

Havana Central NY2, LLC v Lunney's Pub, Inc.

2005 NY Slip Op 30164(U)

October 14, 2005

Supreme Court, New York County

Docket Number: 0110821/2004

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK**
Justice

PART 2

Favara Central

INDEX NO.

110821/04

MOTION DATE

*- v -
Lunney's Pub*

MOTION SEQ. NO.

05

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

OCT 25 2005

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: 10/14/05

Luy
LOUIS B. YORK *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 2

-----x
HAVANA CENTRAL NY2, LLC,

Plaintiff,

Index No. 110821/04

-against-

LUNNEY'S PUB, INC., HUGH O'LUNNEY,
MAUREEN O'LUNNEY and EMMETT O'LUNNEY,

Defendants.

-----x

Louis B. York, J.:

This is an action for tortious interference with contract, tortious interference with prospective contractual relations, and prima facie tort by plaintiff Havana Central NY2, LLC (Havana Central) against defendant Lunney's Pub, Inc. (Lunney's Pub) and its individual owners. Defendants move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 1003 and CPLR 3025(b) for an order granting leave to amend the complaint and to add a party to the caption.

Lunney's Pub is the corporate owner of a restaurant known as O'Lunney's Pub which was located at 151 West 46th Street in New York, NY. Defendants Maureen O'Lunney and Emmett O'Lunney were employees of Lunney's Pub and Hugh O'Lunney was the president of

the company.

On or about November 19, 1999, Lunney's Pub assumed a lease for the premises dated August 19, 1992 by assignment from the previous tenant. The term of the lease was to expire on July 31, 2004. The lease provided that if the tenant did not vacate the premises at that time, then the rent would be doubled for the period that the tenant remained on the premises.

On September 8, 2003, the landlord, third-party defendant Elo Equities, LLC (Elo), entered into a lease for the premises with Havana Central, to commence at the expiration of the lease with Lunney's Pub. Havana Central intended to operate the premises as a restaurant.

It is undisputed that Lunney's Pub did not vacate the premises when the lease expired and it began paying rent at double the rate set forth in the lease. Elo commenced a holdover proceeding which resulted in a judgment of possession, which was entered in December of 2004, and an eviction of Lunney's Pub by marshals.

Havana commenced this action in 2004, asserting claims for tortious interference with contract, tortious interference with prospective contractual relations and prima facie tort. The complaint alleges that Lunney's Pub deliberately refused to vacate the premises at the end of its lease, which prevented Havana

Central from timely moving into the premises pursuant to its own lease with Elo. The result was that Havana Central was unable to operate its restaurant after spending a great deal of time and money preparing to operate their restaurant on the premises.

In a decision dated December 21, 2004, this court granted Elo's motion for summary judgment dismissing the third-party complaint against it.

1. Tortious Interference with Contract

The first cause of action alleges that defendants were aware that Havana Central had entered into a lease with Elo. It further alleges that defendants caused Elo to breach that contract by failing to vacate the premises at the end of their own lease with Elo, on July 31, 2004.

The essential elements of a claim for tortious interference with contract "are the existence of a valid contract between plaintiff and a third party, defendants' knowledge of that contract, defendants' intentional procurement of the third party's breach of that contract without justification, and damages." Weaver v. Town of Rush, 1 AD3d 920, 924 [4th Dept 2003]; see, Lama Holding Co v Smith Barney, 88 NY2d 413, 424 [1996]; NBT Bancorp Inc v Fleet/Norstar Financial Group, Inc, 87 NY2d 614 [1996]. Here, there is no dispute as to the existence of a contract, ie the lease, or

that defendants knew of the contract.

Instead, defendants argue that this claim must be dismissed because plaintiff fails to allege that Elo breached its contract with Havana Central. Defendants further argue that a breach did not occur because Havana Central did not exercise its option to terminate the lease.

Havana Central has specifically alleged that Elo breached the contract, ie the lease, when it failed to make the premises available to Havana Central at the commencement of the lease term as a result of the holdover by Lunney's Pub. The fact that Havana Central did not terminate the lease does not mean that a breach did not occur. Moreover, factual questions exist as to whether a breach occurred and whether it was wrongfully induced by defendants. Therefore, the court finds that Lunney's has not demonstrated that this claim should be dismissed.

2. Prospective Economic Advantage

The second cause of action alleges that defendants' failure to vacate the premises prevented Havana Central from operating its restaurant on the premises. Havana Central alleges that this prevented it from booking the premises for parties during the "holiday season" from October through December. In response, defendants assert that Lunney's Pub held over to protect its own

economic interests, rather than in an effort to harm plaintiff.

In order to sustain a claim for 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." Snyder v. Sony Music Entertainment, Inc., 252 AD2d 294 [1st Dept 1999]; see, Interweb, Inc v iPayment, Inc, 12 AD3d 164 [1st Dept 2004]. Wrongful means may include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure..." NBT Bancorp Inc v Fleet/Norstar Financial Group, Inc, 87 NY2d 614, 624 [1996], quoting Guard-Life Corp v S Parker Hardware Mfg Corp, 50 NY2d 183 [1980]; see, John Hancock Life Ins. Co. v. 42 Delaware Ave. Associates, LLC, 15 AD3d 939 [4th Dept 2005]. Additionally, the plaintiff must submit evidence demonstrating "that there was 'a reasonable certainty' a contract would have been entered into but for the defendant's interference." Long Island University v Grucci For Congress, Inc, 10 AD3d 412 [2d Dept 2004]; Gebbia v. Toronto-Dominion Bank, 306 AD2d 37 [1st Dept 2003].

Defendants have made a prima facie showing that this claim should be dismissed, by submitting evidence demonstrating that

Lunney's Pub held over at the premises in furtherance of its own economic interests. In response, Havana Central does not set forth any evidence to demonstrate that factual questions exist as to whether Lunney's Pub held over solely in an effort to harm it.

Havana Central has also not set forth any wrongful means on the part of defendants to sustain this claim. Havana Central states that defendants acted fraudulently by leading it to believe that Lunney's Pub would vacate the premises. Havana Central also contends that defendants failed to notify Havana Central that Lunney's Pub in fact intended to hold over despite knowing of the new lease. However, Havana Central does not set forth with sufficient specificity any alleged misrepresentations by defendants or that Havana Central reasonably relied on such misrepresentations. Nor does it demonstrate that defendants intended to hold over and failed to notify Havana Central, even assuming that defendants had such a duty.

In any event, Havana Central has not set forth evidence of any specific contracts that it would have entered into, but for the interference of defendants. In the absence of such evidence, this claim must be dismissed. See, Long Island University v Grucci For Congress, Inc, 10 AD3d 412 [2d Dept 2004]; Gebbia v. Toronto-Dominion Bank, 306 AD2d 37 [1st Dept 2003].

3. Prima Facie Tort

The third cause of action is for prima facie tort. It alleges that defendants "employed unlawful means" and "intentionally inflicted harm on [Havana Central] without excuse or justification."

"The elements of prima facie tort are: '(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful.'" Jonas v New York Cent Mut Fire Ins Co, 244 AD2d 916 [4th Dept 1997], quoting Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314 [1983]. This claim cannot be sustained unless plaintiff demonstrates that a "disinterested malevolence" toward the plaintiff constituted the sole motivation for the defendant's act. Great American Trucking Co, Inc v Swiech, 267 AD2d 1068 [4th Dept 1999]; Rabideau v Albany Medical Center Hosp, 195 AD2d 923 [3d Dept 1993].

Here, defendants have made a prima facie demonstration that Lunney's Pun held over at the premises in further of its own economic interests. In response, plaintiff has not set forth any facts that would raise a question as to whether defendants acted with disinterested malevolence toward plaintiff. Therefore, this claim is dismissed.

4. Individual Defendants

Defendants Maureen O'Lunney, Emmett O'Lunney and Hugh O'Lunney seek to dismiss the complaint to the extent that it asserts claims against them in their individual capacities. It is undisputed that Lunney's Pub was the tenant under the lease, not the individual defendants, and that Lunney's Pub was the party that held over on the premises. Havana Central contends that the individual defendants caused Lunney's Pub to hold over after the lease expired. However, the complaint fails to allege any acts by defendants in their individual capacities, such as would subject them to liability based on the holdover by Lunney's Pub. Therefore, the Complaint is dismissed as against the individual defendants.

5. Leave to Amend

Finally, Havana Central seeks leave to amend the Complaint to add a new party, HMU Lunney Restaurant Corporation. Havana Central states that Lunney's Pub, Inc. is no longer an active business entity and that all of its assets may have been transferred to HMU Lunney Restaurant Corporation.

"Leave to amend a pleading...should be freely granted where...the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party." Bolanowski v Trustees of Columbia University in

City of New York, 21 AD3d 340 [2d Dept 2005], citations omitted; see, CPLR 3025 [b]. Here, Havana Central has put in evidence demonstrating that defendants may now be operating as HMU Lunney Restaurant Corporation. However, it has not put forth any evidence or facts to demonstrate that defendants may have transferred assets from Lunney's Pub to the new company. Therefore, the motion to amend the complaint to add a new party is denied with leave to renew.

Havana Central also seeks to amend the complaint with respect to its claims against the individual defendants. However, the proposed Amended Complaint does not contain any additional facts to support a claim against any of the defendants in their individual capacities. Therefore, this portion of the cross-motion is denied. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent that the second and third causes of action are dismissed as against Lunney's Pub, Inc. and the complaint is dismissed in its entirety as against the individual defendants and the motion is otherwise denied; and it is further

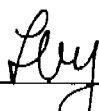
ORDERED that plaintiff's cross-motion to amend the complaint is denied with leave to renew; and it is further

ORDERED that the clerk is directed to enter judgment

accordingly.

DATED: 10/12/05

ENTER:



J.S.C.

LOUIS B. YORK

FILED

1001 25 2005

NEW YORK
COUNTY CLERK'S OFFICE