLR 3212).

Facts

As stated in this Court's prior decisions, Plaintiff, Staples is the tenant ("Staples" or "Tenant") to a long term lease with the Defendants (collectively "Landlord" or "Owners"). Staples became the tenant by a lease assignment for the premises from Sunrise supermarket, the original tenant. The assignment caused certain problems, specifically, the Certificate of Occupancy permits the Premises to be used only as a supermarket.

On or about March 21, 2007, two "anonymous complaints were called into the DOB concerning Staples occupancy of the Premises. The first complaint stated that there were too few parking spaces, and the second complaint, called in three minutes later, asserted that Staples misrepresented itself as the owner of the Premises when it applied for permit in January 2007.

On May 4, 2007 the Landlord served a Notice to Cure upon Staples. The Notice to Cure compelled Staples to legalize its use as required by paragraph 17 of the lease, specifically occupying the premises with a valid Certificate of Occupancy, by June 12, 2007¹. Upon failure to cure, the Notice stated that the Landlord would elect to terminate the Lease.

Shortly after the Landlord served Staples with the Notice to Cure, on May 18 2007, Staples obtained a temporary certificate of occupancy (TCO) for the Premises from the Department of Buildings (DOB). The TCO has been renewed several times over the years. On July 22, 2008, the DOB renewed the TCO through October 8, 2008. Notwithstanding the valid TCOs, the Landlord refused to withdraw the Notice to Cure.

On May 23, 2007, the Brooklyn Deputy Borough Commissioner of the Department of Buildings sent a letter to the Landlord stating that, due to anonymous complaints, he was issuing a Stop Work

¹Initially the time to Cure any violations expired on May 29, 2007, however, the Landlord extended the time to Cure to June 12, 2007.

Order with respect to alterations on the Staples Premises. The letter stated that all work was to be stopped until the time the DOB's objections were addressed. Staples did not receive notice of the Stop Work letter and the Landlord did not forward a copy of the letter to Staples.

On June 11, 2007, Staples commenced an action against Defendants seeking, inter alia, a stay in the enforcement of the Notice to Cure, a declaration that it was not in default of paragraph 17 of the lease, a declaration that the violations were not curable within 30 days and Yellowstone relief. On June 11, 2007, the Court entered a temporary restraining order. Then, on August 21, 2007, Judge Acosta granted a preliminary Yellowstone injunction which stayed the running of the time to cure any Certificate of Occupancy violations and permitted the use of the premises as a stationary store.

After the Yellowstone application was made, on June 18, 2007, without any information from Staples, the Borough Commissioner revoked the approval and permit issued for Staples' alterations at the Premises. Staples did not receive a copy of the letter until June 22, 2007. Prior to receiving the letter, on June 19, 2008, Staples met with the Borough Commissioner to address the seven items in its TCO. Upon a showing by Staples that it was authorized by the Landlord to do the work back in 1996, by letter dated June 25, 2007, the Borough Commissioner

reinstated the alteration application and TCO.

On March 11, 2008, Staples moved for an order compelling Defendants to respond to Staples' outstanding discovery requests. After oral argument, the parties entered into a Preliminary Conference Order which provided that all discovery would be completed June 30, 2008 and that a compliance conference would be held on August 1, 2008.

By Order dated May 7, 2008, this court granted Plaintiffs' motion to compel and directed that all discovery be completed by December 18, 2008. That Order further stated that there would be a Preliminary Conference on August 1, 2008.

Plaintiff failed to appear for the Preliminary Conference on August 1, 2008 claiming that there was an office recording error. When Plaintiff did not appear in court and the Defendants were the last remaining people in the courtroom, this court dismissed the action pursuant to 22 NYCRR 202.27.

Even though a TCO was in place for the Premises, the Landlord viewed the dismissal as permitting Staples' time to cure to run. The Landlord's view was that since Staples filed for the Yellowstone one day before its time to cure would expire, the time to cure expired one day after the dismissal. Therefore, on August 12, 2008, the Landlord invoking section 6(a) of the Lease, served a three day Notice of Termination notifying Staples that its tenancy would be effectively terminated on August 21, 2008.

Plaintiff, unaware of the August 1, 2008 dismissal, filed motion sequence 005, for an order compelling Defendants to comply with the Yellowstone injunction granted by the Court on August 21, 2007, holding Defendants in contempt for violating said order and enjoining the Defendants from taking any action to terminate the lease between Plaintiff and Defendants. When Staples presented the Order to Show Cause for signature, it was only then advised by the court that the action had been dismissed. Nevertheless, the Court signed Staples Order to Show Cause which was returnable on September 5, 2008.

Having discovered that the action was dismissed, Staples, by motion sequence 006, moved for an order vacating the dismissal of the action, restoring the action to the calender and reinstating the Yellowstone injunction which was in place before said dismissal. That motion was granted.

By this motion, Defendants seek an order dismissing Plaintiff's claim for tortious interference with prospective economic relations arguing that it is an impermissible "Strategic Lawsuit Against Public Participation ("SLAPP" suit). Alternatively, Defendants' seek an order dismissing Plaintiff's third Cause of Action alleging tortious interference (CPLR 3212).

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective

motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

In the Complaint, Plaintiff claims that Defendants engaged in a campaign of harassment against Staples. Although Plaintiff did eventually obtain a certificate of occupancy, it argues that

Defendants actions injured Defendants by causing a delay in obtaining the certificate, costing high legal and architectural fees.

Defendants argue that this cause of action should be dismissed because it is an impermissible SLAPP suit. Defendants argue that Plaintiff brought and maintained this lawsuit when the Owners exercised their rights to comment on applications for work permits on the property [even while the certificate of occupancy was pending].

Where there is an existing, enforceable contract and defendants' deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even *if defendants were engaged in lawful behavior* (*emphasis added NTB Bankcorp Inc v. Fleet/Nordstarr Financial group Inc.*, 87 NY2d 614 [1996]).

Where there has been no breach of a contract, but only interference with prospective rights, such as in this case, plaintiff must show more "culpable conduct" on the part of defendants than is required when an existing contract has been breached (*Id.*).

A necessary element of the claim for tortious interference with economic relations is the use of wrongful means to achieve an end (*Don Buchwald & Associates, Inc. v. Rich*, 281 Ad2d 329 [1st Dept 2001]). Such wrongful mean may include violence,

fraud, misrepresentation, civil suits, criminal prosecution and even some degree of economical pressure (NTB Bankcorp Inc v. Fleet/Nordstarr Financial group Inc., 87 NY2d 614 [1996]).

Here, Defendants actions over the years show a clear campaign to terminate Staples long term Lease. In March 2005 Defendants first sought to terminate the Lease. That case was heard before an arbitrator. By decision dated January 23, 2007, the arbitrator issued an award to Staples stating that the Landlord had no basis in law or equity to terminate the Lease. The arbitrator found that the Landlord was improperly seeking to "terminate the Lease because the rent payable thereunder is believed to be well below market, and they want to relet the Property at substantially higher rent." (Plaintiff's Ex. 2).

Then, on January 26, 2006, while the Landlord and Staples were still in the midst of the arbitration, the Landlord received a notice violation from the Environmental Control Board (ECB) stating that the Premises did not have a certificate of occupancy. It was one of the Defendants that made the complaint to the ECB which caused it to issue the violation. Even though the Landlord's filing of the complaint was permissible, when the landlord received a formal notice of the violation, they did not forward it to Plaintiff for five months (Plaintiff's Ex. 4).

When plaintiff did receive the notice, it diligently worked to make the necessary changes and hired an architectural firm.

Once the work was to begin, Plaintiff discovered that Department of Building files were missing for the Premises (Plaintiff's Ex. 30). Even though certain work had been performed years earlier, the architectural firm had to recreate documents [such as sprinkler documents] so that the work could be re-inspected and signed off on (id.).

Once Plaintiff won the arbitration and was awarded over \$200,000 in attorneys' fees, Plaintiff claims that Defendants retaliated by calling the Department of Buildings and filing two complaint is Against Plaintiff. The first complaint stated that there were only 50 parking spaces when there should have been 78 parking spaces based on the square footage of the Premises. The other complaint, which was made on the same day, claimed that Plaintiff applied for a permit misrepresenting itself as the owner of the Premises.

Plaintiff argues that these complaints were false because (1) less square footage was used as selling space which is what determines how many parking spaces is required; and (2) Defendants did not mention in their complaint that an agent of Defendants authorized various work applications in connection with altering the Premises and that Plaintiff in fact never represented itself as the owner of the Premises.

After making these complaints, Defendants then tried to terminate Plaintiff's tenancy by sending it a Notice to Cure.

The Notice to Cure stated that plaintiff was to cure any certificate of occupancy violation within 29 days. Defendants refused to withdraw the Notice to Cure even once Plaintiff had obtained a temporary certificate of occupancy.

Plaintiff then commenced this action and sought, *inter alia*, a Yellowstone injunction which was granted.

These highlights of the Owners continuous actions against the Plaintiff in what appears to be a deliberate effort to terminate Plaintiff's Lease warrant, at the very least, the denial of Defendants motion in its entirety.

After a thorough review of the history and facts of this case, Defendants motion must be and is denied as there are questions of fact regarding whether Plaintiff sought to terminate the Lease by wrongful means.

Accordingly, it is

ORDERED that the motion is denied in its entirety.

Counsel for the parties are directed to contact the Clerk of the Court for a pre-trial date.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/16/09

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NOV 19 2009
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HON. WALTER B. TOLUB, J.S.C.