STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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10 ELLICOTT SQUARE COURT CORPORATION
d/b/a ELLICOTT DEVELOPMENT CO., LLC,
1097 GROUP, LLC and
4628 GROUP, INC.

Plaintiffs

vs.

MEMORANDUM DECISION

Index No. 7591/08

VIOLET REALTY, INC.,
VIOLET REALTY, INC. d/b/a
MAIN PLACE LIBERTY GROUP and
PATRICK HOTUNG

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **MOSEY PERSICO, LLP**
Attorneys for Plaintiffs
Shannon M. Heneghan, Esq., of Counsel

THE KNOER GROUP, PLLC
Attorneys for Defendants
Robert E. Knoer, Esq., of Counsel

CURRAN, J.

Defendants have moved to dismiss and for summary judgment pursuant to CPLR § 3211 and § 3212. Alternatively, defendants seek an order compelling plaintiffs to provide discovery responses.

This action was commenced on June 30, 2008 and the Answer was served on August 25, 2008. Document discovery is underway but no depositions have been taken.

BACKGROUND

Plaintiffs are in the business of purchasing, developing and leasing commercial real estate (Complaint ¶ 4 [Defendants' Ex. A]). Defendant Main Place Liberty Group manages property for defendant Violet Realty Group, Inc. ("Violet"), which owns the Main Place Tower, Liberty Building and the Main Place Mall complex. Defendant Patrick Hotung ("Hotung") is the General Manager of Main Place Liberty Group (Hotung Aff. ¶¶ 1, 3). The parties compete in the leasing of commercial real estate in the City of Buffalo.

Since October of 2002, plaintiffs have sought to purchase and develop 50 Court Street ("Property"), and together with the adjoining but separately owned property of 30 Court Street ("30 Court"), plaintiffs' plan has been to develop those properties into a large Class A office building (Gregory Aff. ¶ 4; Plaintiffs' Ex. D).

The Property and 30 Court are directly across Pearl Street from Violet's property (Hotung Aff. ¶ 5). Hotung asserts that the development planned by plaintiffs "will significantly impact the property owned by Violet," as well as Violet's interest in its property and its tenants (Hotung Aff. ¶¶ 6, 13). Plaintiffs allege that defendants' interest in the Property and 30 Court is premised on their own self-interested desire not to have a new Class A office building next door competing with their older facility for tenants in the downtown office space market (Complaint ¶¶ 23-24).

The Property is owned by the Buffalo Urban Renewal Agency ("BURA"). Ellicott Development Co. ("EDC") sought and received preferred developer status for the Property from BURA in January 2003, effectively affording EDC exclusive rights to develop the Property (Complaint ¶ 15; Defendants' Ex. E; Plaintiffs' Ex. E; Gregory Aff., Exs. A, B).

The designation was for a period of six (6) months and required EDC to pay a monthly designation fee of $500.00 (Complaint ¶ 16). EDC had previously entered into an Option Agreement with Court and Pearl Associates ("CPA") to purchase 30 Court ("Option Agreement") (Gregory Aff., ¶ 13, Ex. E). The option was procured in October 2002 and was to last for one (1) year, with a purchase price of $750,000, and contained a six month renewal term with a purchase price of $775,000 (Complaint ¶ 40).

On February 12, 2003, Main Place Liberty Group's director of leasing acknowledged EDC's designation as the preferred developer of the Property in a letter. That letter also notes defendants' awareness of the Option Agreement between EDC and CPA for the adjacent property at 30 Court (Plaintiffs' Ex. F; Gregory Aff., ¶ 7, Ex. C).

In April 2003, plaintiffs applied for a building permit to develop the Property (Defendants' Ex. F). According to defendants, the application was made prior to EDC having received approval by BURA for the Land Development Agreement ("LDA") or having received approval from the Common Council for the designation as the "redeveloper." The application was denied on the basis that the proposed facility failed to comply with the Code of the City of Buffalo ("Code") (Defendants' Ex. F). The City's Building Department determined that it was necessary to seek variances from the Zoning Board of Appeals ("ZBA").

One of the variances sought was from the "step back" requirement of the Code. Due to extreme wind conditions in Buffalo, building architecture cannot create or exacerbate "down washing" or "tunneling" of wind (Section 511-71). On May 14, 2003, the ZBA denied the variance (Defendants' Ex. H). Instead of filing an Article 78 challenging the ZBA's denial,

a second request for the same variance, under a different name, was resubmitted to the ZBA (Defendants' Ex. I). The second request was granted.

On July 11, 2003, BURA redesignated EDC as the preferred developer and EDC continued to pay the monthly designation fee (Complaint ¶ 18). On July 21, 2003, Violet commenced an Article 78 proceeding against the ZBA, BURA, CPA and EDC seeking to nullify the variance (Index # 7338/03) (the "First Petition") (Defendants' Ex. J). Following a conference before Justice Kevin Dillon, all counsel agreed to vacate the variance without prejudice and discontinue the action (Defendants' Ex. K).

On September 29, 2003, in accordance with its terms, plaintiffs elected to renew the Option Agreement with CPA for an additional term of six months and paid an additional deposit (Complaint ¶ 41; Gregory Aff., Ex. F). As provided in the Option Agreement, the additional deposit was credited toward the purchase price.

In December 2003, EDC submitted an application to the City of Buffalo Planning Board for site plan approval (Plaintiffs' Ex. G). According to defendants, this was done without having submitted an application or plans to the Building Department, which defendants maintain was improper (see Defendants' Ex. L). At the time of the presentation, EDC was not the owner of the Property nor had it negotiated a contract to purchase it. The Planning Board received many comments, including from defendants, specifically with regard to the step back and parking. The Planning Board approved the site plan and BURA issued negative SEQRA declarations as the lead agency (Defendants' Ex. M; Plaintiffs' Exs. H, I). On January 8, 2004, BURA again redesignated EDC as the preferred developer and EDC continued to pay the monthly designation fee (Complaint ¶ 18).

On February 26, 2004, Violet commenced an Article 78 proceeding against the Planning Board, BURA, Kideney Architects ("Kideney")(plaintiffs' consultants), CPA and EDC seeking to reverse the Planning Board approval (Index #1978/04) (the "Second Petition") (Defendants' Ex. N; Plaintiffs' Ex. J). On March 22, 2004, respondents Kideney, EDC and CPA submitted a joint answer with counterclaims for (1) tortious interference with performance of a contract; (2) tortious interference with prospective contractual relations; (3) tortious interference with business relations; and (4) costs, attorneys' fees and sanctions (Defendants' Ex. O; Plaintiffs' Ex. K).

On or about April 1, 2004, plaintiffs negotiated a further renewal of the Option Agreement for an additional term of six months with a purchase price of $793,750 (Complaint ¶ 44). However, unlike the prior extension, the increased consideration paid for the second extension ($18,750) was non-refundable and was not credited toward the purchase price under the Option Agreement (Complaint ¶ 44; Gregory Aff. ¶ 16, Ex. G).

On April 11, 2004, plaintiffs sent a final draft of the LDA to BURA that included a purchase price for the Property of $483,000 (Complaint ¶ 20). At a May 4, 2004 Planning Board meeting, EDC proposed some modifications to the site plan. The meeting was attended by a representative of the plaintiffs as well as counsel for Violet (Plaintiffs' Ex. G).

On May 13, 2004, the return of the Second Petition, Justice Fahey vacated the determination of the Planning Board for the City's failure to notify the neighbors, including Violet, of the pending proceeding and issued an "Interim Memorandum Decision" granting part of the Petition, determining that BURA is the designated lead agency, remanding the matter to the City for further proceedings on the issue of notice requirements, and setting further

proceedings on the remaining causes of action for June 18, 2004 (Defendants' Ex. P; Plaintiffs' Ex. L). Following the Interim Decision, plaintiffs resubmitted their application to the Planning Board (Defendants' Ex. Q). On May 28, 2004, BURA issued an amended negative declaration and the project was subsequently approved by the Planning Board at its June 1, 2004 meeting (Plaintiffs' Exs. H, I).

On July 2, 2004, Violet commenced another Article 78 proceeding against the Planning Board, BURA, Kideney, CPA and EDC seeking to reverse the new Planning Board decision and to vacate the negative declaration issued by BURA under the SEQRA (Index #6427/04) (the "Third Petition") (Defendants' Ex. R; Plaintiffs' Ex. N). On July 22, 2004, respondents Kideney, EDC and CPA again submitted a joint answer with counterclaims for (1) tortious interference with performance of a contract; (2) tortious interference with prospective contractual relations; (3) tortious interference with business relations; and (4) costs, attorneys' fees and sanctions (Defendants' Ex. S; Plaintiffs' Ex. O).[1]

Oral argument was heard on July 12, 2004 and Justice Fahey dismissed the Second Petition regarding the SEQRA claims (Index #1978/04) and invited the parties back on July 27, 2004 to argue the Third Petition (Defendants' Ex. T). On July 27, 2004, Justice Fahey, *sua sponte,* ordered that the two Petitions be consolidated, noting that the Third Petition "was properly brought to protect the client's rights." Justice Fahey's oral decision denied the relief requested in the Third Petition and dismissed all of the counterclaims (Defendants' Ex. U; Plaintiffs' Ex. P).

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[1] While this Third Petition was pending, BURA again redesignated EDC as the preferred developer and EDC continued to pay the monthly designation fee (Complaint ¶ 28).

Both sides appealed those Fahey decisions (embodied in a September 9, 2004 Order) (Defendants' Exs. V, W; Plaintiffs' Exs. M, Q, R, S). The Fourth Department noted that respondents' notice of appeal stated that they appealed from so much of the judgment as dismissed their counterclaims for costs and fees associated with the motion to dismiss the petition. "The counterclaims for tortious interference with contractual relations and that part of the fourth counterclaim seeking sanctions are therefore not properly before us, because the only issues which we may consider are limited by the notice of appeal" (20 AD3d 901, 903-904 [4th Dept 2005], *lv denied* 5 NY3d 713 [2005]).

On October 1, 2004, after CPA refused to negotiate a further extension, EDC elected to acquire 30 Court in the name of its affiliate, 4628 Group, Inc. (Complaint ¶ 45; Gregory Aff. ¶ 17, Ex. H). According to plaintiffs, CPA was contacted by defendants at least twice seeking to purchase 30 Court even though defendants were aware the property was under contract with EDC (Complaint ¶ 42). Plaintiffs assert that, as a result of defendants' interference, EDC was forced to pay an additional $62,500 for the property ($43,750 as increased purchase price and $18,750 as a non-creditable option fee) (Gregory Aff. ¶ 18). Plaintiffs also allege that defendants named CPA in their various Article 78 petitions in an effort to harass plaintiffs and interfere with the relationship.

On January 13, 2005 and July 14, 2005, BURA again redesignated EDC as the preferred developer and EDC continued to pay the monthly designation fee (Complaint ¶ 28). On November 17, 2005, negotiations between BURA and EDC resumed for the LDA (Complaint ¶ 30; Plaintiffs' Ex. T). Pursuant to the proposed LDA, EDC would acquire the Property for a purchase price of $483,500. On November 23, 2005, BURA met to review a

draft of the LDA (Plaintiffs' Ex. U). According to plaintiffs, at that meeting, defendants submitted an "improper and illusory" offer of $1,000,000 for the Property knowing that EDC had been previously designated as redeveloper (Complaint ¶¶ 31-32; Gregory Aff. ¶ 256). Thereafter, on December 7, 2005, defendants transmitted to BURA an increased offer of $1,275,000 to purchase the Property (Gregory Aff. ¶ 26, Ex. J).

On December 8, 2005, BURA voted to recommend that it enter into an LDA with 1097 Group, LLC "despite Violet's previously rejected offer to pay $1,275,000.00 for the Property and to develop it into a parking structure which was an identified need in the urban core" (Plaintiffs' Ex. V). According to plaintiffs, on December 27, 2005, the Common Council approved BURA's recommendation by a vote of 5-4 (Gregory Aff. ¶ 30, Ex. L). However, the City of Buffalo refused to honor the LDA and the proposed transfer to 1097 Group was rejected (Defendants' Ex. X, p. 25; Gregory Aff. ¶ 30).

On January 12, 2006, defendants' counsel threatened litigation should plaintiffs' attorney not meet with him to come to a "mutual resolution" (Complaint ¶ 36; Gregory Aff. ¶ 32, Ex. L; Plaintiffs' Ex. W). On February 1, 2006, defendants' counsel sent another letter offering to purchase 30 Court and indicating that Violet would continue to pursue a project at 50 Court Street regardless of the ownership of 30 Court (Complaint ¶ 37; Plaintiffs' Ex. X).

Thereafter, 1097 Group entered into further discussions with BURA and the City and a new LDA was fashioned. On March 2, 2006, BURA voted to recommend approval of the LDA with 1097 Group. On April 4, 2006, the Common Council approved BURA's action (Plaintiffs' Ex. Y). According to plaintiffs, they were forced to pay an additional $216,500 for the Property due to defendants' interference and submission of illusory purchase offers and

appraisals in late 2005 (Gregory Aff. ¶ 30). The total purchase price for the Property was $700,000 (Gregory Aff. ¶ 30).

On August 3, 2006, Violet commenced an Article 78 proceeding against the Common Council, BURA, and 1097 Group asserting that actions taken by BURA were in violation of law and that the sale to 1097 Group was invalid based on those violations (Index #7429/06) (the "Final Petition") (Defendants' Ex. Y; Plaintiffs' Ex. AA). Respondents made a pre-answer motion to dismiss which Justice Timothy Walker granted in a decision and order issued December 22, 2006 (18 Misc 3d 1122[A]) (Defendants' Ex. Z). The decision was affirmed by the Fourth Department (46 AD3d 1433 [2007]). On April 29, 2008, the Court of Appeals denied the request to appeal by permission (Defendants' Ex. AA).

As recent as June 2, 2008, Hotung sent a letter to Mayor Brown attacking the credibility and financial strength of plaintiffs to complete a project at 50 Court Street (Complaint ¶ 56). As of December 18, 2008, 1097 Group has still not taken title to the Property (Hotung Aff. ¶ 17).

The Complaint contains six (6) causes of action: (1) interference with prospective business and economic advantage; (2) loss of prospective business; (3) malicious prosecution; (4) abuse of process; (5) prima facie tort; and (6) attorneys' fees (Complaint "Prayer for Relief"). Defendants assert that Justice Fahey's Order was a final determination on the merits for the counterclaims that the Fourth Department ruled were not properly appealed, and therefore, the Fourth Department's decision was a final determination on the merits for the remaining counterclaims. Accordingly, defendants urge, this action is barred by the principles of res judicata and collateral estoppel. Alternatively, defendants argue that the various causes

of action are either barred by the statute of limitations, fail for lack of standing, fail to state a cause of action and/or that defendants are entitled to summary judgment. Further, should any part of the motion be denied, defendants seek an order compelling plaintiffs to provide discovery responses. Finally, defendants also assert that Hotung acted only in a representative capacity, and not as an individual, and should be dismissed from the action.

ANALYSIS

I. Res Judicata/Collateral Estoppel

Defendants assert that all of plaintiffs' causes of action here, except for prima facie tort and attorneys' fees/sanctions, are barred by the principles of res judicata and/or collateral estoppel. Specifically, defendants argue that: (1) the first two causes of action for tortious interference were dismissed by Justice Fahey when he dismissed the plaintiffs' counterclaims to the Second Petition and Third Petition, and that decision was not set aside on appeal; and (2) the causes of action for malicious prosecution and abuse of process were necessarily determined in those two Article 78 Proceedings.

The doctrine of res judicata, and its corollary of collateral estoppel, serve the useful purpose of "discouraging redundant litigation" by providing that "a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" (*Gramatan Home Inv. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Still, "strict requirements for application of the doctrine must be satisfied to insure that a party not be precluded from obtaining at least one full hearing on his or her claim" (*Gramatan*, 46 NY2d at 485).

Res judicata and collateral estoppel have been applied to damages claims asserted in Article 78 proceedings (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 347 [1999]; *LaDuke v Lyons*, 250 AD2d 969, 970 [3d Dept 1998]). However, they are inapplicable in such proceedings where the damages sought are "not incidental to the nonmonetary relief sought in the prior proceeding" (*LaDuke*, 250 AD2d at 970-971; *Parker*, 93 NY2d at 349). Indeed, "[w]hile a counterclaim may be raised in an article 78 proceeding (CPLR 7804 [d]), the issue should be relevant to the issues of the administrative proceeding under review" (*Johnson v Popolizio*, 153 AD2d 546 [1st Dept 1989]; *see also Dist. Council No. 9, Intl. Bhd. of Painters & Allied Trades v Metro. Transp. Auth.*, 115 Misc 2d 810, 812 [Sup Ct, New York County 1982], *affd* 92 AD2d 791 [1st Dept 1983]).

Here, the gravamen of the prior Article 78 proceedings was to review the propriety of: (1) a variance; (2) a planning board approval; (3) a negative declaration; and (4) a sale of property. "Compensatory damages for torts such as those alleged in the complaint are recoverable without respect to the rationality of an administrative determination and are therefore not available in a CPLR article 78 proceeding as incidental damages" (*LaDuke*, 250 AD2d at 971). Indeed, where plaintiffs' causes of action seek damages not recoverable in a CPLR article 78 proceeding, it would be unjust and unfair to preclude the plaintiffs from litigating the damages issue based upon the prior proceeding pursuant to CPLR article 78, since the law permits only the recovery of incidental damages in such a proceeding (*see LaDuke*, 250

AD2d at 972).[2] Further, since the counterclaims were dismissed without an explanation, a hearing or other development of the record, it cannot be said that the plaintiffs have been afforded a full and fair opportunity to litigate the claims or issues (*see Newell v Clifton Park*, 172 AD2d 928 [3d 1991]). There also is nothing in Justice Fahey's decision or in the Order based on that decision indicating it was on the merits or with prejudice. Accordingly, the motion to dismiss on the grounds of res judicata or collateral estoppel is denied.

II. Interference with the Development of 50 Court

In opposition to this motion, plaintiffs state that their first cause of action "is one for intentional interference with prospective business and economic advantage as it relates to 50 Court Street" and that "plaintiffs did not bring any cause of action for tortious interference with contracts" (Plaintiffs' January 29, 2009 Memorandum of Law pp. 6-7, citing Complaint ¶¶ 58-64). Thus, despite the allegations of the Complaint, plaintiffs are not alleging interference with the LDA but rather with development of the Property.

A. Statute of Limitations

A cause of action for tortious interference with a contract or contractual relations is governed by the three (3) year statute of limitations period for an injury to property (*Van Dussen-Storto Motor Inn, Inc. v Rochester Tel. Corp*., 63 AD2d 244, 250-251 [4th Dept 1978];

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[2] Because the relief sought in the counterclaims would not be appropriate in a CPLR article 78 proceeding, and because triable issues of fact may have been present, the benefit of hindsight suggests it may have been better to sever the counterclaims and remove them from the article 78 proceeding (*Newell v Town of Clifton Park*, 172 AD2d 928 [3d Dept 1991]; *see also Nodine v Bd. of Trustees of the Village of Baldwinsville*, 44 AD2d 764 [4th Dept 1974][severance of unrelated counterclaim was appropriate remedy]).

CPLR 214 [4]). Since this action was commenced on June 30, 2008, any alleged actions constituting tortious conduct which occurred after June 30, 2005 are still actionable.

Specifically, plaintiffs' allegations that defendants: (1) submitted an "improper and illusory" offer of $1,000,000 for the Property knowing that EDC had been previously designated as redeveloper (Complaint ¶¶ 31-32; Gregory Aff. ¶ 256); (2) transmitted to BURA an increased offer of $1,275,000 to purchase the Property on December 7, 2005 (Gregory Aff. ¶ 26, Ex. J); (3) threatened litigation on January 12, 2006 "should plaintiffs' attorney not meet with him to come to a mutual resolution" (Complaint ¶ 36; Gregory Aff. ¶ 32, Ex. L; Plaintiffs' Ex. W); (4) attempted to interfere with the LDA at the meeting on April 4, 2006; (5) commenced an Article 78 proceeding on August 3, 2006; and (6) sent a letter to Mayor Brown on June 2, 2008 attacking the credibility and financial strength of plaintiffs to complete a project at 50 Court Street, are timely.

B. Failure to State a Cause of Action

Defendants assert that the Complaint fails to state a cause of action for tortious interference with prospective economic advantage, otherwise known as interference with prospective contractual relations (*see NBT Bancorp, Inc. v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]). The elements of that cause of action are: (1) that defendants knew of the proposed contract(s) between Plaintiffs and third parties; (2) that defendants intentionally interfered with those proposed contracts; (3) that the proposed contracts would have been entered into were it not for defendants' interference; (4) that defendants used "wrongful means" or acted for the sole purpose of harming Plaintiffs (*see Snyder v Sony Music Entertainment, Inc.*, 252 AD2d

294, 299-300 [1st Dept 1999])[3]; and (5) that Plaintiffs suffered damages as a result (*see* NY PJI 3:57).

The "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship," here, BURA and the prospective tenants and/or contractors of the proposed office building (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). Although plaintiffs have made specific allegations concerning defendants' conduct toward BURA, the Complaint is devoid of any allegations concerning actions taken with regard to prospective tenants and/or contractors. Rather, plaintiffs simply allege that defendants tortiously interfered with their "anticipatory contracts with tenants and agreements for construction of the project" resulting in the "breach of agreement between plaintiff and potential tenants, economic loss in the form of increased option prices, extensive legal fees, designated developer fees and construction costs" (Complaint ¶¶ 66-67).

Further, plaintiffs have failed to allege any facts showing that a contract or similar business relationship would have been entered into but for defendants' wrongful conduct. Absent such causation allegations, the cause of action for interference with prospective economic advantage must fail (*A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 376 [1957]; *Pacheco v United Med. Assocs., P.C.*, 305 AD2d 711, 712-713 [3d Dept 2003]).

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[3] As stated by the Fourth Department, "[i]t is well settled that, '[w]here there has been no breach of an existing contract, but only interference with prospective contract rights, ... [a] plaintiff must show more culpable conduct on the part of the defendant'"(*Jim Ball Chrysler LLC v Marong Chrysler-Plymouth, Inc.*, 19 AD3d 1094, 1095 [4th Dept], *lv denied* 5 NY3d 709 [2005], quoting *NBT Bancorp Inc. v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996] [internal citation omitted]).

Accordingly, defendants' motion to dismiss the first cause of action with regard to prospective tenants and/or contractors is granted.

C. Summary Judgment

"In order to prevail on a cause of action for tortious interference with contractual relations, a plaintiff must establish the existence of a valid contract between plaintiff and a third party, the defendant's intentional and unjustified procurement of the third party's breach of the contract, the actual breach of the contract and the resulting damages . . . It is well settled that, where there has been no breach of an existing contract, but only interference with prospective contract rights, a plaintiff must show more culpable conduct on the part of the defendant" (*Jim Ball Chrysler LLC v Marong Chrysler-Plymouth, Inc.*, 19 AD3d 1094, 1095 [4th Dept 2005], *lv denied* 5 NY3d 709 [2005]; *see also Butler v Delaware Otsego Corp*., 218 AD2d 357, 360 [3d Dept 1996]).

Plaintiffs, both in the Complaint and in opposition to this motion, admit that defendants acted out of self interest. Specifically, plaintiffs state that defendants "do not wish to see 50 Court Street developed into an office building because it may draw tenants away from their older and less attractive property" (Complaint ¶ 23) and that "defendants would prefer to see 50 Court Street lie vacant or be turned into a parking ramp . . . so that they can protect their own self-interests" (Complaint ¶ 24; Plaintiffs' January 29, 2009 Memorandum of Law pp. 12, 21). Thus, where defendants' motive in interfering with plaintiffs' relationships was "normal economic self-interest," plaintiffs, as a matter of law, cannot establish that defendants' actions were without justification (*see Carvel Corp,* 3 NY3d at 190). Accordingly, defendants' motion for summary judgment also is granted.

III. Interference with the Development of 30 Court

In opposition to this motion, plaintiffs state that their second cause of action "is one for intentional interference with prospective business and economic advantage as it relates to 30 Court Street" and that "plaintiffs did not bring any cause of action for tortious interference with contracts" (Plaintiffs' January 29, 2009 Memorandum of Law pp. 6-7, citing Complaint ¶¶ 65-68). Specifically, despite the allegations of the Complaint, plaintiffs' Memorandum of Law makes clear that the second cause of action is based on defendants' interference with plaintiffs' Option Agreement with, and the acquisition of 30 Court from, PCA (Plaintiffs' January 29, 2009 Memorandum of Law pp. 15-18).

A. Statute of Limitations

As noted above, a cause of action for tortious interference with a contract or contractual relations is governed by the three (3) year statute of limitations period for an injury to property (*Van Dussen-Storto Motor Inn*, 63 AD2d at 250-251). It is undisputed that plaintiffs elected to acquire the property at 30 Court on October 1, 2004 in a transaction which closed on January 25, 2005, i.e., more than three years prior to initiation of this action (Defendants' Ex. GG). Accordingly, the first cause of action with regard to the acquisition of 30 Court is dismissed as time barred.

B. Failure to State a Cause of Action

As discussed above, the "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship," here, the prospective tenants and/or contractors of the proposed office building (*Carvel Corp. v Noonan*, 3 NY3d at 192). Although plaintiffs

have made specific allegations concerning defendants' conduct toward CPA, the Complaint is devoid of any allegations concerning actions taken with regard to prospective tenants and/or contractors. Rather, plaintiffs simply allege that defendants tortiously interfered with their "anticipatory contracts with tenants and agreements for construction of the project" resulting in the "breach of agreement between plaintiff and potential tenants, economic loss in the form of increased option prices, extensive legal fees, designated developer fees and construction costs" (Complaint ¶¶ 66-67).

Further, plaintiffs have failed to allege any facts showing that a contract or similar business relationship would have been entered into but for defendants' wrongful conduct. Absent such causation allegations, the cause of action for interference with prospective economic advantage must fail (*A.S. Rampell,* 3 NY2d at 376; *Pacheco,* 305 AD2d at 712-713). Accordingly, defendants' motion to dismiss the second cause of action with regard to prospective tenants and/or contractors is granted.

C. Summary Judgment

As discussed above with regard to 50 Court, plaintiffs, both in the Complaint and in opposition to this motion, admit that defendants acted out of self interest and are competitors. Thus, where defendants' motive in interfering with plaintiffs' relationships was "normal economic self-interest," plaintiffs, as a matter of law, cannot establish that defendants' actions were without justification (*see Carvel Corp,* 3 NY3d at 190). Accordingly, defendants' motion for summary judgment as to the development of 30 Court as alleged in the second cause of action is granted.

IV. Malicious Prosecution

In opposition to this motion, despite the allegations of the Complaint, plaintiffs' Memorandum of Law makes clear that the third cause of action is addressed solely to the Final Petition (Plaintiffs' January 29, 2009 Memorandum of Law pp. 19-20).

A. Statute of Limitations

"Abuse of process and malicious prosecution are both intentional torts which are governed by CPLR 215, the one-year Statute of Limitations" (*Bittner v Cummings*, 188 AD2d 504, 506 [2d Dept 1992]). A cause of action for malicious prosecution accrues when judgment was entered in the earlier action (*Pico Prods., Inc. v Eagle Comtronics, Inc*., 96 AD2d 736 [4th Dept 1983], *lv dismissed* 60 NY2d 559 [1983]; *see also Campo v Wolosin*, 211 AD2d 660 [2d Dept 1995]).

Thus, a malicious prosecution claim is time-barred if it was not commenced within one year of the dismissal of the underlying action against plaintiffs, notwithstanding that an appeal was taken (*Spinale v Guest*, 270 AD2d 39, 40 [1st Dept 2000]). In the present action, Justice Walker dismissed the Final Petition on December 22, 2006, as confirmed in a judgment granted January 9, 2007. Since this action was commenced on June 30, 2008, more than one year after the dismissal of the underlying action against plaintiffs, the third cause of action for malicious prosecution is dismissed as time barred.

V. Abuse of Process

A. Statute of Limitations

"A claim for damages for an intentional tort is subject to the one-year limitations period" (*Gallagher v Directors Guild of America, Inc.*, 144 AD2d 261, 262 [1st Dept 1988], *lv*

denied 73 NY2d 708 [1989]). "Abuse of process and malicious prosecution are both intentional torts which are governed by CPLR 215, the one-year Statute of Limitations" (*Bittner*, 188 AD2d at 506, citing *Gallagher*, 144 AD2d at 262; *Beninati v Nicotra*, 239 AD2d 242 [1st Dept 1997]; *Werner v Joyce*, 266 AD2d 618 [3d Dept 1999]).

Plaintiffs correctly note that the Fourth Department in *Pico Products, Inc. v Eagle Comtronics, Inc.* (96 AD2d at 736) held that the statute of limitations for an abuse of process cause of action is three years. Nevertheless, the Fourth Department in *Stalteri v County of Monroe* (107 AD2d 1071 [4th Dept 1985]) also has seemingly held that a cause of action for abuse of process is governed by the one-year statute of limitations contained in CPLR 215 (3). In light of this apparent contradiction, the *Gallagher* decision from the First Department, from which leave to appeal was denied, is persuasive. In *Gallagher*, the court noted that "[t]he operative distinction between the sort of causes of action governed by CPLR 215 and those within the scope of CPLR 214 is whether the particular claim involved is for an intentional tort or a tort sounding in negligence" (*Gallagher*, 144 AD2d at 262-263 [internal citations omitted]).

In the present action, plaintiffs are clearly alleging an intentional tort which should be governed by the one-year statute of limitations (Complaint ¶ 79). As noted above, Justice Walker dismissed the final petition on December 22, 2006, as confirmed in a judgment granted January 9, 2007. Since this action was commenced on June 30, 2008, more than one year after the dismissal of the last underlying action against plaintiffs, the fourth cause of action for abuse of process is dismissed as time barred.

VI. PRIMA FACIE TORT

In opposition to this motion, despite the allegations of the Complaint, plaintiffs' Memorandum of Law indicates that the fifth cause of action is addressed solely to the Final Petition (Plaintiffs' January 29, 2009 Memorandum of Law pp. 24).

A. Statute of Limitations

"A cause of action for prima facie tort is governed by a one-year statute of limitations" (*Russek v Dag Media, Inc.*, 47 AD3d 457, 458 [1st Dept 2008]; *Havell v Islam*, 292 AD2d 210 [1st Dept 2002]). "As plaintiffs' motion papers emphatically confirm, their claims are predicated upon allegations of intentional wrongdoing by defendants, which is subject to a one-year Statute of Limitations, commencing, at the latest, when the acts in question were completed and plaintiffs were damaged thereby" (*Della Villa v Constantino*, 246 AD2d 867, 868 [3d Dept 1998]; *see also Yong Wen Mo v Gee Ming Chan*, 17 AD3d 356, 358 [2d Dept 2005]). As a consequence, plaintiffs are barred from recovering any damages caused by acts that occurred prior to June 29, 2007, "notwithstanding their attempt to characterize the entirety of defendants' avowed wrongdoing, throughout the years, as a single 'conspiracy' or a single 'prima facie tort'" (*Della Villa*, 246 AD2d at 868).

As noted above, Justice Walker dismissed the final petition on December 22, 2006, as confirmed in a judgment granted January 9, 2007. Since this action was commenced on June 30, 2008, more than one year after the dismissal of the last underlying action against plaintiffs, the fifth cause of action for prima facie tort is dismissed as time barred.

B. Recharacterization

"Prima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy" (*Curiano v Suozzi*, 63 NY2d 113, 118 [1984]). "Plaintiff cannot, in pleading prima facie tort, seek to avoid the stringent requirements . . . set for traditional torts, such as malicious prosecution, requirements which are necessary to effectuate the strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit" (*Williams v Barber*, 3 AD3d 695, 698 [3d Dept 2004]; *see also Sokol v Sofokles*, 136 AD2d 535 [2d Dept 1988]). Moreover, "[p]rima facie tort should not become a catch-all alternative for every cause of action which cannot stand on its own legs" (*DeNaro v Rosalia*, 59 AD3d 584, 588 [2d Dept 2009]). Thus, plaintiffs cannot recast their allegations as a prima facie tort in an effort to avoid the effects of the dismissal of their traditional tort claims.

VII. ATTORNEYS' FEES

Plaintiffs' sixth cause of action seeks attorneys' fees incurred by reason of defendants' alleged tortious interference, including fees expended in defending the four (4) Article 78 petitions filed by defendants which are the subject matter of this action. Defendants seek to dismiss this cause of action on the ground that there is no separate cause of action for attorneys' fees. In opposition, plaintiffs contend that pursuant to CPLR 8303-a and 22 NYCRR 130-1.1, they are entitled to attorneys' fees and costs for defendants' frivolous conduct.

CPLR § 8303-a, by its own terms, limits its application to recovery of costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death and therefore does not apply to Article 78 proceedings (*see also*

Iannello v Allstate Ins. Co., 292 AD2d 789 [4th Dept 2002] [statute does not apply to breach of contract actions]). Further, although 22 NYCRR § 130-1.1 is applicable in any civil action or proceeding, both the statute and the regulation contemplate an award within the context of the underlying action and not as a cause of action in a separate proceeding (*Rose Valley Joint Venture v Apollo Plaza Assocs.*, 191 AD2d 874 [3d Dept 1993]; *Aurora Loan Servs., LLC v Cambridge Home Capital, LLC*, 12 Misc 3d 1152[A], 2006 NY Slip Op 50869[U] [Sup Ct, Nassau County 2006]). Accordingly, defendants' motion to dismiss and for summary judgment as to the sixth cause of action is granted.

VIII. DEFENDANT PATRICK HOTUNG

On this motion, defendants assert that Patrick Hotung acted, if at all, in his capacity as a representative of Violet and not in an individual capacity. Since the Court has dismissed all of the causes of action in the Complaint on various grounds, it declines to address this issue as moot.

IX. DISCOVERY

Plaintiffs' assertion that summary judgment is precluded by the necessity for further discovery is without merit. Plaintiffs have failed to identify any specific discovery which would aid them in ascertaining facts necessary to oppose the motion as required by CPLR § 3212 (f).

CONCLUSION

Based upon the foregoing, defendants' motion to dismiss and for summary judgment is granted. Defendants' counsel shall prepare the Order and settle it with plaintiffs' counsel.

DATED: December 21, 2009

HON. JOHN M. CURRAN, J.S.C.