

Learning Annex Holdings, LLC v Gittelman
2006 NY Slip Op 30562(U)
June 23, 2006
Supreme Court, New York County
Docket Number: 120980/03
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Index Number : 120980/2003
LEARNING ANNEX HOLDING LLC.
vs
GITTELMAN, MARTIN
Sequence Number : 004
SUMMARY JUDGMENT

PART 11

INDEX NO. _____
MOTION DATE 4/6/06
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 is decided in accordance with the attached memorandum Decision + Order

FILED
JUL 06 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 23, 2006

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 11

-----X
LEARNING ANNEX HOLDINGS, LLC.,

Plaintiff,

Index No.: 0120980/03

-against-

MARTIN GITTELMAN,

Defendants.

-----X
JOAN A. MADDEN, J.

FILED
JUL 06 2006
NEW YORK
COUNTY CLERK'S OFFICE

Defendant Martin Gittelman (“Gittelman”) moves for summary judgment dismissing the complaint against him. Plaintiff Learning Annex Holdings, LLC. (“Learning Annex”) opposes the motion, which is granted for the reasons below.

Background

In this action, Learning Annex seeks to recover damages from Gittelman for his admitted removal and discarding of its magazines/catalogues (“magazines”) from its distribution boxes (“boxes”). Learning Annex offers various seminars, lectures, classes, and workshops throughout the United States and Canada.

Non-party Harry Javier (“Javer”) is Learning Annex’s Editor-In-Chief, and is also in charge of management, and business development. Javer testified at his deposition that Learning Annex has placed between nineteen hundred and two thousand of its boxes, filled with its magazines, throughout Manhattan, and that Learning Annex relies on these boxes to advertise its classes to the public and to obtain students. Javer also testified that all of the

magazines are free to anyone, as indicated on many of the boxes, and that an individual is permitted take more than one magazine.

According to Javer on March 26, 2003, while sitting at an outdoor café near Gittelman's home, on the corner of 94th Street and Columbus Avenue, New York, New York, he observed Gittelman remove about 40 magazines from one of Learning Annex's boxes, and put them in a trash can, and that he followed Gittelman who proceeded to 93rd Street and Columbus Avenue, where he removed about 40 magazines from the second box and put them in the trash can.

At his deposition, Gittelman testified that magazines from the boxes were often on the street, resulting in papers flying in the area. He testified that he had emptied Learning Annex's boxes between ten and one hundred times, and while at one point he testified that he took a handful of magazines when removing them, he later testified that he fully emptied the box of its magazines. He admitted that he would not look at the magazines before he threw them into the garbage.

In his affidavit submitted in support of the motion, Gittelman states that while in recent years the boxes have become cleaner and he has not removed any magazines since 2003, at the time that he removed the magazines, the boxes were not clean, were either falling down or broken, were missing doors, and were covered with graffiti. He also states in his affidavit that he complained to his councilwoman on numerous occasions, but was unable to accomplish any change. Further, Gittelman states that he emptied the boxes in an effort to reduce the amount of the litter they created.

In its amended complaint, Learning Annex asserts causes of action for: (1) tortious interference with business relations, based on Gittelman's alleged intentional interference

with the business relationship between Learning Annex and prospective students, (2) conversion, based on Gittelman's alleged taking of Learning Annex's magazines for his own use, (3) prima facie tort, based on Gittelman's allegedly unjustifiably interference with Learning Annex's property and prospective business for the sole purpose of causing injury, and (4) permanent injunction.

Gittelman moves for summary judgment dismissing the claims against him. With respect to the tortious interference with business relations claim, Gittelman argues that Learning Annex cannot establish that a third party would have become a student but for Gittelman's "wrongful" conduct. Next, Gittelman argues that he cannot be held liable for conversion, as Learning Annex offers the magazines to the public for free and thus does not have a superior right to them. Further, Gittelman argues that he did not convert the magazines to his own use, but rather put them in the garbage.

With respect to the prima facie tort claim, Gittelman asserts that he did not have a malicious motive in removing the magazines, but rather, sought to clean up his neighborhood. Further, he contends that Learning Annex has not adequately indicated special damages needed to recover under prima facie tort. Gittelman also argues that a permanent injunction is inappropriate, as Learning Annex cannot demonstrate a likelihood of success on the merits. Additionally, Gittelman contends that the equities are in his favor as the boxes indicate that the magazines are free, and he was providing a service to the public by cleaning the area.

Learning Annex opposes the motion, relying on Gittelman's deposition testimony to support its position that by removing and disposing the magazines, he intentionally and unjustifiably interfered with Learning Annex's business for the purpose of causing injury.

Learning Annex also contends that sufficient evidence exists to raise questions of fact as to whether Gittelman committed an unjustified and wrongful act, whether Gittelman intended to cause financial harm through interference with Learning Annex's business practice, and whether and to the extent Learning Annex suffered financial damage as a result of Gittelman's conduct.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

Tortious Interference with Business Relations

The "tort of interference with business relations applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant." WFB Telecom., Inc. v. NYNEX Corp., 188 AD2d 257 (1st Dept 1992), lv denied, 81 NY2d 709 (1993). In order to recover, a plaintiff must prove that the motive for the interference was solely malicious. John R. Loftus, Inc. v. White, 150 AD2d 857 (3d Dept 1989); M.J. & K. Co. v. Matthew Bender & Co., 220 AD2d 488 (2d Dept 1995). There must be a factual basis for allegations of malice, and suspicion alone is insufficient to support a cause of action. Loftus, 150 AD2d at 860. In defining the term malicious conduct, the Court of Appeals has explained:

It is a wrongful act, done intentionally, without just cause or excuse, and from this a malicious motive is to be inferred. This does not necessarily mean actual malice or ill-will, but the intentional doing of a wrongful act without legal or social justification. The action is predicated not on the intent to injure, but on the intentional interference . . .

Campbell v. Gates, 236 NY 457 (1923).

Additionally, “conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship.” Carvel Corp. v. Noonan, 3 NY3d 182, 192 (2004). To recover for tortious interference with business relations, a plaintiff must also show that it “would have entered into an economic relationship but for defendant’s wrongful conduct.”

Vigoda v. DCA Productions Plus Inc., 293 AD2d 265, 266 (1st Dept 2002)(citations omitted).

Under this standard, plaintiffs cannot sustain their claim for tortious interference with business relations. While a reasonable fact finder could determine that Gittelman acted intentionally to dispose of the magazines, and with the knowledge that doing so would make magazines unavailable to potential students, there is insufficient evidence that but for Gittelman’s conduct Learning Annex would have entered into a contractual relationship with specific perspective students.

The Learning Annex fails to point to any specific contracts, name specific students, or provide competent proof that there was a statistically significant decline in enrollment in its advertised classes as a result of Gittelman’s conduct. See Vigoda v. DCA Prods. Plus Inc., 293 AD2d at 267 (dismissing claim for tortious interference with business relations based on plaintiff’s failure to name the parties to any specific contract that would have been entered into but for defendant’s conduct); American Preferred Prescription, Inc. v. Health Management, Inc.

252 AD2d 414, 419 (1st Dept 1998)(tortious interference with business relations claim must be dismissed when record contained insufficient facts to demonstrate that plaintiff would have entered into any type of contract “but for” defendant’s conduct); Safmor, Inc. v The Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York, 7 Misc3d 1021(A), *7 (Sup Ct NY Co. 2005)(granting summary judgment dismissing claim for tortious interference with contractual relations where the claim was based solely on allegations that defendant’s conduct resulted in plaintiff’s loss of “only unnamed potential customers”).

Similarly, Learning Annex has not shown any resulting damages from Gittelman’s conduct, and there is no basis in the record for supporting the \$1,000,000 in damages allegedly suffered due to the discarding of the magazines at issue. American Preferred Prescription, Inc. v. Health Management, Inc., 252 AD2d 419 (dismissing claim for tortious interference with business relations based on plaintiff’s failure to provide evidentiary support for claim of damages resulting from defendant’s conduct).

Accordingly, as there is no basis in the record for finding that any contracts would have been entered into but for Gittelman’s conduct, or evidentiary support for any damages resulting from such conduct, Learning Annex’s tortious interference with business relations claim must be dismissed.

Prima Facie Tort

“The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal.” Del Vecchio v. Nelson, 300 AD2d 277 (2d Dept 2002). Central to this cause of action is that defendant’s intent has been solely to injure plaintiff, or that defendant acted from disinterested malevolence, meaning that

“the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another.” Beardsley v. Kilmer, 236 NY 80, 90 (1923). In other words, a malicious intention must be defendant’s sole motivation in order to recover under prima facie tort. Squire Records, Inc. v. Vanguard Rec. Soc., Inc., 25 AD2d 190 (1st Dept), appeal dismissed, 17 NY2d 870 (1966). Recovery is barred if other motives exist, such as “profit, self-interest, business advantage.” Id.

To recover under prima facie tort, a plaintiff must also plead special damages in the form of a “specific and measurable loss.” Freihofer v. Hearst Corp., 65 NY2d 135, 143 (1985). “[G]eneral allegations of lost sales from unidentified lost customers are insufficient.” DiSanto v. Forsyth, 258 AD2d 497 (2d Dept 1999). Rather, plaintiff must provide a “particularized statement of the reasonably identifiable and measurable losses suffered.” Skouras v. Brut Prods., Inc., 45 AD2d 646 (1st Dept 1974). Failure to adequately plead special damages is grounds for dismissal of causes of action based on prima facie tort. See DiSanto, 258 AD2d 497; Pappas v. Passias, 271 AD2d 420 (2d Dept 2000).

Irrespective of whether Gittelman’s sole motive was malicious, Learning Annex may not recover under prima facie tort, as it has failed to adequately plead special damages. In its amended pleading, Learning Annex merely asserts that it suffered \$1,000,000 in damages without indicating how this amount was calculated. Furthermore, Learning Annex failed to respond to Gittelman’s discovery request for a particularized statement of its computation for monetary relief, even upon an order by this Court. Although it may be impossible to determine its damages with specificity, Learning Annex fails to offer any proof in connection with damages, such as statistical evidence regarding the change in the number of students resulting from Gittelman’s conduct, the average profit generated from each of its current students, and an

* 9]
expert affidavit supporting and analyzing such statistical evidence. As Learning Annex has failed to plead or establish special damages, it may not recover on its claim for prima facie tort.

Accordingly, Gittelman's motion for summary judgment dismissing Learning Annex's prima facie tort claim is granted.

Conversion

"Conversion is an 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.'" Vigilant Ins. Co. of America v. Housing Authority of the City of El Paso, Texas, 87 NY2d 36, 44 (1995)(citations omitted). "Interference with a right of possession is the essence of a conversion." Meese v. Miller, 79 AD2d 237, 242 (4th Dept 1981). Conversion requires that the defendant exercise dominion or interfere with the plaintiff's property in a manner that excludes the plaintiff, or deprives him of his rights to the property. Id. at 243. To properly plead such a cause of action, it is incumbent upon plaintiff to allege facts establishing that he owned or had a superior right to the materials in question, that he demanded their return, and that defendant refused to deliver them. See Weider v. Chem. Bank, 202 AD2d 168 (1st Dept), lv denied, 83 NY2d 759 (1994). "Tangible personal property or specific money must be involved." Fiorenti v. Cent. Emergency Physician, PLLC., 305 AD2d 453, 454 (2d Dept 1975).

Under this standard, Gittelman's conduct did not constitute conversion, as Learning Annex did not have superior possessory control over the magazines in its boxes. In the case of Galtieri v. Kramer, 232 AD2d 369 (2d Dept 1996), the Appellate Division held that once defendant accepted a check tendered by plaintiff, regardless of whether it was accepted in a manner contrary to plaintiff's instructions for use, an action for conversion cannot be sustained as plaintiff no longer had a possessory right to it.

Similarly, in this case, once Learning Annex made the magazines available to the public by leaving them in the boxes and encouraging people to take copies at no cost, Learning Annex no longer had a possessory right to the magazines. Even though Learning Annex owned and maintained the boxes, the question of superior possessory right pertains to the magazines, not to the boxes, as the cause of action for conversion does not involve the boxes, but rather the magazines. Notably, Javer testified at his deposition that all of the magazines in the boxes are free to anyone, as indicated on many of the boxes. Thus, once left in the boxes, Learning Annex no longer had superior possessory right to the magazines.

Accordingly, Gittelman's motion for summary judgment dismissing Learning Annex's conversion claim is granted.

Permanent Injunction

To obtain a permanent injunction, plaintiff must demonstrate "irreparable harm and the lack of an adequate remedy of law." McNeary v. Niagara Mohawk Power Corp., 286 AD2d 522, 525 (3d Dept 2001). A permanent injunction is improper where money damages may provide sufficient relief. See Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ. Co., 30 NY2d 34, cert denied, 409 U.S. 875 (1972) (affirming that an injunction, in response to defendant's claim based on defendant's alleged breach of a contractual duty to use its best efforts to promote plaintiff's books, was unnecessary, as money damages could afford plaintiff adequate relief). Further, "[a] mandatory injunction is an extraordinary remedy to which a suitor has no absolute right but which may be granted or withheld by a court of equity in the exercise of its discretion." Lexington & Fortieth Corp. v. Callaghan, 281 NY 526, 531, aff'd, 281 NY 526 (1939). A court will also examine the equities in favor of each party in consideration of whether a permanent injunction is appropriate. See Di Marzo v. Fast Trak Structures, Inc., 298 AD2d 909 (4th Dept

2002) (vacating a permanent injunction prohibiting defendant developer from artificially discharging water onto plaintiff landowner's property on the grounds that a balancing of equities is not in plaintiff's favor, as water would have naturally flowed onto plaintiff's property even in the absence of defendant's conduct).

Learning Annex does not specifically oppose Gittelman's request to dismiss its request for permanent injunction, and has otherwise, in its amended complaint, failed to sufficiently establish that such drastic remedy is appropriate here as a result of irreparable harm and the lack of an adequate legal remedy. In fact, in its amended complaint, Learning Annex alleges an amount of past and future monetary damage attributable to Gittelman's conduct, suggesting that an adequate legal remedy exists.

Accordingly, Gittelman's motion for summary judgment dismissing Learning Annex's request for permanent injunction is granted.

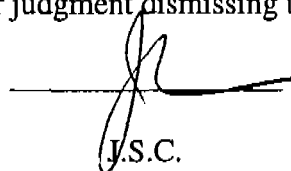
Conclusion

In view of the above, it is

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint in its entirety.

DATED: June 23, 2006


J.S.C.

FILED
JUL 06 2006
NEW YORK
COUNTY CLERKS OFFICE