

Siegmund Strauss, Inc. v East 149th Realty Corp.

2007 NY Slip Op 32436(U)

August 3, 2007

Supreme Court, New York County

Docket Number: 0601991/2006

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED
Justice

FBEM

PART 60

Siegmund Strauss
PLAINTIFF

INDEX NO. #601991-2006

MOTION DATE _____

- v -
East 149th Realty Corp.

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

DEFENDANT

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

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED

AUG - 6 2007

NEW YORK
COUNTY CLERKS OFFICE

Dated: 8/3/07

Bernard J. Fried
J.S.C.

BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION **J.S.C.**

Check if appropriate: DO NOT POST

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 60

-----X
SIEGMUND STRAUSS, INC.,

Plaintiff,

Index No. 601991/2006

-against-

EAST 149th REALTY CORP, WINDSOR BRANDS, LTD.,
TWINKLE IMPORT CO., INC., TERESA RODRIGUEZ and
ROBERT RODRIGUEZ,

Defendants,

TERESA RODRIGUEZ, ROBERT RODRIGUEZ, TWINKLE
IMPORT CO., INC., and WINDSOR BRANDS, LTD.,

Third Party Plaintiffs,

Index No. 590306/2007

-against-

STANLEY MAYER and MARC STRAUSS, and S. STRAUSS,
INC.,

Third Party Defendants

FILED
AUG - 6 2007
NEW YORK
COUNTY CLERKS OFFICE

-----X

APPEARANCES:

For Plaintiff/Third Party
Defendants:

LOWENSTEIN SANDLER PC
by: Ralph Berman
1251 Avenue of the Americas
New York, NY 10020

For Defendants/Third Party
Plaintiffs:

FRIEDRICH & FRIEDRICH, LLC
by: David B. Friedrich
203 Godwin Avenue
Ridgewood, NJ 07450

Fried, J.:

This case comes before me on a motion to dismiss defendant's counterclaim and third-party complaint, both of which assert claims of, among other things, fraud, conversion, and tortious interference with a contractual relationship.

The original action was brought by Siegmund Strauss, Inc. ("Strauss") against defendants Windsor Brands, Ltd. ("Windsor"), Twinkle Import Co., Inc. ("Twinkle"), Teresa Rodriguez ("Teresa"), Roberto Rodriguez ("Roberto"),¹ and 149th Realty Corp. Roberto and Teresa (collectively "the Rodriguezes") are the owners and operators of Windsor and Twinkle. The Rodriguezes have asserted a counterclaim against Strauss and a third-party complaint against Stanley Mayer ("Stanley") and Marc Strauss ("Marc") as individuals.² Stanley is the president of Strauss and Marc is its secretary. The dispute is essentially one with Stanley, Marc, and Strauss (the "Strauss parties") on one side, and Roberto, Teresa, Windsor, and Twinkle (the "Rodriguez parties") on the other. On September 19, 2006, I granted a preliminary injunction that, in effect, gave sole possession of the premises in dispute to Strauss.

In that decision, I found the following: Strauss and Twinkle ran similar operations, with each selling paper and plastic products, meat, and non-perishable foods for wholesale distribution. Windsor was the business name that the Rodriguez parties

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In the Strauss parties' caption of their motion to dismiss (as well as in the body of that motion), Roberto's name appears incorrectly as "Robert Rodriguez." Accordingly, "Robert Rodriguez" is the name that appears in the caption of this decision.

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The third-party complaint also demands judgment against "S. Strauss, Inc.," but does not make any allegations against that entity.

had on the lease to the property from which Twinkle operated – 520 Exterior Street, Bronx, a/k/a 110 East 149th Street, Bronx, NY (the “property” or “premises”). By 2005, both businesses were in trouble; Strauss had recently lost its lease due to the closing of the Bronx Terminal Market, and Twinkle had financial troubles and needed help to stay in business. The parties were put into contact by their mutual accountant to consider a merger of the businesses, and they reached a preliminary agreement in the early months of 2006. Under this agreement, Strauss was to move into the premises, Windsor and Twinkle were to be dissolved, Strauss was to purchase Windsor’s equipment and fixtures for \$100,000, Roberto or Teresa was to become a one-third owner of the new business entity that was to keep the Strauss name, and Windsor was to use its best efforts to negotiate a new lease between its landlord and Strauss. Performance of the agreement was conditioned on Strauss obtaining a five-year lease from Windsor’s landlord. Left unresolved in the preliminary injunction decision is whether or not this negotiated agreement was an enforceable contract or whether the agreement as negotiated fails for indefiniteness. During the weekend of April 29-30, 2006, Strauss moved into the property. Shortly thereafter, however, the relationship between the Strausses and the Rodriguezes began to sour. By June 1, Strauss had changed the locks on the property, and on June 5, the Rodriguezes were fired and taken off the payroll. The following day, the Rodriguezes were not permitted to enter the premises. (Siegmund Strauss, Inc. v. East 149th Realty Corp., 13 Misc. 3d 1209[A].)

On June 6, the Strauss parties filed this action. They sought a declaratory judgment stating that Strauss is the tenant of the property and that Windsor and Twinkle have no interest in it. They also sought specific performance of the alleged agreement, an

injunction stopping the Rodriguezes and their employees from entering the property, and damages for allegedly fraudulent statements that induced Strauss to enter the agreement and for tortious interference with prospective business opportunities.

On the same date, the Rodriguez parties filed a complaint against Strauss, Stanley, and Marc in the Superior Court of New Jersey (the “New Jersey action”). The parties agreed to voluntarily dismiss this action and re-file it in New York. However, there is a dispute as to the scope of this agreement—the Strauss parties claim that they agreed to accept service in New York and to litigate the case there, but did not agree to waive any arguments about the sufficiency of the complaint; the Rodriguez parties claim that the Strauss parties had in fact agreed to waive arguments about its sufficiency. Alternatively, the Rodriguez parties argue that the Strauss parties made representations to the New Jersey court that are inconsistent with their current position that personal liability cannot be imposed on Marc and Stanley, and that this inconsistency should form the basis for an application of judicial estoppel.

Pursuant to the agreement voluntarily dismissing the New Jersey action, the Rodriguez parties counterclaimed in their action against Strauss and also asserted third-party claims against Marc and Stanley. The Rodriguez parties allege fraud in the first cause of action of the counterclaim and in count one of the third-party complaint, conversion in the second cause of action of the counterclaim and in count three of the third party-complaint, and tortious interference in the third cause of action of the counterclaim and in count five of the third-party complaint. The allegations, while not identical, are similar in their descriptions of the alleged wrongdoings; the principal difference is that the counterclaim asserts claims against Strauss, while the third-party

complaint asserts claims against Mark and Stanley. The Strauss parties have moved to dismiss these three claims for failure to state a claim pursuant to C.P.L.R. 3211(a)(7). They additionally seek dismissal of all of the claims for punitive damages. Finally, they move to dismiss all of the claims against “S. Strauss, Inc.”³ and to dismiss all of the claims against Marc and Stanley in their individual capacities, except fraud, which, as first stated, is claimed to be legally insufficient.

When deciding a motion to dismiss pursuant to C.P.L.R. 3211(a)(7), the facts as alleged in the complaint and opposition papers must be accepted as true. A court must accord the plaintiff “the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.” E.g., Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414 (2001); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). “The motion must be denied, if from the pleadings’ four corners, ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” Richbell Info. Servs., Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 289 (1st Dep’t 2003) (quoting 511 West 232nd Owners Corp. v. Jennifer Realty Corp., 98 N.Y.2d 144, 151-152 [2002]). Some claims, however, are subject to a higher pleading standard and must be pled with specificity, including claims of fraud, Sheridan Broad. Corp. v. Small, 19 A.D.3d 331, 332 (1st Dep’t 2005), and claims seeking to impose for personal liability for corporate actions, Barclay Arms, Inc. v. Barclay Arms Assocs., 74 N.Y.2d 644, 647 (1989). Both of these claims are present in the Rodriguez parties’ pleadings.

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The Strauss parties’ motion to dismiss all claims and demands against the entity named “S. Strauss, Inc.” is unopposed by the Rodriguez parties. Accordingly, the motion to dismiss these claims is granted.

As a threshold matter, the Rodriguez parties make two arguments as to why I should not consider this motion. Both arguments involve the voluntary dismissal of the New Jersey action. First, they claim that as part of the agreement to dismiss the New Jersey action, the attorneys for Strauss agreed to waive any arguments about the legal sufficiency of the complaint. Second, and in the alternative, they argue that the attorneys for Strauss made statements in the New Jersey court that are inconsistent with their current position that personal liability cannot be imposed on Marc and Stanley, and that this inconsistency should form the basis of an application of judicial estoppel.

In response, the Strauss parties claim that the agreement did not deal with the issue of whether the pleadings were legally sufficient. Furthermore, they argue that there is no basis for judicial estoppel because their statements to the New Jersey court are consistent with their current position that personal liability cannot be imposed for the actions of Strauss.

The record supports not the Rodriguez parties' understanding of the agreement between the parties, but rather that of the Strauss parties. Even the affidavit of David B. Friedrich, Esq., counsel for the Rodriguez parties, does not claim that the Strauss parties consented to the sufficiency of the third-party complaint that was to be filed in New York. This affidavit states only that the third-party complaint "was deemed acceptable by Plaintiff's counsel." (Affirmation of David B. Friedrich ¶ 5.) Paragraph six of that affidavit states only that there was a misunderstanding: "If Defendant knew it was Plaintiff's intent to just accept a review of our pleadings and then file a Motion to Dismiss. [*sic*] Defendant would have rejected Plaintiff's motion" On this record,

there is no support for the claim that the Strauss parties waived their right to challenge the legal sufficiency of the claims.

Likewise, there is no basis for judicial estoppel. The Rodriguez parties seek to estop the Strauss parties from taking the position that personal liability cannot be imposed on Stanley and Marc—a position the Rodriguez parties view as inconsistent with statements that the Strauss parties made in the New Jersey action. In the New Jersey action, the Strauss parties wrote to the court that

[t]he Rodriguez entities have already asserted a Counterclaim in the New York Action that covers the sum and substance of the Complaint in the New Jersey Action, and there is no reason why the individual Defendants here (Messrs Mayer and Strauss) could not be added as additional counterclaim Defendants there. . . . It would not be difficult for them to add Messrs Mayer and Strauss as additional counterclaim defendants. *See* New York CPLR 3019(a). This action could also simply be commenced in New York and consolidated with the pending New York Action. *See* New York CPLR 602. . . . [i]n order to avoid piecemeal litigation, the dispute can be decided in its entirety if Messrs Mayer and Strauss are added as parties to the New York action or this action is commenced there and consolidated with the pending matter.

(Memorandum of Law in Opposition to Third-Party Defendant’s Motion to Dismiss [“Memo. in Opp.”], Exhibit B, 1:8-11; 2:10-12; 3:13-16.)

“The doctrine of judicial estoppel precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed.” Gale P. Elston, P.C. v. Dubois, 18 A.D.3d 301, 303 (1st Dep’t 2005) (internal quotations omitted). Here, the prior statements by the Strauss parties are not inconsistent with their current position. The same way that Marc and Stanley were individual defendants in the New Jersey action, they have been made individual defendants in the

New York action, and the same challenges to the imposition of personal liability now made in the New York action could have been made in the New Jersey action.

The second threshold issue on this motion is the question of whether there was an enforceable contract between the parties at the time of the allegedly tortious actions. There is no dispute that the parties had an oral agreement before Strauss moved into the premises; the parties disagree, however as to whether this agreement was an enforceable contract or only a preliminary understanding. The Rodriguez parties' claims for damages resulting from fraud, conversion, and tortious interference all operate on the theory that there was not an enforceable contract at the time of the complained-of actions. They acknowledge as much in their opposition papers:

[I]f the Court finds that this is Contractual in nature . . . then the damages would flow from the Contract. If in fact that Court makes a determination there is no Contract then my client is entitled to recoup all of its damages as a result of the torturous [*sic*] acts of Plaintiffs/Third Party Defendants herein.

(Memo. in Opp. 9:14-18.) The Rodriguez parties argue that there has not yet been a finding that there was an enforceable contract, and therefore they should be able to assert their tort claims in the alternative to the damages that otherwise would flow from the contract. The Strauss parties argue that there was an enforceable contract, and they point to the deposition transcripts of Roberto and Teresa to support this claim. They claim that the Rodriguez parties' tort claims are, in reality, claims for breach of contract masquerading as independent torts. On a 3211(a)(7) motion, the nonmoving party is entitled to "the benefit of every possible favorable inference." Sokoloff, 96 N.Y.2d at

414. Therefore, I must accept the Rodriguez parties allegation that there was no enforceable contract at the time of the complained-of actions.

Counts one through five of the third-party complaint assert claims against Stanley Mayer and Marc Strauss in their individual capacities. These include the claims of fraud, conversion, and tortious interference mentioned previously, as well as claims stemming from the Strauss parties' accounting practices and their actions in firing Twinkle employees. The third-party defendants have moved to dismiss all of these claims, except for fraud, on the ground that there is no basis for personal, rather than corporate, liability for the alleged actions (they seek dismissal of the fraud claim on other grounds). They argue that the alleged conduct of Stanley and Marc fail to meet the legal standard required for piercing the corporate veil. The Rodriguez parties argue that the actions taken by Marc and Stanley were taken for their personal benefit and not for the benefit of Strauss, and that the pleading requirements for veil piercing are met.

Generally speaking, the law respects the fictional entity known as the corporation; if there has been corporate misconduct, the corporation is liable, but the individual owners are not. In some circumstances, however, the law will reach beyond the boundaries of the corporate identity, or "pierce the corporate veil," and assert liability on the shareholders. "It is well settled that 'those seeking to pierce a corporate veil . . . bear a heavy burden . . .'" Sheridan Broad. Corp. v. Small, 19 A.D.3d 331, 332 (1st Dep't 2005) (quoting TNS Holdings Inc. v. MKI Sec. Corp., 92 N.Y.2d 335, 339 [1998]).

Generally speaking:

[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a

fraud or wrong against the plaintiff which resulted in plaintiff's injury. . . . The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.

Morris v. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141-142 (1993). The recent First Department case of Shisgal v. Brown lists some of the characteristics that may indicate that the owners exercise "complete domination" over the corporation:

(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Shisgal v. Brown, 21 A.D.3d 845, 848 (1st Dep't 2005). Finally, a plaintiff attempting to pierce the corporate veil must allege "particularized statements" that show why veil piercing is appropriate. Sheridan, 19 A.D.3d at 332.

The third-party complaint falls far short of the bar for veil piercing. It does not allege any of the above factors of complete domination. In contrast, the plaintiffs in Shisgal alleged many of them. The counterclaim alleges that the Rodriguez parties "based on communications from attorneys of Lowenstein Sandler [Strauss's counsel during merger negotiations], realized that, in fact, Lowenstein Sandler was only

protecting the interest of Stanley and Marc and not that of Strauss, Windsor or Twinkle.” (Defendant’s Counterclaim ¶ 16.) However, this conclusory statement does not meet the specificity requirements necessary to support veil piercing. Since there has been no allegation of complete domination under the first prong of the Morris test, there is no need to proceed with the analysis under the second prong. Therefore, the motion to dismiss all of the third-party claims against Stanley Mayer and Marc Strauss as individuals is granted.

The first cause of action of the counterclaim and count one of the third-party complaint allege fraud based on promises that the Strauss parties made—promises that, according to the Rodriguez parties, were never intended to be kept. These include promises that the oral agreement would be finalized by counsel, that the Rodriguezes would obtain part-ownership in Strauss, and that sums of money would be paid to the Rodriguez parties for their interests in Twinkle and Windsor, their business inventory, and their fixtures and equipment. (Def.’s Counterclaim ¶¶ 19, 22; Third-Party Complaint ¶¶ 12, 19.) The Rodriguez parties allege that these fraudulent representations were made with the intent that the Rodriguezes would rely on them, that the Rodriguezes relied on these representations when they allowed Strauss to move in, and that after Strauss moved in, Strauss wrongfully took control of Twinkle, fired Twinkle employees, and committed other actions that harmed the Rodriguez parties. The Strauss parties argue that these claims fail as a matter of law because they only allege a breach of contract, and such a breach cannot form the basis of a fraud claim.

The essential elements of fraud are “misrepresentation of a material fact, falsity, scienter and deception.” Barclay Arms, Inc. v. Barclay Arms Assocs., 74 N.Y.2d 644,

646-647 (1989). Fraud must be pled with specificity under C.P.L.R. 3016(b). A fraud claim, however, may not be predicated on a mere breach of contract. “General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim [of fraud].” New York Univ. v. Cont’l Ins. Co., 87 N.Y.2d 308, 318 (1995). “The courts of this State have consistently held . . . that a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract.” Metro. Transp. Auth. v. Triumph Adver. Prods., Inc., 116 A.D.2d 526, 527 (1st Dep’t 1986). Accord Sudul v. Computer Outsourcing Servs., 868 F. Supp. 59, 62 (S.D.N.Y. 1994). Moreover, the fact that the contract claim is legally insufficient does not revive the fraud claim. See Papa’s-June Music v. McLean, 921 F. Supp. 1154, 1154 (S.D.N.Y. 1996) (fraud claim is barred even though the contract claim fails; contract is not enforceable because it is not in writing as required by statute).

When false representations about future intent are not contractual, but ancillary to a contract, however, they may be actionable in fraud. See Metro. Transp. Auth., 116 A.D.2d at 526 (dismissing fraud claim where plaintiff failed to allege misrepresentations apart from specifications of the contract). “Where a party has fraudulently *induced* the plaintiff to enter into a contract, it may be liable in tort.” New York Univ., 87 N.Y.2d at 316 (emphasis added). The Rodriguez parties rely on Sabo v. Delman, 3 N.Y.2d 155 (1957) for the proposition that “a contractual promise made with the undisclosed intention not to perform it constitutes fraud” (Memo. in Opp. 5:17-18 [quoting Sabo, 3 N.Y.2d at 162].) However, the promise at issue in Sabo induced the contract, and therefore was more than a mere obligation under the contract.

Papa's-June Music, cited by the Strauss parties, lays out factors to consider when deciding whether a fraud claim is sufficiently separate from a breach of contract claim

To maintain a claim for fraud, a plaintiff must allege: (1) a legal duty separate and apart from the contractual duty to perform, (2) a fraudulent representation collateral or extraneous to the contract, or (3) special damages proximately caused by the fraudulent representation that are not recoverable under the contract measure of damages.

Papa's-June Music, 921 F. Supp. at 1161 (S.D.N.Y. 1996) (citations omitted).

The Rodriguez parties argue that because they are not alleging that there was an enforceable contract, their fraud claims should not be barred by the rule that fraud may not be predicated on a mere breach of contract. While it is true that the cases that dismissed a fraud claim as being predicated on a mere breach of contract involved plaintiffs that also asserted claims for breach of contract, none of those cases suggest that a plaintiff may forgo its contract claim and instead proceed on a fraud theory. Instead, the cases state an expansive rule that a plaintiff may not bring an action for fraud on facts that support a breach of contract.

The Rodriguez parties' fraud claims are predicated on a breach of contract claim; the fraud they allege is only that the Strauss parties entered into the agreement without an intention of performing it. The Rodriguez parties do not allege that the Strauss parties owed them any duties outside of those in the proposed agreement. The representations here are part of the agreement, rather than collateral to it. The promises that the Rodriguez parties would have part-ownership in the new Strauss and that the Strauss parties would pay the Rodriguezes for their interests in Twinkle and Windsor and for the fixtures and equipment are some of the benefits to flow to the Rodriguez parties as a

result of the merger. The promise to have the oral agreement finalized by counsel is not collateral to the contract because this agreement was required to be in writing under the statute of frauds. Windsor was the current tenant, and the merger was conditioned on Strauss obtaining a new lease from Windsor's landlord; thus, the agreement would have transferred Windsor's tenancy interest to Strauss. A contract transferring an interest in real property (excluding a lease for under one-year) must be in writing to be enforceable. GEN. OBLIG. LAW § 5-703(1) (2001). Finally, while the Rodriguez parties seek punitive damages as well as compensatory damages for the fraud claim, their prayer for punitive damages is legally insufficient. Therefore, we are thus left only with compensatory damages, which are equal to what is recoverable under a breach of contract claim.

Because the fraud claims allege nothing more than that the Strauss parties entered into the contract without an intention to perform, they are dismissed.

The second cause of action of the counterclaim and count three of the third-party complaint allege that the Strauss parties converted Twinkle's and Windsor's "assets, including inventory, office equipment, fixtures, gratuities and its revenue." (Def.'s Counterclaim ¶ 24.) The Strauss parties argue that under the contract, they were supposed to take possession of this property, and that the Rodriguez parties' claim is really a breach of contract claim for money that was to be paid for the property. They seek to dismiss this claim on account of the rule that a conversion claim cannot be predicated merely on a breach of contract. The Rodriguez parties counter that they are not alleging that there was an enforceable contract, and because there has not yet been a finding to that effect, they should be permitted to assert their conversion claims.⁴

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“Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights.” State of New York v. Seventh Regiment Fund, 98 N.Y.2d 249, 259 (2002). A plaintiff may not recover in conversion on the same facts that make out a breach of contract claim. Wolf v. Nat’l Council of Young Isr., 264 A.D.2d 416, 417 (2d Dep’t 1999). “[A]n action for conversion cannot be validly maintained where damages are merely being sought for breach of contract.” Peters Griffin Woodward, Inc. v. WCSC, Inc., 88 A.D.2d 883, 884 (1st Dep’t 1982). Moreover, a plaintiff’s conversion claim is not revived if its breach of contract claim is insufficient. See Richbell Info. Servs. v. Jupiter Partners, L.P., 309 A.D.2d 288, 306 (1st Dep’t 2003) (dismissing plaintiff’s conversion claim as duplicative of its insufficient contract claim).

The Rodriguez parties’ allegations make out a claim for breach of contract, and therefore may not support a claim of conversion. Their pleadings acknowledge that the alleged wrong was not that the Strauss parties exercised control of the property, but that they did so without making payment. Count three of the third-party complaint contains the following paragraphs:

3. Marc and Stanley did convert the inventory and facilities of the Defendants corporate business entities.
4. The assets of Defendants’ business entities were converted, and otherwise utilized by Marc and Stanley for their own specific benefit.
5. Marc and Stanley *failed to make payments* for the inventory of the Defendants or their business entities that were being utilized by Marc and Stanley.
6. Marc and Stanley *did not make any payments* for the use of the facilities and did continue to convert the assets of Defendants for their own specific pecuniary benefit.

The Rodriguez parties also argue that some of the property that has allegedly been converted is “outside of the contract agreed to,” but their memorandum of law is unclear as to exactly which property this is. (Memo. in Opp. 6:18.)

(Third-Party Compl. Count III: ¶ 3-6 [emphases added].) The complaint makes clear that the Rodriguez parties would have been satisfied had the Strauss parties paid them for this property. These facts make out a claim only breach of contract—that the Strauss parties merely failed to perform their end of the bargain and pay the agreed-upon price. Inasmuch as a conversion claim may not be predicated on a mere breach of contract, the Rodriguez parties' allegations are insufficient to support a claim of conversion.

The third cause of action of the counterclaim and count five of the third-party complaint allege that the Strauss parties tortiously interfered with contractual relationships that the Rodriguez parties had with (1) their landlord, and (2) their suppliers, customers, and vendors. A plaintiff claiming tortious interference with a contractual relationship must allege “the existence of [a] valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages.” White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007). Economic justification is a defense to a claim of tortious interference with a contractual relationship. E.g., Id. at 426; Foster v. Churchill, 87 N.Y.2d 744, 750 (1996).

(a) Tortious Interference Arising from the Rodriguez Parties' Contractual Relationship with the Landlord

The third cause of action of the counterclaim and count five of the third-party complaint allege that the Strauss parties tortiously interfered with Windsor's lease. The allegation here seems to be that after the merger broke down, and without an enforceable contract dictating the rights and obligations of the parties, the Strauss parties persuaded Windsor's landlord to break its lease. This claim, however, is almost incomprehensible

in the pleadings, and it is dismissed. However, since the Rodriguez parties have requested leave to amend and replead, this is granted with respect to this claim, which may have a colorable basis. However, defendants' motion to replead, if one is filed, is to be accompanied by an affidavit of merit.

(b) Tortious Interference Arising from the Rodriguez Parties' Contractual Relationships with the Suppliers, Customers, and Vendors

The Rodriguez parties assert a claim of tortious interference with contractual relationships that they had with their suppliers, customers, and vendors. However, these allegations are insufficiently pled. "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." C.P.L.R. 3013. The pleadings contain only vague allegations that the Strauss parties interfered with Windsor's and Twinkle's "contractual relationships" with its customers and vendors. (Def.'s Counterclaim ¶¶ 32-35. Third-Party Compl. Count V.) They are devoid of any allegations of a *breach* of a contract that Twinkle had with the suppliers, vendors, or customers. See Levine v. Yokell, 258 A.D.2d 296, 296 (1st Dep't 1999) (dismissing claim for tortious interference with a contract where pleading did not contain allegation that defendant procured an actual breach with the contracting party). Since the Rodriguez parties have not alleged the elements of the tort, the claim of tortious interference based on the contractual relationships with Twinkle's suppliers, customers, and vendors is dismissed.

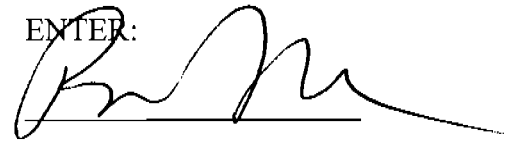
Finally, the Strauss parties have moved to dismiss the Rodriguez parties' claims for punitive damages for the fraud, conversion, and tortious interference claims.

Inasmuch as these claims have been dismissed for insufficiency, the motion to dismiss the punitive damages arising from these claims is granted.

Accordingly, the motion to dismiss the counterclaim and third-party complaint is granted as set forth in this memorandum decision.

Dated: 8/3/07

ENTER:



J.S.C.

BERNARD J. FRIED
J.S.C.