

**Ellenberg v Penquin Tenants Corp.**

2007 NY Slip Op 30920(U)

April 18, 2007

Supreme Court, New York County

Docket Number: 0400420/2007

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----x  
SHEPARD ELLENBERG,

Plaintiff,

-against-

INDEX NO. 400420/2007

PENQUIN TENANTS CORPORATION, and DAVID  
GOLDSMITH and SUSAN CHIN, Individually and as  
Members of the Board of Directors of Penquin Tenants'  
Corporation,

Defendants.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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 accompanying  
Decision and Order.

Dated: April 18, 2007

**FILED**  
APR 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

\_\_\_\_\_  
KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 3

-----X  
SHEPARD ELLENBERG,

Plaintiff,

Index No. 400420/2007

-against-

PENQUIN TENANTS CORPORATION, and DAVID  
GOLDSMITH and SUSAN CHIN, Individually and as  
Members of the Board of Directors of Penquin Tenants'  
Corporation,

**DECISION and ORDER**

Defendants.

**FILED**

APR 25 2007

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**KARLA MOSKOWITZ, J.:**

Defendants, Penquin Tenants' Corporation ("Co-op"), David Goldsmith and Susan Chin, move to dismiss what was a third party action and is now a first party action. Justice Kenneth W. Rudolph, Justice of the Supreme Court, recently severed this action from a first party action before him and transferred this action to this court.

In his December 11, 2006 decision, Justice Rudolph succinctly stated the claims in this now separate action and the grounds of the motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and (7) for failure to state a claim and based on documentary evidence and for sanctions.

I am familiar with the allegations in this lawsuit as well as among the various parties based on two other actions before me: *Penguin Tenants Corp. v Shepard Ellenberg et al*, Index No. 600923/2004 and *Shepard Ellenberg v Penguin Tenants Corp.*, Index No. 110409/2005. It is unnecessary for the purposes of this decision to reiterate the allegations in those lawsuits.

In this action, plaintiff Shepard Ellenberg sues defendants for tortious interference with his sublease agreement with Aurora Restaurant Corp. and Anna Molisse and for punitive damages.

A claim for tortious interference with contract has six elements: (1) existence of a valid contract between a plaintiff and a third party; (2) defendants had knowledge of that contract; (3) defendants acted with the intent of inducing the third party to breach the contract; (4) the third party breached the contract; (5) defendants' actions were a substantial factor in causing the breach; and (6) plaintiffs were damaged. (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413; 2 PJI 3:56).

Defendants argue that I found the sublease agreement invalid and, thus, plaintiffs cannot meet the first element of the cause of action. Defendants further argue that their "interference" was not improper or was "privileged" or "justified." The remaining elements of the cause of action are not in issue on this motion to dismiss.

In addition, defendants argue that the complaint contains no separate allegations against defendant Susan Chin. Defendants further rely on documentary evidence consisting of the specific communications defendants sent as well as the House Rules and my Order. Finally, defendants seek sanctions under Part 130-1 of the Chief Administrator's Rules contending the causes of action are barred as a matter of law.

As to the first element, there is nothing in the record that supports defendants' contention that I found the sublease invalid *ab initio*. Even if the terms of the sublease violated my Preliminary Injunction Order, that does not invalidate the sublease between Ellenberg and the sublessee Aurora Restaurant Corp.

Most of the allegations in the third party complaint are irrelevant to the claimed tortious interference with contract claim. (Third Party Complaint, ¶¶ 8-51). As is relevant to the claim, Ellenberg alleges that Goldsmith as Co-op President, with Chin's knowledge and consent, drafted a letter addressed to the subtenant threatening contempt, sanctions or other liability for

\* 4 ]  
purported violations of my June 30 Order. (*Id.*, ¶ 53).

The amended complaint continues by alleging that defendants had “taped” the letter and a copy of the Order on the outside door, directed the porter to deliver the letter and the Co-op’s counsel to serve a copy of the letter on the sublessee. (*Id.*, ¶¶ 54-56). Finally, the complaint alleges that the Co-op refused to consider the “scope of work” application of Aurora and sought to hold Aurora in contempt. (*Id.*, ¶¶ 58, 59).

First, there are no allegations against the individuals except as acting on behalf of the defendant Co-op, so the court dismisses the action against David Goldsmith and Susan Chin, individually. Second, as officers or members of the Board of Directors, these individuals are immune from suit without specific allegations of personal gain for themselves as opposed to the allegations here as acting on behalf of the corporation. (*Petkanas v Kooyman et al*, 303 AD2d 303 [1st Dept 2003]; *Joan Hansent Co v Everlast World’s Boxing Headquarters Corp.*, 296 AD2d 103, 109 [1st Dept 2002]).

Thus, at this juncture, I dismiss all allegations against all defendants except for the Co-op.

As to the Co-op, there are two sets of allegations in the complaint. The first relate to the Co-op’s publication of its letter, the Co-op rules and my Order to the subtenant. The second set relate to the Co-op’s later failure to approve plans and its initiation of contempt proceedings.

The Co-op’s defense rests on the documents themselves. The three documents defendants had delivered to the sublessees consist of a copy of this Court’s Order filed June 30, 2004 in *Penquin Tenants’ Corp v Shepard Ellenberg et al* (600923/2004), a letter and the Co-op rules.

The Order granted the Co-op plaintiff in that action a preliminary injunction ordering “defendants . . . and anyone acting on their behalf or in concert with them . . . from using or

\* 5 ]  
occupying . . . [the premises] in contravention [of the Co-op's] Rules and Regulations 1, 2, 3 and 4 . . . .”

Accompanying that order was the following letter or notice about the order:

To the subtenant leasing or occupying the commercial subgrade premises located at 21 West 9<sup>th</sup> Street, NY, NY, and anyone acting in concert or on behalf of the subtenant or Shepperd Ellenberg or performing any work or activity in the premises,

Please be advised that the Supreme Court of the State of New York has enforced by an injunctive order the first four rules of the House Rules of this cooperative, and such rules, forbid, among other things, the use of the premises as anything other than a white table cloth restaurant, the playing of ANY music and amplification of sounds in the restaurant by either the tenant or any sub-tenant, and any construction without the permission of the Coop board. A copy of the Court order and the rules which the order enforces are attached to this letter. Please be further advised that any violation of the Court's order by anyone who has knowledge of the order can result in contempt of court or other sanctions or liability. If you have any questions, please contact our counsel, Jeffrey M. Eilender, Esq., Schlam Stone & Dolan LLP, 265 Broadway, New York, NY 10004 (212) 344-5400. You are also advised to consult with your own attorney regarding the meaning of this Order.

The third document was a copy of the Co-op's Rules referred to in my Order.

A court accepts the facts as alleged in a complaint as true and accords a plaintiff every possible favorable inference. Under CPLR 3211 (a)(1), the court grants dismissal only if the documentary evidence that the defendants submit conclusively establishes a defense to the claim as a matter of law. (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]).

Here, the delivery of these documents as well as the Co-op's later actions, including bringing on a contempt motion, all support the Co-op's defense of justification. (*The Torrenzano Group v Hugh Burnham*, 26 AD3d 242 [1st Dept 2006]). In *Torrenzano*, the court, on a pre-answer motion to dismiss, held that the alleged interference of a contract had an economic justification that required the plaintiff "to adduce evidence in opposition sufficient to

raise an issue of fact.” That it failed to do. The court also relied on *Felsen v Sol Café Mfg. Corp.*, 24 NY2d 682 (1969) in which the Court stated, “Procuring the breach of a contract in the exercise of equal or superior right is acting with just cause or excuse and is justification for what would otherwise be an actionable wrong.” (24 NY2d at 687).

Here, defendants first confusingly argue that there is an “absolute litigation privilege” or litigation justification. As plaintiff’s counsel points out, the “privilege” relates to defamation causes of action and statements in legal proceedings. (Memorandum of Law in Opposition to Motion, pp 12-14). The application of this privilege to other causes of action still rests on statements made in litigation and is inapposite to what defendants did here.

However, the concept of economic justification is applicable and applies equally to areas other than business. (*Ultramar Energy Limited v Chase Manhattan Bank, N.A.*, 179 AD2d 592 [1st Dept 1992] [protection of bank’s security interest]; *MLI Industries, Inc. v New York State Urban Development Corp.*, 205 AD2d 998 [3d Dept 1994] [interest of state agencies in protecting public funds]; *Stratford Materials Corp. v Jones*, 118 AD2d 559 [2d Dept 1986] [public officials interest in its contracts]; *Beardsley v Kilner*, 236 NY 80, 90 [1923] [social factors]; *Foster v Churchill*, 87 NY2d 744 [1996]).

Defendants can rely on justification as a defense here, not as a “litigation privilege,” but to justify its actions in protecting the Co-op’s interest in enforcing its then valid rules as embodied in this court’s Order. The case law that plaintiff relies on to invalidate the justification defense is applicable to a different claim: interference with contractual relations or contracts at will and not interference with an existing contract.

A plaintiff can defeat a justification defense only by alleging or submitting evidence of defendants’ committing independent torts or advancing some personal interest. (*Foster v*

*Churchill, supra*). Under *Felson* plaintiff would have to allege facts showing malice or fraudulent or illegal means. Acting in bad faith is insufficient. (*Id.* at 751). Neither in his complaint nor his attorney's affirmation in opposition or his brief does plaintiff present factual allegations negating defendant's justification defense.

Thus, as in *Torrenzano, supra*, defendant Co-op is entitled to dismissal of the tortious interference claim as a matter of law. Similarly, in *Delta Filter Corporation v Gilles A. Moria*, 108 AD2d 991, 993 (3d Dept 1985), only after a bench trial, the court likewise affirmed dismissal of a counter claim for interference with plaintiff's business relationships with its suppliers and customers that was based on plaintiff informing them that plaintiff no longer employed defendant's principals and that there was litigation between the two companies.

With the dismissal of the tortious interference claim, the punitive damages claim likewise fails.

Without submitting a factual basis for repleading, plaintiff's request to replead is without merit.

Defendant's request for sanctions is denied because plaintiff's institution of this lawsuit is not frivolous. The law in the tortious interference area is unsettled at this juncture. (22 NYCRR 130-1).

Therefore, it is

ORDERED that the complaint is dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 18, 2007

ENTER

  
\_\_\_\_\_  
J.S.C.

**FILED**  
APR 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE