

**Barrett v Toroyan**

2006 NY Slip Op 30081(U)

Supreme Court, New York County

Decided: October 20, 2006

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III  
*Justice*

PART 56

Patrick D Barnett

INDEX NO. 112012/01

MOTION DATE 6/18/06

MOTION SEQ. NO. 006

MOTION CAL. NO. \_\_\_\_\_

- v -

Kevin Toroyan

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 24 2006

NEW YORK

HON. RICHARD B. LOWE, III

Dated: 10/20/06

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 56

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PATRICK D. BARRETT, individually and as a  
Limited Partner of Delma Associates, LP, for the  
benefit of Delma Associates, LP,

Plaintiff,

INDEX NO.  
112012/04

-against-

KEVORK TOROYAN, DELMA ASSOCIATES,  
LP, DELMA PROPERTIES INC., DELMA  
ASSOCIATES II, LLC, NABIL SHAWWA,  
WA'EL KHOURY, TEMA DEVELOPMENT  
(1988), INC. and ISSAM HOURANI,

Defendants.

----- X

**RICHARD B. LOWE, III, J.:**

Defendants Kevork Toroyan ("Toroyan"), Delma Associates, LP ("Delma Associates"),  
Delma Properties, Inc. ("Delma Properties") and Delma Associates II, LLC ("Delma II") move  
pursuant to CPLR 3212 for an order granting summary judgment and dismissing Counts VII and  
VIII of the amended complaint.

The underlying facts are fully set forth in this court's decision and order dated June 24,  
2005 (the "prior decision") and will be repeated herein only as needed.

Plaintiff was the executive vice president of Delma Properties and a limited partner in  
Delma Associates until his employment with Delma Properties was terminated in February 2002.  
Delma Properties is a Delaware corporation and the general partner of Delma Associates. Delma

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Associates is a Delaware limited partnership. Defendant Delma II is a Delaware limited liability company. Defendants Toroyan, Wa'el Khoury ("Khoury") and Nabil Shawwa are the directors of Delma Properties. Toroyan is also chairman of the board and president of Delma Properties. Khoury is the sole principal of Tema, Inc., which is a limited partner of Delma Associates and Delma II.

The original complaint asserted 10 causes of action referred to as "Counts" based on allegations of breach of fiduciary duty, abetting the breach, waste, breach of contract and "tortious interference with contract/economic advantage." In the prior decision this court granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)7 and 8 to the extent of dismissing Counts I through III and VI for failure to state a cause of action, dismissing Count VI against Tema, Inc. on the additional ground of lack of personal jurisdiction, and directing plaintiff to serve an amended complaint. Plaintiff appealed and the Appellate Division modified the prior decision while affirming the court's finding that it lacked jurisdiction over Tema, Inc. (see Barrett v. Toroyan, 28 AD3d 331 [1<sup>st</sup> Dept 2006]).<sup>1</sup> Plaintiff's tortious interference claims, which he states arose after his employment with Delma Properties was terminated, are the subject of defendants' instant motion for summary judgment.

Counts VII and VIII of the amended complaint, both labeled "Tortious Interference with Contract/Economic Advantage," allege that "Toroyan, in his individual capacity or on behalf of Delma Associates, Delma Properties or Delma II, with the intention of interfering, wrongfully or improperly interfered" with plaintiff's contract or economic relationship with "Khoury through Tema" with respect to the purchase of a real estate investment known as Great Woods (Count

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<sup>1</sup> The Appellate Court reinstated Counts I-III and VI

VII) and the pursuit of other real estate investments (Count VIII) causing Khoury to terminate his relationship with plaintiff who, as a result, sustained unspecified damages (see amended complaint, ¶¶ 151-164). Plaintiff contends that these Counts state two claims for tortious interference with contractual relations and two claims for tortious interference with prospective business relations. The purported contract relied on by plaintiff is an unsigned one-page document drafted by him titled “Investment Understanding between Tema Development, Inc. and Patrick Barrett” (the “Investment Understanding”). His fallback position (should the court determine that the Investment Understanding is not a binding contract) is that “[a]t minimum, Mr. Barrett had a prospective business relation in the Investment Understanding Agreement and the Great Woods investment.”

To sustain a claim for tortious interference with contract plaintiff must demonstrate (i) the existence of a valid contract between plaintiff and a third party, (ii) defendant’s knowledge of that contract, (iii) defendant’s intentional procurement of the third-party’s breach of the contract without justification, (iv) actual breach and, (v) damages (see Lama Holding Company v. Smith Barney Inc., 88 NY2d 413, 424 [1996]).

To sustain a claim for tortious interference with prospective economic relationship plaintiff must allege that the action complained of was motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations (see Entertainment Partners Group, Inc. v. Davis, 198 AD2d 63, 64 [1<sup>st</sup> Dept 1993]; see also Kantor v. Bernstein, 225 AD2d 500, 501 [1<sup>st</sup> Dept 1996] [claim for tortious interference with prospective economic relations requires allegations of disinterested malevolence]).

Movants contend that these causes of action should be dismissed because plaintiff cannot

establish the elements of a claim of tortious interference with contract such as the existence of a valid contract and lack of economic justification on defendants' part, and cannot meet the stricter requirements of proof necessary to support a claim of tortious interference with economic relationship such as interference based solely on malice or the utilization of unlawful or improper means. Defendants make the following supporting arguments: the so-called Investment Understanding relied on by plaintiff is nothing more than plaintiff's proposal for future deals; the parties never reached an agreement concerning the proposed Great Woods investment; the August 5, 2003 e-mail from Toroyan to Khoury as well as defendants' relevant actions were based on economic self-interest, not malice, because plaintiff was involved in disputes with Delma; plaintiff's contract claims are barred by the Statute of Frauds (GOL § 5-701[a]1) because the terms of the alleged contract could not have been performed within one year; and, plaintiff cannot prove tortious interference with economic relationship because he cannot prove that Tema, Inc. would have entered into a contract with him "but for" the alleged interference by Toroyan and the Delma defendants.

In opposition, plaintiff contends that defendants' motion should be denied for the following reasons: the Investment Understanding, although unsigned, is still a binding contract because its terms were negotiated in London and accepted by Khoury in London with the result that it is governed by English law, which does not impose a signature requirement; even if New York law is found to be applicable, the signature requirement is met because the parties' signed correspondence pertaining to the Investment Understanding satisfies the Statute of Frauds; plaintiff's partial performance, including bringing investment opportunities to Khoury in addition to Great Woods, validated the Investment Understanding; plaintiff had an enforceable "Type II"

agreement with Tema, Inc. with respect to Great Woods because plaintiff and Tema, Inc. agreed to all terms requiring negotiation leaving only housekeeping matters to be finalized; at the very least, plaintiff had a prospective business relation in the Investment Understanding and the Great Woods investment; Toroyan's e-mail intentionally caused Khoury to breach the Investment Understanding and the Type II agreement relating to Great Woods because it "induced Khoury to introduce a condition on the Great Woods investment that was outside the agreement between [plaintiff] and Tema" (see plaintiff's memorandum of law, p 17); Toroyan cannot claim economic justification as a defense to his tortious interference because he had no economic interest in Delma Associates and was not a shareholder of Tema, Inc.; Toroyan was motivated by malice as demonstrated by the fact that he stated in his e-mail that a relationship between plaintiff and Tema, Inc. would "smell bad."

In reply, movants contend that plaintiff's purported reliance on English law to avoid the signature requirement of GOL § 5-701[a](1), (10) and § 5-703 is disingenuous because after plaintiff's claims against Tema, Inc. in this action were dismissed he filed a complaint against Tema, Inc. in federal court for failure to consummate the Great Woods transaction and breach of the Investment Understanding in which no mention of acceptance or performance in England or English law is made ( see Gottehrer reply affirmation, exhibit 1; see also, exhibit 3, [Declaration of Patrick Barrett]). After debunking plaintiff's discussion of Type II contracts, defendants contend that the doctrine of partial performance does not apply to GOL § 5-701[a](1) (contract which by its terms cannot be performed within one year) and that plaintiff has no proof of Khoury's alleged refusal to go forward with the Great Woods deal or any other deal. Movants conclude that with respect to plaintiff's claim of tortious interference with contractual relations

Toroyan can assert the defense of economic justification for stating that it would “smell bad” or look bad to Delma’s employees and other investors if Khoury or Tema, Inc. entered into financial arrangements with a former employee who was threatening to sue Delma because “by Barrett’s own statements, Toroyan, Khoury and Tema share a significant interest in Delma” (presumably resulting from movants’ relationship *inter se*) and that with respect to plaintiff’s claim of tortious interference with economic relationship plaintiff cannot prove that movants were motivated solely by malice.

As noted above, to prevail on a claim of tortious interference with contract plaintiff must establish that a valid contract existed and that defendants, without justification, intentionally caused a breach of that contract (see Lama Holding Company v. Smith Barney Inc., *supra*, 88 NY2d at 424). Plaintiff’s contention that the Investment Understanding is governed by English law is contrived and belied by the papers before the court. However, under New York law parties can be bound by a contract even though it is not signed by the party to be charged if, for example, there has been partial performance unequivocally referable to the purported agreement and nonenforcement will result in injustice (see Elizabeth Street Inc. v. 217 Elizabeth Street Corp., 276 AD2d 295, 296 [1<sup>st</sup> Dept 2000]) or an agreement has been reached in substance (e.g., a “deal memo” with formal contract to follow) with details to be subsequently resolved (cf. Richbell Informations Services, Inc. v. Jupiter Partners, L.P., 309 AD2d 288, 298 [1<sup>st</sup> Dept 2003]). In his opposing affidavit (¶ 10) plaintiff states that shortly after his employment with Delma Properties was terminated in February 2002 he was hired by Khoury, with whom he had worked for 12 years, to work with Khoury on real estate investments. This unchallenged statement is fully consistent with plaintiff’s contention that the Investment Understanding and the

Great Woods deal were viable and enforceable projects. Indeed, since plaintiff is opposing a motion for summary judgment, he will be given the benefit of the doubt with respect to his contention that a valid contract existed ( see McLaughlin v. Thaima Realty Corp., 161 AD2d 383, 384 [1<sup>st</sup> Dept 1990]). Furthermore, plaintiff's contention is underscored by the affidavit of his real estate expert, Thomas F. Imperato. Mr. Imperato, who states that he was employed as a consultant by Delma Properties in 2001 and 2002, confirms plaintiff's argument that the Investment Understanding terms (acquisition fee, property management fee, asset management fee and profit sharing arrangement – see plaintiff's exhibit 1) and the Great Woods investment terms and related correspondence contain all of the material terms required for a real estate partnership or joint venture. At this point the court is not prepared to find as a matter of law that a contract between plaintiff and Khoury or Tema, Inc. did not exist with respect to real estate investments in general and an investment in Great Woods in particular.

In his memorandum of law plaintiff states that on the eve of closing on the Great Woods deal Toroyan sent an e-mail to Khoury “that is at the center of the causes of action before the court on this motion” (see plaintiff's memorandum of law, pp 1-2). That e-mail states in pertinent part as follows: “I really think that it will give a very negative message to Delma's current management if they find out that you are doing an investment with Patrick while he has some serious disputes with Delma.... I would strongly recommend for you not to make a deal unless he settles reasonably his disputes with Delma” (see plaintiff's exhibit 2). Plaintiff does not deny that he was having disputes with one or more of the Delma defendants. He admits that Toroyan was the president and chairman of the board of Delma Properties and the “principal actor” in the events that led to his disputes with “Delma” (see plaintiff's affidavit in opposition,

¶ 9; see also amended complaint ¶ 124 [Delma Properties has benefitted from wrongful acts complained of herein]). While it is well known that the court's only function on a motion for summary judgment is to determine if factual issues exist (see, e.g., Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957], rearg den 3 NY2d 941 [1957]), it is also fair to say that no reasonable trier of fact could conclude that, under the circumstances herein, Toroyan's e-mail was bereft of economic justification or that it was motivated solely by malice (see Roberts v. Pollack, 92 AD2d 440, 444 [1<sup>st</sup> Dept 1983] [allegations consisting of bare legal conclusions not entitled to presumption of truth]). In view of the above, the court concludes that Counts VII and VIII of the amended complaint should be dismissed.

Accordingly, defendants' motion is granted and it is hereby

ORDERED that Counts VII and VIII of the amended complaint are hereby dismissed.

This constitutes the decision and order of the court.

DATED: October 20, 2006



HON. RICHARD S. LOWE, III

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