

**New Stadium LLC v Greenpoint-Goldman Corp.**

2006 NY Slip Op 30290(U)

August 31, 2006

Supreme Court, New York County

Docket Number:

Judge: Herman Cahn

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

PRESENT:                     

PART 49

Index Number : 600493/2005

NEW STADIUM LLC

INDEX NO.                     

vs

GREENPOINT- GOLDMAN CORP.

MOTION DATE 9/20/05

Sequence Number : 002

MOTION SEQ. NO. 002

DISMISS ACTION

MOTION CAL. NO. 10

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 IN MOTION SEQUENCE.....**

**FILED**

SEP - 7 2006

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/31/06

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 49

-----X  
NEW STADIUM LLC,

Plaintiff,

- against -

Index No. 600493/05

GREENPOINT-GOLDMAN CORP.,

Defendant.

-----X

Herman Cahn, J.

Defendants move to dismiss, CPLR 3211(a)(1), (3), (7).

This action case involves a property owner which withheld its consent to the assignment of a lease. Plaintiff is the proposed assignee. The lessee is not a party to the action.

**Background:**

Defendant Greenpoint-Goldman Corp. is the fee owner of property located at 470 Vanderbilt Avenue in Brooklyn, New York. Greenpoint-Goldman leased the property to non-party Vanderbilt Holdings LLC by a long-term ground lease dated February 2, 2000, expiring February 1, 2077.

Article Twelve of the lease states that Vanderbilt can assign it with Greenpoint-Goldman's prior consent. Article Twelve also states that Greenpoint-Goldman cannot withhold or delay its consent, provided that the assignee or the assignee's guarantor has a net worth of \$35,000,000. The lease is silent regarding any fees that Greenpoint-Goldman Corp. may charge in return for giving its consent.

In March of 2004, Vanderbilt entered into a Sale-Purchase Agreement with New Stadium LLC, to assign the lease to New Stadium. In April of 2004, Vanderbilt requested that Greenpoint-Goldman consent to the assignment. Greenpoint-Goldman declined to consent.

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New Stadium alleges that Greenpoint-Goldman demanded a fee in return for its consent. Following Greenpoint-Goldman's refusal to consent, Vanderbilt commenced an action against Greenpoint-Goldman seeking specific performance in order to compel it to consent to the assignment. It is alleged that Vanderbilt agreed to pursue this litigation to its conclusion in a Litigation Agreement. However, on February 1, 2005, Vanderbilt terminated its Sale-Purchase Agreement with New Stadium, and subsequently discontinued its litigation without prejudice by stipulation.

New Stadium's complaint herein contains four causes of action: 1) tortious interference with contract; 2) tortious interference with prospective economic advantage; 3) breach of contract- third party beneficiary; and 4) specific performance- third party beneficiary.

Vanderbilt has continued its attempts to assign the lease, to other third parties, and has commenced an action against Greenpoint-Goldman, entitled, *Vanderbilt Holdings LLC, v Greenpoint-Goldman*, Sup. Ct., New York County, Index No.107408/05, relating to this issue which is pending in this court.

***Discussion:***

***3<sup>rd</sup> /4<sup>th</sup> Causes of Action- Breach of Contract/Specific Performance:***

The first issue which must be resolved is whether New Stadium is an intended third-party beneficiary of the lease, and may therefore assert a claim alleging breach of contract against one of the contracting parties. An intended third-party beneficiary has the right to enforce a contract between the contracting parties, whereas an incidental beneficiary cannot compel performance (*Crown Wisteria, Inc. v F.G.F. Enterprises Corp.*, 168 AD2d 238, 241-242 [1st Dept 1990]). New York has adopted the Restatement 2<sup>nd</sup> of Contracts § 302[2], which explains that one is an intended beneficiary if "the circumstances indicate that the promisee

intends to give the beneficiary the benefit of the promised performance.” (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 44 [1985]). There is no need for the identity of the third party to “be set forth in the contract or, for that matter, even be known as of the time of its execution.” (*MK West Street Co. v Meridien Hotels, Inc.*, 184 A.D.2d 312, 313 [1<sup>st</sup> Dept 1992]; see *Gonzalez v National Corporation for Housing Partnerships*, 255 AD2d 151, 153 [1<sup>st</sup> Dept 1998], *leave to appeal denied* 93 NY2d 812 [1999]). The intended beneficiary could in fact be the class of potential assignees. However, no facts are alleged in the complaint that anything in Article Twelve of the lease suggests the intent to benefit third-party assignees. Rather, as was noted in another case involving withheld consent for an assignment, the lease only “indicates an intention to benefit the *holder* . . . by facilitating assignment of the lease.” (*Sims v Darwood Management, Inc.*, 147 AD2d 373, 376 [1<sup>st</sup> Dept 1989]). Thus, New Stadium is only an incidental beneficiary and cannot itself sue to enforce the lease. Therefore, the third and fourth causes of action are dismissed.

**1<sup>st</sup> Cause of Action- Tortious Interference with a Contract:**

The required elements of a cause of action for tortious interference with contract are: 1) the existence of a valid contract; 2) the defendant’s knowledge of that contract; 3) the defendant’s intentional procuring of the breach of that contract, and 4) damage. (*Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]). Where these elements are met, a plaintiff may recover damages even if the defendant was engaged in lawful behavior. However, when there is no breach, but the contract is terminable at will -- and therefore, there is only interference with prospective contracts -- plaintiff must show “more culpable conduct on the part of the

[\* 5 ]  
defendant.”<sup>1</sup> (*NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 621 [1996]).

Here, New Stadium claims that Greenpoint-Goldman, by withholding its consent, interfered with the Sale-Purchase Agreement between Vanderbilt and New Stadium.

Greenpoint-Goldman contends that the Sale-Purchase Agreement was terminable at will after a certain date. In fact, New Stadium does not allege that Vanderbilt’s termination of the Sale-Purchase Agreement was a breach. Rather, New Stadium alleges that Vanderbilt *unexpectedly* terminated the Sale-Purchase Agreement. (Amended Complaint ¶ 51)(emphasis added).

Additionally, it alleges that Vanderbilt “had absolutely no right to terminate the Sale-Purchase Agreement prior to June 18, 2004 at the earliest.” (*id.*, ¶ 55). However, the date of termination was February 1, 2005. Therefore, since New Stadium does not allege that there was any breach by Vanderbilt,<sup>2</sup> there was no tortious interference with a contract.

The third cause of action is dismissed.

**2<sup>nd</sup> Cause of Action- Tortious Interference with Prospective Economic Advantage**

Even when no breach has occurred, a plaintiff may still allege interference with prospective contractual rights by asserting that it would have entered or continued its business relations with a non-party, but for the defendant’s wrongful conduct (*Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265, 266-267 [1<sup>st</sup> Dept 2002]). However, the plaintiff must then show that defendant’s conduct was not “lawful,” but “more culpable” (*Carvel Corp. v Noonan*, 3 NY3d

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<sup>1</sup> This will be addressed in the Section concerning tortious interference with prospective economic advantage.

<sup>2</sup> Additionally, the Sale-Purchase Agreement, itself, provided that if Vanderbilt did not obtain Greenpoint-Goldman’s consent within 90 days from its execution, which would fall in June of 2004, Vanderbilt could terminate the Agreement (Sale-Purchase Agreement, Section 6 (c), (d),(f)). It follows that it was terminable before February 1, 2005.

182, 190 [2004]; *John Hancock Life Ins. Co. v 42 Delaware Ave. Associates, LLC*, 15 AD3d 939, 940 [4<sup>th</sup> Dept. 2005], *rearg denied* 17 AD3d 1175 [4<sup>th</sup> Dept 2005], *leave to appeal dismissed in part, denied in part* 5 NY3d 819 [2005]). “[A]s a general rule, the interfering party’s conduct must amount to a crime or an independent tort (*id.*). Conduct that is not criminal or tortious will generally be ‘lawful’ and thus not sufficiently ‘culpable’ to create liability for interference with prospective contracts or other nonbinding economic relations.” (*id.*).

The exception to this general rule applies where defendants acted “for the sole purpose of inflicting emotional harm on plaintiffs” (*Carvel, supra*, 3 NY3d 182 at 190). Additionally, it has been suggested that an exception exists when a defendant applied “extreme and unfair” economic pressure onto the party with which the plaintiff seeks to have a relationship (*id.* at 190-191). However, the Court of Appeals has specifically declined to rule that such an exception exists (*id.*).

Here, New Stadium argues that Greenpoint-Goldman both engaged in criminal conduct and applied undue economic pressure. It claims that Greenpoint-Goldman’s conduct amounts to the crime of attempted larceny by extortion. Penal Law §155.05(2)(e)(ix) defines larceny by extortion:

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . perform any act which *would not in itself materially benefit the actor* but which is calculated to harm another person materially with respect to his . . . business.

\* 7 ] .  
Penal Law §155.05(2)(e)(ix) (emphasis added).<sup>3</sup> The focus of the above statute is not on the illegality of the underlying threatened act, but rather, on whether the act would carry out a legitimate objective (*People v Forde*, 153 AD2d 466, 472-473 [1<sup>st</sup> Dept 1990]).

New Stadium's conclusory allegations that "Greenpoint-Goldman Corp. withheld . . . [c]onsent to the assignment for the wrongful and illegal purposes of extorting a 49 million [c]onsent fee," (Amended Complaint, ¶ 66.b), do not amount to attempted larceny by extortion. In fact, New Stadium does not allege in the complaint that Greenpoint-Goldman would not materially benefit from the act of withholding consent. Greenpoint-Goldman could have many reasons for withholding consent, including, for example, apprehension concerning New Stadium's future use of the property. In other words, even if Greenpoint-Goldman breached its agreement with Vanderbilt by withholding its consent to the assignment to New Stadium, it may have had a legitimate objective for so doing. New Stadium has not alleged that Greenpoint-Goldman did not have such an objective. Therefore, New Stadium has not asserted all of the elements necessary to constitute attempted larceny by extortion.

As to New Stadium's argument regarding undue economic pressure, the Court of Appeals has specifically declined to acknowledge the existence of such an exception, and New Stadium fails to cite any authority subsequent to *Carvel*, that recognized it.

For all of these reasons, New Stadium cannot maintain a cause of action for tortious interference with prospective economic advantage.

Consequently, the motion to dismiss is granted.

Accordingly, it is

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<sup>3</sup> Attempted larceny by extortion is fundamentally the same but is "complete upon the making of the extortionary threat coupled with the intent to commit larceny" (*People v Zaccaro*, 132 AD2d 589, 590 [2<sup>nd</sup> Dept 1987, *appeal denied* 70 NY2d 756 [1987]).

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: August, 29, 2006

ENTER:

  
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J.S.C.

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