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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 116447/2006

GUARDSMAN ELEVATOR

VS

APARTMENT INVESTMENT

Sequence Number : 001

DISMISS ACTION

INDEX NO. 116447/06

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 ...	1
Answering Affidavits — Exhibits (in seq. 002)	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JUL 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 16, 2007

MARTIN SHULMAN 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: I.A.S. PART 1

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GUARDSMAN ELEVATOR CO., INC.,

Plaintiff,

Index No. 116447/06

-against-

APARTMENT INVESTMENT & MANAGEMENT CO., AIMCO PROPERTIES, L.P., AIMCO CAPITAL, INC., OP PROPERTY MANAGEMENT, LLC, 107-145 WEST 135TH STREET ASSOCIATES LLP, PARRY C. BERKOWITZ and B SQUARED ENGINEERING, LLC.,

Defendants.

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MARTIN SHULMAN, J.:

Motion Sequence Nos. 001 and 002 are consolidated for disposition. In Motion Sequence No. 001, defendants Parry C. Berkowitz and B Squared Engineering, LLC (collectively the "B Squared Defendants") move for an order, pursuant to CPLR 3211(a)(7) dismissing the complaint as asserted against them, or alternatively, in the event that the court should deny the motion, granting them additional time to serve an answer. In Motion Sequence No. 002, defendants Apartment Investment & Management Co., Aimco Properties L.P., Aimco Capital, Inc., OP Property Management, LLC and 107-145 135th Street Associates, LLP (collectively "AIMCO") move for an order: a) pursuant to CPLR 3211(a)(1), dismissing the complaint as asserted against them on the ground that a defense is founded upon documentary evidence; b) pursuant to CPLR 3211(a)(7), dismissing plaintiff's claim for conversion for failure to state a cause of action; and c) if deemed appropriate, treating their application as one for summary judgment pursuant to CPLR 3211(c).

Plaintiff Guardsman Elevator Co., Inc. ("Guardsman" or "plaintiff"), an elevator servicing company, alleges that, until recently, it serviced approximately 42 elevators for AIMCO and various AIMCO affiliates and subsidiaries at several AIMCO properties throughout New York. Guardsman further asserts that, on or about June 1, 2002, it entered into a master contract with AIMCO for a one-year term for the servicing of elevators at various AIMCO properties throughout New York (the "Service Contract"), and that this contract had been renewed annually, most recently on June 1, 2006.

On July 18, 2006, Guardsman entered into another contract with OP Property Management, LLC ("OP"), a subsidiary of AIMCO and manager of 107-145 West 135th Street, New York, New York (the "Subject Premises"), for the modernization of 10 elevators (the "Modernization Contract") located within the Subject Premises. A few months later, AIMCO notified Guardsman that it was terminating the Modernization Contract (see correspondence from AIMCO to Guardsman dated September 22, 2006 [the "Termination Letter"] at Exh. C to the B Squared Defendants' motion).

Guardsman's complaint asserts four causes of action: prima facie tort (first) and conversion (second) against AIMCO; breach of contract (third) against OP and 107-145 West 135th Street Associates, LLC, the alleged owner of the Subject Premises; and tortious interference with contract (fourth) against the B Squared Defendants, an alleged professional engineering consulting business for elevator servicing, repairs and modernization.

In Motion Sequence No. 001, the B Squared Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(7), claiming that: 1) a claim for tortious interference with an existing contract cannot lie where the underlying contract is

terminable at will; and 2) the complaint does not sufficiently allege the elements necessary to support a claim for tortious interference with a contract.

On a motion to dismiss pursuant to CPLR 3211, the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 [1994]); Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, 275 A.D.2d 243, 712 N.Y.S.2d 526 [1st Dept., 2000]). A claim for tortious interference with contract requires: 1) the existence of a valid contract between the plaintiff and a third party; 2) defendant's knowledge of that contract; 3) defendant's intentional procurement of a breach of that contract without justification; 4) actual breach of the contract; and 5) resulting damages (NBT Bancorp Inc. v. Fleet/Norstar Fin. Group Inc., 87 N.Y.2d 614, 641 N.Y.S.2d 581 [1996]). "The allegations cannot be conclusory, but must include facts sufficient to support the conclusions to be drawn. Mere conclusions that third parties cancelled contracts because of defendants' action will not withstand a motion to dismiss." Tsadik v. Beth Israel Med. Center, 13 Misc.3d 359, 365, 822 N.Y.S.2d 395, 399 (Sup. Ct., NY Cty., 2006), citing M.J. &K. Co., Inc. v. Matthew Bender and Co., Inc., 220 A.D.2d 488, 631 N.Y.S.2d 938 (2nd Dept., 1995).

As argued by the B Squared Defendants, agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts (American Preferred Prescription, Inc. v. Health Management, Inc., 252 A.D.2d 414, 678 N.Y.S.2d 1 [1st Dept., 1998]). Guardsman does not dispute that the Modernization Contract was terminable at will, and, accordingly, a claim for tortious interference with an existing contract cannot be

alleged (Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 428 N.Y.S.2d 628 [1980]).

However, where there has been no breach of an existing contract, a cause of action for tortious interference with prospective contractual relations can be asserted provided that plaintiff demonstrates that the interference was accomplished by wrongful means (Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., supra), such as "physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure" (Snyder v. Sony Music Entertainment, Inc., 252 A.D.2d 294, 300, 684 N.Y.S.2d 235 [1st Dept., 1999]), or where defendant acted solely for the purpose of harming the plaintiff (id.). Here, Guardsman argues that its complaint sufficiently alleges that the B Squared Defendants acted wrongfully and with malice.

The purported wrongful means alleged in the complaint consist of "maliciously false accusations" made by the B Squared Defendants to AIMCO concerning work Guardsman performed at the Subject Premises (Complaint, ¶¶ 24, 53, 54), including: 1) insufficient staffing of the project; 2) supplying non-conforming and non-specified elevator equipment; 3) non-conformance with the project manual; 4) inability to provide a project schedule; and 5) general failure to communicate effectively on the project (id., ¶ 22). Plaintiff alleges that these injurious allegations are inaccurate, false and without basis in fact (id., ¶¶ 23, 54), and were allegedly utilized by AIMCO as a pretext to terminate the Modernization Contract for cause (id., ¶¶ 24, 53). Guardsman further alleges that the B Squared Defendants, with actual knowledge of the existence of the Modernization Contract, "intentionally, knowingly and without reasonable justification or

excuse, interfered with the contractual relationship between plaintiff and defendants, and induced defendants to breach the [Modernization Contract] with plaintiff."

Here, plaintiff argues that its allegations of "maliciously false accusations" are sufficient to withstand a motion to dismiss. However, while Guardsman may use the appropriate buzzwords to establish wrongful means in its attempt to set forth a cause of action for tortious interference with prospective contractual relations, under the factual circumstances presented, the court must conclude that the fourth cause of action fails to state a cause of action.

Here, plaintiff alleges that the B Squared defendants "acted as professional engineers and engineering consultants to the AIMCO Defendants." (Complaint, ¶ 24). In providing its assessment of Guardsman's work to AIMCO, the B Squared defendants were acting within the scope of their own contractual relationship with AIMCO. Thus, it cannot be said that the B Squared defendants acted solely for the purpose of harming Guardsman. See Miller v. Mt. Sinai Med. Center, 288 A.D.2d 72, 73, 733 N.Y.S.2d 26 (1st Dept., 2001). Moreover, in acting within the scope of their contractual duties, the B Squared defendants' alleged conduct cannot be construed as "wrongful means". Conclusory allegations of alleged false and malicious statements do not rise to the level of "physical violence, fraud, misrepresentation, civil suits, criminal prosecutions . . . [or] some degree of economic pressure" (bracketed matter added).

The situation in this case is analogous to the factual scenario in Miller v. Mt. Sinai Med. Center, supra, where the court dismissed an employee's cause of action for tortious interference with prospective contractual relations against her former supervisor predicated upon a negative employment reference, stating:

> That Siegel may have given plaintiff a negative job reference or did not believe plaintiff to be a qualified candidate for the position did not constitute interference by "wrongful means." *Id.*

Similarly, that the B Squared defendants may have made negative comments to AIMCO pertaining to Guardsman's work in the context of performing their own contractual duties to AIMCO cannot constitute "wrongful means". See also, Scalise v. Adler, 267 A.D.2d 295, 296, 700 N.Y.S.2d 49 (2nd Dept., 1999)(motion to dismiss cause of action for tortious interference with prospective contractual relations granted where plaintiffs failed to demonstrate defendant 'acted with the sole purpose of harming the plaintiffs or engaged in any improper or unlawful conduct' and failed to establish a direct link between defendant's alleged defamatory remarks and termination of plaintiffs' employment or that 'but for' such remarks plaintiffs' employment would have continued). Accordingly, the B Squared defendants' motion to dismiss the fourth cause of action is granted.

In Motion Sequence No. 002, AIMCO moves pursuant to CPLR 3211(a)(1) to dismiss the claim for prima facie tort as asserted against them on the ground that a defense is founded upon documentary evidence. Under CPLR 3211(a)(1) a defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law (Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc., 290 A.D.2d 383, 737 N.Y.S.2d 40 [1st Dept., 2002]). The criterion is whether the proponent of a pleading has a cause of action, not whether he has stated one (Leon v. Martinez, supra).

In support of their motion, the AIMCO defendants maintain that the prima facie tort claim should be dismissed because special damages are an essential element in a

claim for prima facie tort, and the Modernization Contract contains a provision that specifically bars recovery of special damages. The requisite elements of a cause of action for prima facie tort are: 1) the intentional infliction of harm, 2) which results in special damages, 3) without any excuse or justification, 4) by an act or series of acts which would otherwise be lawful (Freihofer v. Hearst Corp., 65 N.Y.2d 135, 490 N.Y.S.2d 735 [1985]).

Guardsman acknowledges that special damages are an essential element in a claim for prima facie tort. However, plaintiff argues that the waiver of special damages in the Modernization Contract is applicable only with respect to breach of contract claims, but not to its tort claim.

The law is well-settled that the parties' intention should be determined from the language employed within the four corners of the agreement, and that where the language is clear and unequivocal, interpretation is a matter of law to be determined by the court (Hartford Acc. & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 350 N.Y.S.2d 895 [1973]; see also, American Express Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d 275, 562 N.Y.S.2d 613 [1st Dept., 1990], app. den. 77 N.Y.2d 807, 569 N.Y.S.2d 611 [1991]). AIMCO relies on Section 12.17 of the Modernization Contract, which provides, in relevant part, that the "contractor waives and releases all claims for or right to any consequential, incidental, exemplary, punitive or special damages".

The aforementioned provision is not an exculpatory clause, as plaintiff argues in its opposition papers.[1] Rather, the language utilized therein limits the types of damages

[1] An exculpatory clause exculpates a party from his own negligence (see Gross v. Sweet, 49 N.Y.2d 102, 424 N.Y.S.2d 365 [1979]).

that Guardsman may seek from AIMCO. However, as plaintiff notes, clauses limiting the amount of damages are treated the same as exculpatory clauses in general, i.e., both are enforceable against ordinary negligence but unenforceable against claims of gross negligence or intentional misconduct (see Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 583 N.Y.S.2d 957 [1992]).

Guardsman argues that its complaint sufficiently asserts malicious and willful conduct by AIMCO. The complaint alleges, inter alia, that: 1) during the period from approximately March 2004 to April 2005, plaintiff, at the request of certain AIMCO personnel and officials, assisted AIMCO in "investigations and audits concerning questionable business practices and corruption engaged in by certain [AIMCO] personnel in connection with, inter alia, the elevator contracting business in the New York area and contracting businesses with other trades" (Complaint, ¶18); 2) AIMCO terminated the Modernization Contract in retaliation for Guardsman's exposure of AIMCO's corrupt practices and participation in AIMCO's internal investigations and audits, which resulted in the replacement of several of AIMCO's personnel (id., ¶¶ 23, 27, 29, & 35); 3) the reasons AIMCO sets forth in the Termination Letter were pretextual and false (id., ¶ 33); 4) in light of Guardsman's satisfactory performance under both contracts, AIMCO had no other motivation to terminate the contracts other than to harm Guardsman (id., ¶ 34); and 5) AIMCO's actions were malicious and lacking in any justification (id., ¶ 35).

In liberally construing the complaint, at this juncture, Guardsman sufficiently pleads intentional wrongdoing by AIMCO that might operate to relieve it of the consequences of the contract damages limitation clause it agreed to in the

Modernization Contract (see Sommer v. Federal Signal Corp., supra). Accordingly, that branch of AIMCO's motion pursuant to CPLR 3211(a)(1) for dismissal of the first cause of action for prima facie tort is denied.

AIMCO also moves, pursuant to CPLR 3211(a)(1), for dismissal of the third cause of action for breach of contract, arguing that the Modernization Contract provided it with the right to terminate with or without cause, and thus, that it did not breach the contract. To state a cause of action for breach of contract, a plaintiff must allege the specific terms of the agreement, the consideration, the plaintiff's performance and defendant's breach of the agreement (Furia v. Furia, 116 A.D.2d 694, 498 N.Y.S.2d 12 [2nd Dept., 1986]).

As AIMCO notes, Section 11.3 of the Modernization Contract, entitled "Termination by Owner for Convenience", provides, in relevant part, that AIMCO "may, without cause, terminate performance under this Contract." AIMCO correctly argues that it was free to terminate Guardsman's employment at any time, without cause. Since the Modernization Contract is clearly devoid of any language imposing an express limitation on AIMCO's unfettered right to terminate at will, and indisputably indicates an at-will arrangement, Guardsman fails to state a cause of action for breach of contract (see Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 514 N.Y.S.2d 209 [1987]; see also, Talansky v. American Jewish Historical Society, 8 A.D.3d 150, 779 N.Y.S.2d 58 [1st Dept., 2004]).

Plaintiff's argument that AIMCO should be equitably estopped from relying on the aforementioned section based on the covenant of good faith and fair dealing is without merit. Since the agreement was terminable at will, it was not subject to the implied duty

of good faith and fair dealing (Interweb, Inc. v. iPayment, Inc., 12 A.D.3d 164, 783 N.Y.S.2d 468 [1st Dept., 2004], lv dismissed 4 N.Y.3d 776, 792 N.Y.S.2d 894 [2005]), inasmuch as such duty would be inconsistent with AIMCO's unfettered right to terminate Guardsman at any time (see Sabetay v. Sterling Drug, Inc., supra; see also, Talansky v. American Jewish Historical Society, supra). Additionally, a claim for breach of implied covenant of fair dealing cannot substitute for an unsustainable breach of contract claim (Nikitovich v. O'Neal, 40 A.D.3d 300, 836 N.Y.S.2d 34 [1st Dept., 2007]; see also, Skillgames, LLC v. Brody, 1 A.D.3d 247, 767 N.Y.S.2d 418 [1st Dept., 2003]). Therefore, that branch of AIMCO's motion for dismissal of the third cause of action for breach of contract asserted against it is granted.

That branch of AIMCO's motion for dismissal of the second cause of action for conversion has been withdrawn. Accordingly, AIMCO's motion in Motion Sequence No. 002, pursuant to CPLR 3211(a)(1) and (7) for dismissal of the complaint, or alternatively, pursuant to CPLR 3212, is granted only to the extent of dismissing the third cause of action for breach of contract and is otherwise denied.

Accordingly, it is

ORDERED that defendants Parry C. Berkowitz's and B Squared Engineering, LLC's motion (Sequence No. 001) pursuant to CPLR 3211(a)(7) for dismissal of the complaint as asserted against them is granted; and it is further

ORDERED that the motion by defendants Apartment Investment & Management Co., Aimco Properties LP, Aimco Capital, Inc., OP Property Management, LLC, and 107-145 135th Street Associates, LLP, pursuant to CPLR 3211(a)(1) and (7), or alternatively, pursuant to CPLR 3212 (Seq. No. 002), is granted only to the extent of

dismissing the third cause of action for breach of contract, and is otherwise denied; and it is further

ORDERED that the first and second causes of action are severed and continued as to the AIMCO defendants; and it is further

ORDERED that the AIMCO defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for plaintiff and defendants.

The parties are directed to attend a preliminary conference on August 7, 2007 at 9:30 a.m., at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

Dated: New York, New York
July 16, 2007

Hon. Martin Shulman, J.S.C.