

Gemsco Realty Advisors, Inc. v Dworman

2006 NY Slip Op 30223(U)

October 12, 2006

Supreme Court, New York County

Docket Number: 0602242/2005

Judge: Barbara Kapnick

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 12

Index Number : 602242/2005
GEMSCO REALTY ADVISORS

INDEX NO. 602242/05

vs
DWORMAN, ROSS

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS ACTION

MOTION CAL. NO. _____

The following papers:

his motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

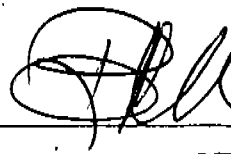
Upon the foregoing papers, it is ordered that this motion

FILED

OCT 18 2006

MOTION IS DECIDED IN ACCORDANCE WITH NEW YORK
ACCOMPANYING MEMORANDUM DECISION COUNTY CLERK'S OFFICE

Dated: 10/12/06



BARBARA R. KAPNICK 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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
GEMSCO REALTY ADVISORS, INC.,

Plaintiff,

-against-

ROSS DWORMAN, KCRF, L.L.C., The ROSS
DWORMAN TRUST, U/A 1/2/96; the DAVID
DWORMAN TRUST, U/A 1/2/96; and 124
GROUP, INC.,

Defendants.
-----X

DECISION/ORDER

Index No. 602242/05

Motion Seq. No. 001

FILED
OCT 18 2006
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK, J.:

In this action, plaintiff Gemsco Realty Advisors, Inc. ("Gemsco") seeks damages for defendants' alleged breach of a brokerage agreement in connection with the sale of defendants' ownership interests in The Kips Bay Plaza Retail Center, a shopping center located on Second Avenue, between East 30th and 32nd Streets in New York City ("the Kips Bay Project"). The complaint asserts causes of action for breach of contract (first and third causes of action), quantum meruit and unjust enrichment (second cause of action), anticipatory breach of contract (fourth cause of action) and tortious interference with contractual relations (fifth cause of action).

Defendants now move to dismiss all but the third cause of action for breach of contract, based upon documentary evidence, the statute of frauds, and failure to state a cause of action.

[*3]

Facts

Gemsco is a real estate consulting firm, in the business of helping its clients obtain financing for real estate projects, introducing clients to lenders and advising clients with respect to structuring and financing real estate deals. Non-party Ross Weiner ("Weiner") is the president of Gemsco.

Defendants Ross Dworman and David Dworman are brothers. They are trustees of defendants Ross Dworman Trust, U/A 1/2/96 (RD Trust) and David Dworman Trust, U/A 1/2/96 (DD Trust). The RD and DD Trusts each own a 49.5% interest in defendant KCRF, L.L.C. (KCRF). The remaining 1% interest in KCRF is owned by KCRF's managing member, non-party KCRF Management, Inc. ("KCRF Mgmt"). KCRF Mgmt is owned by Ross and David Dworman's parents, Wanda Dworman and Alvin Dworman.

KCRF owned a 25% limited partnership interest in non-parties Kips Bay Development Limited Partnership and DFD Development Limited Partnership (together, "the Kips Bay Partnerships") which, in turn, owned and operated the Kips Bay Project. The remaining 75% interest was owned by the general partner, non-party Kips Bay Holding, LLC (Kips Bay Holding). The terms of these partnerships are memorialized in various Agreements of Limited Partnership.

According to the complaint, Ross Dworman approached Gemsco in April 2002, concerning the sale of a portion of his family's ownership interests in the Kips Bay Project. On April 4, 2002, Weiner submitted to Ross Dworman a "MEMORANDUM" on Gemsco letterhead. The April 4, 2002 Memorandum states as follows:

The following summarizes the arrangement we discussed concerning compensation for my in assisting you in pursuing the sale of a partial interest of your (you and DD) LP interest in the "Kips Bay" Project.

The compensation structure for this assignment that we have agreed to is as follows:

- A. Consulting/Success Fee of:
 - a. 2.5% for the first \$2 million (i.e. (\$50,000); and
 - b. 6% for any amounts above \$2 million.
- B. Retainer/Advance
 - a. \$10,000; paid \$5,000 upon commencement and \$5,000 in 30 days.
 - b. Fees paid under B shall be offset (i.e. reduce) Fees to be paid pursuant to A above.
 - c. Fees paid under B shall be earned even in the event no transaction occurs.
- C. Out of Pocket Expenses
 - a. You agree to reimburse me for any reasonable out-of-pocket expenses incurred in the execution of this assignment. Any single expense of \$100 or more will need to be approved by you in advance.
- D. This assignment will be handled with extreme discretion in order to maintain confidentiality.
- E. My responsibilities will include preparing necessary marketing/investment materials; marketing

to prospective investors; conducting negotiations; and overseeing the closing and other details of an agreement with an investor(s).

Please confirm that you are in agreement with the above by signing below.

The complaint states that the April 4, 2002 Memorandum "was signed by both Ross Dworman and Ross Weiner." Instead, the Memorandum appears to be initialed next to each of their names at the top of the document.

Gemsco alleges that the parties thereafter began performing their obligations under the Memorandum. Gemsco contends that it was paid a \$10,000 retainer, and began assisting KCRF in contacting various potential investors, and preparing marketing materials. Gemsco claims that it maintained regular contact with Ross Dworman and Alvin Dworman in connection with its performance under the April 4, 2002 Memorandum.

Gemsco allegedly located several prospective investors interested in purchasing a partial interest in KCRF. Gemsco also allegedly located one investor, non-party Centurion Realty LLC ("Centurion"), that was interested in purchasing KCRF's entire interest in the Kips Bay project, and later 100% of the project.

Section 5.1 of the Agreements required any partner who wanted to sell, transfer or otherwise encumber its interest in the property to obtain the prior written consent of Kips Bay Holding and KCRF.

By letter dated June 20, 2003, Ross Dworman requested the consent of Kips Bay Holding and Kips Bay Development Limited Partnership to transfer KCRF's entire interest in the partnerships to a third party. The letter (which was written on KCRF letterhead) states that, in order to facilitate the proposed transfer, "KCRF would like to introduce you to the prospective transferee, and my associate, Ross Weiner, who is handling this transaction on behalf of KCRF will be calling you shortly to arrange a mutually convenient time for such meeting."

The complaint alleges that pursuant to a "buy/sell" provision in the Kips Bay Project Partnership agreements, either of the parties to the Kips Bay Project - KCRF or Kips Bay Holding - could, under certain circumstances and conditions, force a sale of its interest in Kips Bay Project to the other, or a purchase of the other party's interest. This "buy/sell" right had very explicit terms as to how it could be effectuated; it could not be triggered during 2003 due to a "lock-out" clause but could be triggered beginning on July 2, 2004.

*7]

The complaint alleges that thereafter, Gemsco, through Weiner, had several discussions with Kips Bay Holding and one of its key representatives, non-party Jules Demchick ("Demchick"), concerning the sale of KCRF's interests in the Kips Bay Project to Centurion. These discussions also allegedly involved the potential sale of KCRF's interests to Kips Bay Holding.

The complaint goes on to assert that

During Mr. Weiner's meeting with Centurion and Mr. Demchik, Mr. Demchick indicated that Kips Bay Holding was determined to attach several material conditions to any consent that it might give to KCRF's sale of its interest to Centurion - conditions that included extending the lockout period for the buy/sell. These were conditions to which Centurion would not agree. Mr. Demchik, however, also indicated to Mr. Weiner in a separate meeting that day that did not involve Centurion, that Kips Bay Holding would be interested in pursuing the purchase of all or a portion of KCRF's interest - - but indicated, among other things, that any such deal would be unlikely to occur for another six to twelve months.

As a result, plaintiff claims that KCRF instructed it to continue to seek other potential purchasers of KCRF's interests that Kips Bay Holding might approve, in order to create a competitive bidding atmosphere that would ultimately induce Kips Bay Holding to consider acquiring KCRF's ownership interest in the Kips Bay Project. The complaint alleges that Gemsco maintained regular contact with Ross Dworman and Alvin Dworman through this process.

Gemsco and KCRF allegedly discussed clarifying how Gemsco would be compensated for its efforts in assisting with the sale of KCRF's interests in the Kips Bay Project to an outside investor, such as Centurion, or to Kips Bay Holding pursuant to the "buy/sell" provision of the Agreements. On October 10, 2003, Weiner submitted another "MEMORANDUM" to Ross Dworman, "to confirm [their] recent discussions regarding Kips Bay & [Weiner's] existing compensation arrangement with [him] and KCRF, LLC".

Specifically, the Memorandum provides that

RW/Gemsco will be compensated for any future sale of all or a portion of the KCRF LLC interest, including transactions concluded with the following parties, pursuant to the success fee feature of our existing (Apr 2002) agreement:

- a) Tawil family or affiliates
 - b) Mack family (Richard and/or Bill) or affiliates
 - c) Jules Demchick, Harry Feldman, Carlisle Development and/or any affiliates of them or the existing Kips Bay General Partners.
 - d) Any other parties introduced to KCRF by RW/Gemsco.
 - e) Any transaction concluded pursuant to the Kips Bay "buy/sell" provisions or other rights of 1st refusal or first offer.
 - f) A refinancing or "upsizing" of the existing mortgage(s) which results in positive net proceeds to KCRF, LLC will be compensated as if a sale has occurred.
 - g) A sale of the property, via the buy/sell provision or otherwise, that involves the sale of interests in the property other than KCRF's (i.e. Feldman/Demchick etc.) shall result in additional fair market compensation to RW/Gemsco.
2. For any transaction where Eastdil (or another broker) is retained by KCRF and/or is the primary party in facilitating a transaction, RW/Gemsco

shall receive 1% of the net proceeds to KCRF, subject to a \$100,000 minimum. In the event of a sale of the property, or all, or substantially all of the Kips Bay Interests (i.e. including Feldman/Demchick), RW/Gemsco will receive 1% of the net proceeds to all selling parties.

RW/Gemsco will continue to assist KCRF/RD as requested.

Gemsco claims that each member of KCRF consented to the terms of the October 10 Memorandum.

Gemsco claims that it continued to provide services to KCRF through 2004, and through the first quarter of 2005. During this time, Gemsco was allegedly repeatedly assured by both Ross and Alvin Dworman that KCRF would comply with its agreement with Gemsco.

In April 2005, KCRF sold its 25% interest in the Kips Bay Project to the majority investor Kips Bay Holding for \$15.3 million. Gemsco claims that KCRF concealed the closing of the transaction from it. According to Gemsco, the sale was the result of an offer by Centurion, which Gemsco had located, together with KCRF's threat to exercise the "buy/sell" provision of the Agreements, as leverage to force the sale of KCRF's entire 25% interest to Kips Bay Holding. Gemsco claims that under the parties' agreements, KCRF owes it a fee in the total amount of \$838,000.

The complaint further contends that in addition to failing to pay plaintiff's fee, defendants have taken various retaliatory actions against plaintiff, including evicting Gemsco and Weiner from office space provided by KCRF. In addition, Gemsco claims that Ross Dworman, who owns or is affiliated with defendant 124 Group, Inc. ("124 Group"), caused 124 Group to breach a consulting agreement with Gemsco, dated June 30, 2003. Under the Consulting Agreement, Gemsco was to be paid a monthly fee of \$500 for providing consulting services in connection with property owned by 124 Group in New Hampshire.

Discussion

Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Quantum Meruit & Unjust Enrichment

Defendants move to dismiss the first cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing, and the second cause of action for unjust enrichment and quantum meruit, arguing that these causes of action are refuted by the documents upon which they are based. Specifically, defendants argue that the April 4, 2002 Memorandum is between Weiner and Dworman, not KCRF or the RD and DD Trusts, which own the interest in the Kips Bay Project. Defendants also argue that Ross Dworman did not have authority to act on behalf of KCRF or KCRF Management. In opposition, Gemsco argues that Ross Dworman had implied and apparent authority to bind KCRF and the DD Trust,

and that the complaint, Weiner's affidavit, and certain writings show the existence of an agreement.

"It is hornbook law that an agency may be implied from the parties' words and conduct as construed in light of the surrounding circumstances." Riverside Research Institute v KMGA, Inc., 108 A.D.2d 365, 370 (1st Dep't 1985), aff'd 68 N.Y.2d 689 (1980).

[A]uthority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading, as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances.

Zendman v Harry Winston, Inc., 305 N.Y. 180, 188 (1953); see also, Morales v Cozy Brokerage, Inc., 170 A.D.2d 201, 201 (1st Dep't 1991) ("agency may be implied from the party's words and conduct as viewed in light of the surrounding circumstances").

Apparent authority involves "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." Hallock v State, 64 N.Y.2d 224, 231 (1984). There must be "a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal -- not the agent. (citations omitted)." Id.

Where "the circumstances raise the possibility of a principal-agent relationship but no written authority of the agent has been proven, questions of agency and of its nature and scope ... are questions of fact to be submitted to the jury under proper instructions by the court." Fogel v Hertz Intern., Ltd., 141 A.D.2d 375, 376 (1st Dep't 1988) (citations and internal quotation marks omitted).

The complaint alleges in paragraphs 18-19 that Ross Dworman

represented that he controlled KCRF and had the full authority to act on behalf, and was acting with the knowledge and consent, of his brother, David Dworman, his father, Alvin Dworman, and KCRF. Moreover, on several other occasions, Ross Dworman represented to Gemsco and others that Alvin Dworman had transferred ownership and control of KCRF Management (the managing member of KCRF) to him.

Weiner also claims in his Affidavit in Opposition to defendants' motion that David Dworman confirmed his acceptance of the terms of the April 4, 2002 Memorandum and personally paid half of the \$10,000 retainer fee, and that Gemsco acted at the direction of both Ross and Alvin Dworman.

In addition, Weiner submits a letter, dated February 26, 2003, from Ross Dworman to non-party Milton Cooper at Kimco Realty Corporation ("Kimco"), purporting to discuss the sale of Ross

Dworman's and his "partner's" 25% interest in the Kips Bay Project. The 25% represents the collective interests of KCRF, which is divided among KCRF Management, and the RD and DD Trusts.

Moreover, in the June 20, 2003 letter, Dworman also purports to act on behalf of KCRF and seeks to convey KCRF's "entire interest" in the Kips Bay Project. This letter expressly states that Weiner "is handling this transaction on behalf of KCRF."

Significantly, Gemsco alleges that Alvin Dworman acknowledged the agreement with Gemsco and provided assurances that Gemsco would be compensated pursuant to the parties' agreement.

The complaint alleges that Gemsco relied, to its detriment, on the Dwormans' representations, by performing under the parties' agreement without being fully compensated. These factual circumstances "raise the possibility of a principal-agent relationship," and the nature and scope of the alleged agency are questions of fact to be submitted to the jury. Fogel v. Hertz International, supra at 376.

Defendants also argue that under the April 4, 2002 Memorandum, Gemsco was compensated, and a "partial interest" of Ross and David Dworman's interests in the Kips Bay Project was never sold.

Defendants claim that Ross Dworman never entered into a contract with Gemsco concerning the sale of KCRF's interest in the Kips Bay Project.

However, according to the complaint, the alleged agreement between Gemsco and KCRF concerning the sale of KCRF's entire interest in the Kips Bay Project is confirmed in several writings, including the April 4, 2002 Memorandum, the October 10, 2003 Memorandum, the February 26, 2003 letter and the June 20, 2003 letter.

Based on the allegations of the complaint, after the parties struck their deal, they conducted themselves consistent with Gemsco's interpretation of the parties' agreement. In addition, the Dwormans allegedly held out Gemsco to third parties as their representative. For the foregoing reasons, that portion of defendants' motion seeking to dismiss the first and second causes of action based upon documentary evidence is denied.

Defendants next argue that the first and second causes of action are barred by the statute of frauds, because the agreement is not a signed writing.

However, "the contract in question need not have been in writing since the plaintiff is a licensed real estate broker and is expressly exempt from the requirements of the Statute of Frauds (see, General Obligations Law § 5-701[a][10]; additional citation omitted)." Fidelity Business Brokers v. Grimaldi, 190 A.D.2d 709 (2nd Dep't 1993). Therefore, the statute of frauds does not apply.

Defendants next argue that Gemsco cannot simultaneously assert claims for both breach of contract and quantum meruit/unjust enrichment. In opposition, Gemsco argues that it is entitled to plead its causes of action in the alternative.

The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. (citations omitted). A "quasi contract" only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment.

Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 N.Y.2d 382, 388 (1987)

Here, "it appears that ... there is a bona fide dispute as to the existence of a contract," and, therefore, "plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies." Joseph Sternberg, Inc. v. Walber, 36th St. Assoc., 187 A.D.2d 225, 228 (1st Dep't 1993); see also CPLR 3017

(a) ("[r]elief in the alternative or of several different types may be demanded") and CPLR 3014 ("[c]auses of action or defenses may be stated alternatively or hypothetically"). Accordingly, that portion of defendants' motion seeking to dismiss Gemsco's quasi contract claims as duplicative is denied.

Defendants next argue that the quantum meruit and unjust enrichment claims should be dismissed, because the April 4, 2002 Memorandum limits Weiner's compensation to the \$10,000 advance, plus reimbursement of out-of-pocket expenses in the event that the RD and DD Trusts do not succeed in selling a portion of KCRF's interest in the Kips Bay Project.

However, as discussed above, Gemsco's claim is not limited to the terms of the April 4, 2002 Memorandum. Moreover, the complaint asserts that this claim is asserted only "[i]n the event that the Defendants ... deny the existence, validity, and enforcement of the [April 4, 2002 Memorandum]" Thus, any relief granted to Gemsco based upon its quasi-contract claim would be made only in the event that no valid written contract is found to have existed among the parties. Under such circumstances, the April 4, 2002 Memorandum would be inapplicable. Therefore, this branch of defendants' motion is also denied.

Finally, defendants argue that Gemsco's quantum meruit and unjust enrichment causes of action fail to state a cause of action, arguing that Gemsco fails to allege that it performed the envisioned services under the parties' agreement, or that defendants were unjustly enriched by Gemsco's actions.

"The elements of a claim in quantum meruit are: the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services (citation omitted)." Freedman v Pearlman, 271 A.D.2d 301, 304 (1st Dep't 2000).

Here, defendants' argument is based upon Gemsco's alleged failure to perform under the April 4, 2002 Memorandum. However, as discussed above, Gemsco's claim is not limited to the terms of the April 4, 2002 Memorandum.

Rather, plaintiff alleges in its Complaint that Gemsco provided services to defendants, including efforts to market their interest in the Kips Bay Project to prospective investors, prepare marketing and investment materials, and negotiate with interested parties. Gemsco claims that these activities ultimately led to the consummation of KCRF's sale of its 25% interest in the Kips Bay

Project to Kips Bay Holding for \$15.3 million. Gemsco claims that defendants obtained the benefit of Gemsco's work without compensating Gemsco.

Whether or not Gemsco provided such assistance is a question of fact, the determination of which is premature at this juncture. Accordingly, that portion of defendants' motion seeking to dismiss Gemsco's first and second causes of action is denied.

Anticipatory Breach of Contract

Defendants next move to dismiss Gemsco's fourth cause of action, arguing that it cannot assert claims for breach of contract and anticipatory breach of contract, because if 124 Group's termination of the Consulting Agreement was justified, then 124 Group did not breach the agreement; conversely, if 124 Group's termination was not justified, then Gemsco will prevail on its breach of contract claim. The essence of defendants' argument is that defendants owed no future performance under the Consulting Agreement.

Anticipatory breach of contract involves "a definite and final communication of the intention to forego performance" under a

contract. Rachmani Corp. v 9 East 96th St. Apt. Corp., 211 A.D.2d 262, 267 (1st Dep't 1995).

22A NY Jur 2d Contracts § 443 provides in relevant part that:

[a]n anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is the outcome of words or acts evincing an intention to refuse performance in the future. Thus, an anticipatory breach of a contract precedes the time prescribed for its performance, or at least the time when tender of performance has been proffered; if it does not precede the time of performance or actual tender it is not anticipatory.

Gemsco's anticipatory breach cause of action is asserted as an alternative to its third cause of action for breach of contract against 124 Group. The complaint alleges that Gemsco was retained to provide certain services for 124 Group. The Consulting Agreement was allegedly signed by Weiner on behalf of Gemsco and by Ross Dworman on behalf of 124 Group. Under the Consulting Agreement, Gemsco was to be compensated \$6,000 annually, payable in monthly installments of \$500. The Consulting Agreement was effective July 1, 2003, for a one-year term. It was automatically renewed "for additional periods of one year each after the initial term" unless terminated for reasons expressly stated in the Consulting Agreement.

In a letter dated May 17, 2005, 124 Group notified Gemsco that "124 Group, LLC hereby terminates the Consulting Services Agreement dated June 30, 2003. This termination is effective as of the close of business on June 30, 2005." The complaint alleges that the termination was ordered by Ross Dworman in retaliation against Gemsco in connection with Gemsco's effort to secure a fee from KCRF's sale of its interest in Kips Bay.

According to the complaint, this termination breached the Consulting Agreement, because it was not pursuant to any of the grounds stated in the agreement, 124 Group failed to pay Gemsco amounts already due under that agreement, and 124 Group intended not to make future payments owed to Gemsco under that agreement. These allegations show a definite and final communication of 124 Group's intention to forego performance under the Consulting Agreement.

Defendants argue that 124 Group's decision to terminate the agreement in accordance with its terms eliminated any further obligations under that agreement. However, defendants have made no showing that 124 Group's termination of the Consulting Agreement was in accordance with its terms.

Defendants next argue that Gemsco has not alleged that the 124 Group indicated an intent to breach the Consulting Agreement. However, the complaint specifically alleges that the May 17, 2005 letter announced 124 Group's intention to breach the Consulting Agreement, and to forego future obligations under that agreement.

Defendants next argue that, under New York law, Gemsco may not maintain an action for anticipatory breach, because the Consulting Agreement is a contract for the payment of money in fixed monthly installments. However, this argument is raised for the first time in defendants' reply papers. Thus, Gemsco has had no opportunity to respond to this argument. "Under these circumstances, the arguments are not properly before this Court, and need not be addressed." Johnston v Continental Broker-Dealer Corp., 287 A.D.2d 546, 546 (2d Dep't 2001).

For the foregoing reasons, defendants fail to show that Gemsco fails to state a cause of action for anticipatory breach of contract. Accordingly, defendants' motion to dismiss this claim is denied.

Tortious Interference With Contract

Finally, defendants move to dismiss Gemsco's fifth cause of action, which is asserted solely against Ross Dworman. Defendants

argue that Dworman, acting as an officer or director of a corporation, cannot be held liable for tortious interference, because there is no showing of bad faith, and because the claim is defeated by the economic justification defense.

Tortious interference with contractual relations consists of the following elements: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff." Kronos, Inc. v AVX Corp., 81 N.Y.2d 90, 94 (1993).

However, "'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.'" (Buckley v 112 Cent. Park South, 285 App. Div. 331, 334)." Murtha v Yonkers Child Care Ass'n, Inc., 45 N.Y.2d 913, 915 (1978).

Citing Petkanas v Kooyman (303 A.D.2d 303, 305 [1st Dep't 2003]), defendants argue that "[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," which requires pleading "allegations that the acts of the defendant corporate officers which resulted in the tortious interference with contract either were beyond the scope of their employment or, if not, were motivated by their personal gain, as distinguished from gain for the corporation." In Petkanas, the First Department "construed personal gain in terms 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.'" Id. at 305.

Here, the complaint alleges that 124 Group stated no basis for terminating the Consulting Agreement. In addition, the complaint states that Ross Dworman had previously threatened to terminate the Consulting Agreement after Gemsco requested KCRF to comply with its obligation to pay Gemsco in connection with the sale of KCRF's interests in the Kips Bay Project. The complaint also claims that 124 Group's termination of Gemsco was ordered by Ross Dworman in retaliation against Gemsco for trying to secure a fee in connection with KCRF's sale of its interest in the Kips Bay Project. Furthermore, non-party John Kane, the author of the termination letter, allegedly admitted that the Consulting Agreement was terminated pursuant to Dworman's directions, shortly after Gemsco requested that KCRF comply, and KCRF's refusal to comply, with its

obligations in connection with KCRF's sale of its interests in the Kips Bay Project.

However, "[t]o establish a corporate officer's liability for inducing a breach of contract between the corporation and a third party, the complaint 'must allege that the officers'... 'acts were taken outside the scope of their employment or that they personally profitted from their acts'." (citations omitted). Hoag v. Chancellor, 246 A.D.2d 224, 228 (1st Dep't 1998). "That is, the pleadings must allege that the individual defendant corporate officer must have been acting for his or her own personal interests rather than for the corporate interests (*Hoag, supra* at 229-230, ...)." Petkanas v. Kooyman, supra at 305.

Here, plaintiff's complaint fails to allege that defendant Dworman exceeded the scope of his authority or that he "personally benefitted from these actions and that such was their motivating intent (*compare Hoag, supra*)." Petkanas v. Kooyman, supra at 305. "Nor has plaintiff alleged in nonconclusory terms that [defendant Dworman] had not acted in the corporate interest (citation omitted)." Id. at 305-306.


Therefore, defendants' motion to dismiss Gemsco's fifth cause of action for tortious interference is granted.

Defendants are directed to serve an answer to the complaint (with the exception of the fifth cause of action) within twenty days after service of a copy of this order with notice of entry.

Counsel for all parties are directed to appear for a preliminary conference in IA Part 12, 60 Centre Street, Room 341 on November 29, 2006 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: October 12, 2006



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.
FILED

OCT 18 2006

NEW YORK
COUNTY CLERK'S OFFICE