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

BERNARD J. FRIED J.S.C.

PART 60

0602995/2004

CASTELLANO, NICHOLAS E.

vs

ALLIED NORTH AMERICAN INS.

SEQ 1

DISM ACTION/INCONVENIENT FORUM

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
JUN 20 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/17/05

BERNARD J. FRIED J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

----------X

NICHOLAS E. CASTELLANO,

Plaintiff,

-against- Index No. 602995/04

ALLIED NORTH AMERICA INSURANCE BROKERAGE CORP. OF NEW JERSEY, HENRY LOMBARDI, JEFFREY A. TEITEL, ROBERT L. DUBOFSKY and BWD GROUP LLC,

Defendants.

----------X

FRIED, J.

This action arises out of a May 13, 2002 Separation Agreement (the Separation Agreement) between plaintiff Nicholas E. Castellano, an insurance broker, and defendant Allied North American Insurance Brokerage Corp. of New Jersey (Allied), an insurance brokerage firm. Pursuant to the Separation Agreement, Allied agreed to refrain from soliciting certain of its former customers who delivered "broker of record" letters designating plaintiff as their insurance agent. Non-party Petrocelli Electric Co. Inc. was one such customer from which plaintiff procured a "broker of record" letter.

Plaintiff alleges that Allied, together with defendants Henry Lombardi, Jeffrey A. Teitel, Robert L. Dubofsky and BWD Group LLC, engaged in a scheme to dislodge him as the insurance broker of record for Petrocelli, one of his most valuable and longstanding clients. Plaintiff contends that Allied breached the Separation Agreement by surreptitiously bidding to provide insurance brokerage services to, for, or on behalf of, Petrocelli, and that Lombardi, Teitel, Dubofsky and BWD tortiously interfered with the Separation Agreement

by inducing or causing Allied to breach it. The complaint asserts a breach of contract claim against Allied (first cause of action), and separate claims for tortious interference with contract against Lombardi (second cause of action), Teitel (third cause of action), and Dubofsky and BWD (fourth cause of action).

Motion Sequence Nos. 001, 002 and 003 are consolidated for disposition. In Motion Sequence No. 001, Lombardi moves for an order dismissing the complaint against him. In Motion Sequence Nos. 002 and 003, Teitel and BWD separately move, pursuant to 3211 (a) (1) and (a) (7), for dismissal of the complaint against them. For the reasons set forth below, Lombardi's motion to dismiss is granted, but the remaining motions to dismiss are denied.

Accepting the allegations of the complaint as true (Leon v Martinez, 84 NY2d 83 [1994]), the following facts emerge: For eight years, plaintiff was a shareholder of Allied (Complaint, ¶ 17). In 2002, plaintiff negotiated his separation from Allied, the terms and conditions of which are embodied in the Separation Agreement (id., ¶ 1). Pursuant to the Separation Agreement, plaintiff bargained for, and paid Allied for, the right to solicit and procure from certain clients "broker of record letters," by which these clients designated plaintiff as their broker of record (id., ¶ 2). As the broker of record, plaintiff retained the exclusive right to act on behalf of the client in procuring insurance policies and surety bonds (id.). For each client from whom plaintiff received a broker of record letter, Allied agreed, for a period of 18 months, that it would not solicit that client, or interfere with plaintiff's relationship with that client (id., ¶¶ 2, 22).

Following plaintiff's departure from Allied, Petrocelli, who had been

plaintiff's client for over 20 years, executed and delivered a broker of record letter to plaintiff (id., ¶¶ 3, 18). Plaintiff alleges that Lombardi, a senior officer of Allied, was upset at the loss of the Petrocelli account, and contrived a scheme to undermine the Separation Agreement, steal Petrocelli as a client, and damage plaintiff (id., ¶¶ 4, 6, 27, 32-33, 37). Plaintiff further alleges that Lombardi, knowing Allied was prohibited by the Separation Agreement from competing directly for Petrocelli's business, attempted to circumvent Allied's contractual restrictions by enlisting the assistance of Teitel (Petrocelli's insurance consultant), BWD (an insurance broker) and Dubofsky (affiliated in some capacity with BWD), who were not parties to the Separation Agreement (and, therefore, not subject to its restrictions), to implement the scheme (id., ¶¶ 4, 27, 28, 32-33).

In 2003, after receiving a broker of record letter, plaintiff worked to provide Petrocelli with quotes for its insurance needs for the upcoming policy year (id., ¶ 3). Plaintiff alleges that, in June 2003, Lombardi, using BWD as a "straw man," submitted a bogus and artificially low bid, which Teitel required that plaintiff undercut (id., ¶¶ 33-34). Plaintiff asserts that he responded to BWD's bogus bid – which was represented to him to be genuine – by making significant financial concessions in an effort to retain Petrocelli's business (id., ¶¶ 5, 36). Although plaintiff maintained the Petrocelli account for one year, according to plaintiff, defendants' actions undermined and irreparably damaged his relationship with Petrocelli and, the following year, plaintiff lost the Petrocelli account (id., ¶¶ 38-39).

Plaintiff asserts that each of the defendants played a critical role in the scheme. Lombardi devised the scheme, and enlisted BWD, Teitel, and Dubofsky to carry out the plan (id., ¶¶ 4, 27, 28, 29, 32-33). Knowing Allied was prohibited from soliciting

Petrocelli, BWD (through Dubofsky) agreed to act as a "straw man" to hide Allied's involvement (id., ¶ 33). Lombardi then conspired with Dubofsky, "who was affiliated with BWD, to arrange for BWD to submit an artificially low bid for insurance policies in order to force plaintiff to make unwarranted and unnecessary financial concessions in order to submit a competitive bid" (id., ¶¶ 33-34).

Plaintiff further asserts that Teitel used his influence as Petrocelli's insurance consultant to put the plan into action, a role Teitel played for the sole purpose of harming plaintiff (id., ¶¶ 27-28, 59). Among other things, Teitel ran a rigged bidding process, ignoring BWD's lack of experience in the relevant insurance area, and passing off its bid as genuine (id., ¶ 29). He failed to prepare bid specifications, or inform plaintiff of other participants, both standard practice in the insurance industry, and did so solely to damage plaintiff (id.). In addition, plaintiff alleges, Teitel, knowing BWD was acting as a front for Allied and Lombardi, advanced the scheme by requiring that plaintiff beat BWD's phony bid – a bid ultimately withdrawn because it was bogus, and could not be fulfilled (id., ¶¶ 34, 68, 71).

I. Lombardi's Motion to Dismiss (Motion Sequence No. 001)

Although on a motion to dismiss, "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (Leon v Martinez, 84 NY2d at 87; see also Rovello v Orofino Realty Co., 40 NY2d 633 [1976]), a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (see e.g. 219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506 [1979]; Callaghan v Goldsweig, 7 AD3d 361 [1st Dept 2004]). Here, construing the complaint in the generous

matter to which it is entitled, I nevertheless conclude that plaintiff has failed to state a cause of action with respect to his tortious interference of contract claim against Lombardi, and that thus, the complaint must be dismissed against him.

In his second cause of action, plaintiff asserts a claim against Lombardi for tortious interference of the Separation Agreement entered into by plaintiff and Allied. As set forth in the complaint, Lombardi is an officer of Allied (Complaint, ¶ 14). However, under New York law, "a corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer [and did not] commit independent torts or predatory acts directed at another" (Murtha v Yonkers Child Care Assn., Inc., 45 NY2d 913, 914 [1978] [citation omitted]; see also Foster v Churchill, 87 NY2d 744 [1996]; BGW Devel. Corp. v Mount Kisco Lodge 1552, 247 AD2d 565 [2d Dept], lv denied 92 NY2d 813 [1998]). Here, plaintiff fails to allege that Lombardi committed any independent torts or predatory acts, and thus, the allegations against Lombardi are insufficient to state a cognizable claim.

New York courts consistently apply the doctrine that recognizes the essential distinction between a corporation and those individuals who administer its affairs, as well as the fact that sound public policy restricts the imposition of liability on corporate officers and directors for the acts of the corporation (see Petkanas v Kooyman, 303 AD2d 303 [1st Dept 2003]). As a result, "[a] cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard" (Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d

103, 109 [1st Dept 2002]).

Generally, New York courts have "construed such a standard to require a particularized pleading of allegations that the acts of the defendant corporate officers which resulted in the tortious interference with contract were either beyond the scope of their employment or, if not, were motivated by their personal gain, as distinguished from gain for the corporation" (Petkanas v Kooyman, 303 AD2d at 305). New York courts have interpreted "personal gain" to mean that the challenged acts were undertaken "with malice and were calculated to impair the plaintiff's business for the personal profit of the [individual] defendant" (Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d at 110; accord Hoag v Chancellor, Inc., 246 AD2d 224, 228 [1st Dept 1998] [citation and quotation omitted] ["To establish a corporate officer's liability for inducing a breach of a contract between the corporation and a third party, the complaint must allege that the officer's ... acts were taken outside the scope of their employment or that they personally profited from their acts"]).

Here, although the complaint is replete with allegations of harm to plaintiff, and allegations of malice by defendants, it fails to allege that Lombardi personally benefitted from these actions, as opposed to the benefit of the corporation that he represented, and that this was his motivating intent. Although plaintiff contends in his memorandum of law that "directly and by inference," the complaint alleges that Lombardi acted "'aside from' the interests of Allied," (Pl Mem, at 11), in fact, the complaint neither makes, nor infers, any such allegation (see Complaint, ¶ 33 ["Lombardi conspired with Dubofsky ... to arrange for BWD Group to submit an artificially low bid for insurance policies in order to force

Castellano to make unwarranted and unnecessary financial concessions in order to submit a competitive bid"]). To the contrary, the complaint clearly specifies that the actions taken by Lombardi sought to benefit his own company by increasing Allied's revenues: "Lombardi then offered to submit, together with plaintiff, a winning bid if plaintiff would share with Allied (and not plaintiff's employer, Lockton) the resulting fees and commissions" (Complaint, ¶ 35). Thus, the complaint specifically asserts that Lombardi's alleged actions were designed to benefit Allied, rather than personally benefit Lombardi.

Consequently, the actions allegedly taken by Lombardi which created the breach of contract were clearly done in his corporate capacity, and Lombardi cannot be held liable on the theory that he induced a breach of the Separation Agreement (see Petkanas v Kooyman, 303 AD2d 303, supra [corporation's majority shareholders were not personally liable for tortious interference with corporate officer's employment contract, absent evidence that they personally benefitted from their actions, and that such was their motivating intent]; BGW Devel. Corp. v Mount Kisco Lodge 1552, 247 AD2d 565, supra [individual officers of fraternal organization which sold real property were not personally liable to purchaser for tortious interference with contract where purchaser failed to establish that officers' actions were taken in furtherance of their own interests and not those of the organization]). Accordingly, the second cause of action must be dismissed (see S.F.P. Realty Corp. v G.S. Rockaway Dev., Inc., 206 AD2d 417 [2d Dept 1994] [cause of action for tortious interference with contract against shareholder, director and officer of corporation dismissed where plaintiff failed to allege any independent tort or predatory acts directed against another]).

II. Motions to Dismiss by Teitel and BWD (Motion Sequence Nos. 002 and 003)

BWD and Teitel move to dismiss the tortious interference of contract claims against them on two grounds: (1) failure to state a claim; and (2) documentary evidence.

A. Failure to State a Claim

On a motion to dismiss for failure to state a claim under CPLR 3211 (a) (7), the court must afford the plaintiff every favorable inference that may reasonably be drawn from the facts alleged in the complaint (Hoag v Chancellor, 246 AD2d 244, supra). Where a plaintiff may recover on the basis of a reasonable interpretation of the facts stated in his complaint, a motion to dismiss must be denied (Leon v Martinez, 84 NY2d 83, supra). Here, construing the complaint in the generous matter to which it is entitled, it is clear that plaintiff has stated a cause of action with respect to his claims of tortious interference with contract against both Teitel and BWD.

To state a claim for tortious interference with contract, a plaintiff must allege (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional interference with that contract; and (4) resulting breach and damages (Llama Holding Co. v Smith Barney, Inc., 88 NY2d 413 [1996]; accord Beecher v Feldstein, 8 AD3d 597 [2d Dept 2004]; Vigoda v DCA Productions Plus Inc., 293 AD2d 265 [1st Dept 2002]).

A complaint sufficiently pleads tortious interference where it makes "specific allegations identifying those ... customers who were purportedly contacted by the defendants, describe[s] the challenged conduct and the existing and prospective customers affected by that conduct" (Kevin Spence & Sons, Inc. v Boar's Head Provisions Co., Inc., 5 AD3d 352,

354 [2d Dept 2004]; see also Bestolife Corp. v American Amicable Life, 5 AD3d 211 [1st Dept 2004] [sustaining complaint where it alleged knowing and willing acts, committed without justification, which interfered with a contract]). The complaint in this case sufficiently meets this general standard, identifying the contracts (i.e., the Separation Agreement and the broker of record letter), defendants' knowledge thereof, the challenged conduct (i.e., the scheme involving the promulgation and submission of the phony insurance quote), and the customer contacted by defendants (Petrocelli).

In addition, the complaint specifically sets forth each element of plaintiff's tortious interference claims against both BWD and Teitel. With respect to BWD, the complaint alleges: (1) the existence of the Separation Agreement (Complaint, ¶ 1; Exh A); (2) BWD's knowledge of plaintiff's rights under the Separation Agreement (id., ¶ 66 [BWD "was aware of the Separation Agreement and Castellano's rights thereunder"]); (3) BWD's intentional interference with the Separation Agreement (id., ¶¶ 33; 69 [BWD submitted "an artificially low bid for insurance policies in order to force plaintiff to make unwarranted and unnecessary financial concessions in order to submit a competitive bid," which action was "undertaken without justification and for the sole purpose of harming Castellano and assisting Allied's breach of the Separation Agreement"]); and (4) resulting damage to plaintiff (id., ¶ 73). These allegations are sufficient to support a cause of action for tortious interference with contract (see Kralic v Helmsley, 294 AD2d 234 [1st Dept 2002]; William Kaufman Organization, Ltd. v Graham & James LLP, 269 AD2d 171 [1st Dept 2000]).

BWD contends that the complaint must nevertheless be dismissed, because plaintiff does not allege that BWD intentionally procured or induced a breach of the

Separation Agreement by Allied, i.e., that "but for" BWD's conduct, Allied would not have breached the Agreement (see e.g. Washington Ave. Assocs., Inc. v Euclid Equip., Inc., 229 AD2d 486 [2d Dept 1996]).

This contention must be rejected, as the allegations in the complaint, taken together, clearly allege that BWD's participation in the scheme was the "but for" cause of plaintiff's damages. For instance, in Butler v Delaware Otsego Corp. (218 AD2d 357 [3d Dept 1996]), the plaintiff sued when he learned that the defendants had circulated a "package" of information damaging to the plaintiff's public and professional character. The complaint alleged that the defendants knew that the plaintiff had contracted with a third party to construct a house. In refusing to dismiss the cause of action for tortious interference, the court found that "[t]hose allegations, coupled with the further allegation that [the customer] breached the contract ... because she was influenced by defendants' tortious conduct in disseminating the package, is sufficient for purpose of defeating the motion to dismiss" (id. at 360). The court also inferred "from the nature of the derogatory package and the manner in which it was distributed to various individuals and businesses, that defendants' motives were solely to injure [plaintiff's] reputation and harm his business," and that the defendants "engaged in 'improper' conduct" (id. at 360-361).

Likewise, here, the complaint alleges that BWD submitted "an artificially low quote/bid for Petrocelli's insurance," so as to force plaintiff to dramatically reduce his fees and commissions, and incur substantial damages (Complaint, ¶¶ 33, 68). Given that this is a motion to dismiss, plaintiff is entitled to benefit from the inference, as in Butler, that, based on the manner in which BWD conducted itself with regard to Petrocelli, its sole aim was to

harm plaintiff, and that it acted improperly (see id.; see also Linens of Europe, Inc. v Best Mfg., Inc., 2004 WL 2071689 at *20 [SD NY 2004] [plaintiff alleged "but for" causation by alleging that defendant sought to undermine a customer relationship through "false statements, predatory pricing, improper special deals and other means"]).

The complaint also specifically, and sufficiently, sets forth each element of plaintiff's tortious interference claim against Teitel: (1) the existence of the Separation Agreement (Complaint, ¶ 1; Exh A); (2) Teitel's knowledge of plaintiff's rights under the Separation Agreement (id., ¶ 55 [Teitel "was aware of the Separation Agreement and Castellano's rights thereunder"]); (3) Teitel's intentional interference with the Separation Agreement (id., ¶¶ 58, 59 [Teitel, "at the direction and instruction of Allied, purposely hindered and interfered with plaintiff's efforts to secure insurance policies for Petrocelli," which action was taken "without justification and for the sole purpose of harming plaintiff, [and] wrongfully interfering] with plaintiff's rights under the Separation Agreement"]); and (4) resulting damage to plaintiff (id., ¶ 63). These allegations make out a prima facie claim for tortious interference with contract (see 330 Acquisition Co., LLC v Regency Savings Bank, F.S.B., 293 AD2d 314 [1st Dept 2002]; CBS Corp. v Dumsday, 268 AD2d 350 [1st Dept 2000]).

Although Teitel argues that he cannot be held liable, absent proof that he failed to obtain the lowest insurance quote for Petrocelli, and absent proof of any impropriety on his part, this argument misses the mark. Teitel's ultimate liability, and the proof that may be offered in support of plaintiff's claims or Teitel's defenses thereto, are irrelevant at this juncture. Rather, all that matters is plaintiff's ability to state a cause of action, which he has

done. Plaintiff alleges that Teitel conspired with defendants, and participated, by wrongful means, in a scheme designed to harm plaintiff, and interfere with his contractual rights (Complaint, ¶¶ 6, 27-28). Plaintiff further alleges that Teitel enabled the scheme by conducting a rigged bidding process, and concealing from Petrocelli and plaintiff the bogus nature of the quotes submitted by BWD (id., ¶ 29). Thus, the complaint provides numerous allegations which, taken together, set forth with particularity, the nature of plaintiff's claim against Teitel (id., ¶¶ 6, 27-30, 36, 58; see Kevin Spence & Sons, Inc. v Boar's Head Provisions Co., Inc., 5 AD3d at 354 [complaint alleged tortious interference by providing specific allegations regarding misconduct and undermining the defendants' assertion that they acted in a disinterested fashion]).

B. Documentary Evidence

On a motion to dismiss under CPLR 3211 (a) (1), the documentary evidence must "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law," as well as resolve all factual issues (Goshen v Mut. Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v Martinez, 84 NY2d 83, supra). For these purposes, an affidavit does not constitute "documentary evidence" (Williamson, Picket, Gross, Inc. v Hirschfeld, 92 AD2d 289, 290 [1st Dept], appeal dismissed 60 NY2d 585 [1983] [the court "must ignore" the affidavit relied upon as proof under CPLR 3211 (a) (1) "since an affidavit does not qualify as 'documentary evidence' which will support a motion to dismiss"]; see also Goldberg v Four Seasons Nursing and Rehabilitation Center, 6 Misc 3d 1004 [Sup Ct, NY County 2004] [court refused to consider affidavit evidence in support of a CPLR 3211 (a) (1) motion]). The documentary evidence submitted here fails to "utterly refute" the allegations set forth in the complaint, or resolve the factual issues presented, and does not establish, as a matter of law, a defense to the complaint.

First, relying on the affidavit of Stuart Wilkins, BWD's Vice President, BWD asserts that it is not responsible for Dubofsky's actions, because Dubofsky "is neither an officer, director, shareholder, member nor otherwise a principal of BWD," but rather, "is an independent insurance producer who solicits business with the permission of BWD, but without the power to bind BWD to any proposed sale of insurance, which is universally subject to BWD's final approval" (Wilkins Aff., ¶¶ 3-4). Wilkins' affidavit, however, does not constitute "documentary evidence" under CPLR 3211 (a) (1) (see id.). In any event, even if Wilkins' affidavit were properly before the court, it does not "utterly refute" the

allegations of the complaint, or "conclusively establish a defense as a matter of law." Rather, Wilkins' affidavit raises factual issues with respect to the nature of the relationship between BWD and Dubofsky, i.e., whether Dubofsky acted as BWD's agent, such that it could be liable for his actions (see e.g. Diamond State Ins. Co. v Worldwide Weather Trading LLC, 2002 WL 31819217 [SD NY 2002] [plaintiff stated a claim against an insurance company whose agent engaged in tortious interference "while engaged in the business of his principal [and co-defendant]"]).

BWD further contends, again relying on Wilkins' affidavit, that it had no knowledge that any insurance proposal produced by Dubofsky for Petrocelli contained an artificially low bid (Wilkins Aff., ¶ 6 ["I have no knowledge that any such proposal contained an artificially low bid"]), and that it no knowledge of the Separation Agreement, or any alleged conspiracy to assist Allied in breaching that agreement (see id., ¶¶ 7-8 ["I was not aware ... of the Separation Agreement," and "BWD was not involved in, nor was it aware of, any alleged conspiracy initiated by Defendant Allied to breach the Separation Agreement"]).

Again, these allegations as to BWD's knowledge of the Separation Agreement, or the alleged conspiracy, merely raise factual issues, requiring denial of the motion (see State Enterprises, Inc. v. Southridge Cooperative Section 1, Inc., 18 AD2d 226 [1st Dept 1963]).

Teitel argues that his conduct cannot give rise to a claim for tortious interference with contract, because he was merely acting in the best interest of Petrocelli, his principal. In support of this argument, he relies on the Engagement Letter that he signed with Petrocelli in January 2003, several months prior to any alleged misconduct set forth in

the complaint. Teitel contends that the Engagement Letter, pursuant to which he was to perform insurance consulting services at Petrocelli's request, and, essentially, get Petrocelli the best deal possible, establishes that he did not wrongfully interfere with plaintiff's rights. Teitel alleges that, by re-marketing the insurance policies at issue and obtaining more favorable policies for Petrocelli that those procured by plaintiff, he was doing nothing more than discharging his duty under the Engagement Letter to solicit and procure for his client the best possible insurance agreements. Thus, Teitel argues, this "lawful" conduct cannot give rise to a claim for tortious interference with contract.

The Engagement Letter, however, fails to refute the allegation, as set forth in the complaint, that Teitel participated in the scheme to sabotage plaintiff, and interfere with his rights under the Separation Agreement. To the contrary, whether or not Teitel was acting in the best interest of his principal, as well as the circumstances surrounding the allegedly bogus quotes and the unorthodox bidding process, are, at best, fact questions properly determined at trial.

Thus, rather than conclusively establishing a defense to plaintiff's claims, the documentary evidence relied upon by Teitel and BWD presents issues of fact, requiring denial of the motion (see Cascone & Cole v Frank, 224 AD2d 247 [1st Dept 1996]; Witiuk v Mykytiw, 216 AD2d 779 [3d Dept 1995]).

I have considered the remaining claims, and find them to be without merit.

Accordingly, it is

ORDERED that Lombardi's motion to dismiss (Motion Sequence No. 001) is granted, and the second cause of action of the complaint is dismissed, with costs and

disbursements to Lombardi as taxed by the Clerk of the Court; and it is further

ORDERED that Teitel's motion to dismiss (Motion Sequence No. 002) is denied; and it is further

ORDERED that BWD's motion to dismiss (Motion Sequence No. 003) is denied; and it is further

ORDERED that the remaining defendants are directed to serve an answer to the complaint with 10 days after service of a copy of this order with notice of entry.

Dated: 6/17/05

ENTER:

J.S.C.

BERNARD J. FRIED
J.S.C.

FILED
JUN 20 2005
COUNTY CLERK'S OFFICE
NEW YORK