[* 1]

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

PRESENT: JANE S. SOLOMON Justice PART 55

Brown

- v -

The Pullman Group

INDEX NO. 602593/06

MOTION DATE 12/11/06

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits Memorandum in opp	
Replying Affidavits Reply memo	

Cross-Motion: ☐ Yes ☒ No

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

[FILED]

AUG 21 2007

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/29/07 8/20/07

JANE S. SOLOMON 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 : IAS PART 55
----------X

JAMES BROWN, JAMES BROWN ENTERPRISES, INC., AND JAMES BROWN, LLC,

Plaintiffs,

-against-

INDEX NO. 602593/06

THE PULLMAN GROUP,

DECISION AND ORDER

Defendant.

----------X

JANE S. SOLOMON, J.

Defendant The Pullman Group ("Pullman") moves to dismiss the second of two causes of action, leaving the first cause of action for declaratory judgment to determine the parties' rights under an engagement letter. For the reasons below, the motion is granted.

Plaintiff James Brown ("Brown") was a famous and beloved musical entertainer, known to his fans by many different names, including the "Godfather of Soul," "Soul Brother Number One" and "The Hardest Working Man in Show Business." The complaint alleges that "Brown has become one of the one of the most influential popular musicians of the modern era." Defendant does not contest this claim, and it is deemed true for the purposes of this motion.

After this motion was fully submitted, Brown passed away, and as of a conference held on January 22, 2007, no one was appointed to represent the estate as executor or administrator.

This motion is decided ~~because it was fully submitted and argued before Brown's death~~ issued now that the Estate is substituted.

In the course of his successful career, Brown generated a revenue stream from his songs and recordings, including artist royalties from sales of recordings. He pledged future revenue as collateral to secure loans, a process referred to as "securitization". In 1990, plaintiff James Brown Enterprises, Inc., was formed as a South Carolina corporation for the purpose of organizing and providing services for Brown and his musicians for concerts. James Brown, LLC is a Delaware limited liability company formed in May 1999, and it is in the business of owning and using royalty income from Brown's songs.

Brown and James Brown Enterprises, Inc. (together referred to as the "Owners") entered into an agreement with Pullman pursuant to an engagement letter dated February 24, 1999 ("Engagement Letter"). Owners agreed to retain Pullman on an exclusive basis with respect to certain financial transactions described in paragraph 3 of the Engagement Letter. In paragraph 7, Pullman was granted the exclusive right to refinance any future transactions or assets sales for Owners "upon future recoupment of the securities." That paragraph further stated that "[t]his clause shall be interpreted to include all future financings during the greater of owner's life or two future financing periods in addition to the initial financing

contemplated by this agreement."

Pursuant to the Engagement Letter, Pullman arranged securitization of Owner's royalty income by issuing $26 million of notes, with interest of 7.98%. The remaining principal debt as of April 28, 2006 was approximately $20,100,000.

In early 2006, James Brown, LLC began negotiations with the Royal Bank of Scotland ("RBS") to obtain a loan in the amount of $25,200,000. They agreed to terms, including a closing date of May 5, 2006. Pullman, by its attorney, sent a letter on May 3, 2006 ("May 2006 Letter") to Brown and James Brown, LLC, and copied to RBS, stating in relevant part as follows:

> It is our client's understanding that you intend to refinance the assets (the "Assets") that were subject to the securitization transaction successfully completed for you by Pullman pursuant to the [Engagement Letter]. This information was discovered by our client within the last days and it is our client's understanding that the transaction is set to close by Friday, May 5, 2006.
>
> The Engagement Letter grants Pullman the sole and exclusive right to refinance the Assets that are subject to the Engagement Letter.
>
> . . .
>
> Accordingly, the transaction by which you intend to refinance is a breach of the Engagement Letter.
>
> By copy of this letter, we are placing all known interested parties on notice of the breach. We demand that you furnish copies of this Notice to all persons and entities involved in the refinancing transaction. . .

> . [O]ur client will hold liable all parties who proceed with the transaction after notification of Pullman's rights has been provided to the parties.

May 2006 Letter, annexed to the Notice of Motion as Exhibit B.

Plaintiffs commenced this lawsuit seeking a declaration of the parties' rights under the Engagement Letter (a copy of which is annexed to the complaint), and, in the second cause of action, they allege tortious interference with prospective economic advantage arising from the May 2006 Letter. Pullman counter-claimed for declaratory judgment as well, and for breach of contract.

On this motion, Pullman argues that the second cause of action must be dismissed because plaintiffs have not stated a claim for tortious interference with prospective economic advantage.

To make a prima facie claim for tortious interference with prospective economic advantage, plaintiffs must allege that Pullman acted either with the sole purpose of harming plaintiffs, or by using wrongful or unlawful means. See, NBT Bancorp, Inc. v Fleet/Norstar Fin. Group, Inc., 215 AD2d 990 (3rd Dept 1995), aff'd, 87 NY2d 614 (1996); and Nassau Diagnostic Imaging & Radiation Oncology Assocs., P.C. v Winthrop-Univ. Hosp.,197 AD2d 563 (2d Dept 1993).

In Guard-Life Corp. v Parker Hardware Mfg. Corp., the

Court of Appeals defined "wrongful means" as physical violence, fraud, misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure; but not persuasion alone, even if knowingly directed at interference with a contract. 50 NY2d 183, 191 (1980). "Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts . . ." Carvel Corp. v Noonan, 3 NY3d 182, 190 (2004).

Plaintiffs contend that Pullman engaged in fraud and misrepresentation. However, the complaint does not allege the elements of fraud. The May 2006 Letter is not a misrepresentation with respect to whether the proposed transaction would constitute a breach of the Engagement Letter, because that part of the letter clearly is a statement of opinion. Plaintiffs argue that Pullman should have provided a more complete explanation of the Engagement Letter and the extent of Brown's obligation to Pullman, and its failure to do so amounts to a misrepresentation because the proposed transaction did not run afoul of the Engagement Letter.

Under paragraph 7 of the Engagement Letter, using the reasonable interpretation most favorable to plaintiffs, Brown granted to Pullman the exclusive right to refinance the subject assets upon any "recoupment", and this right continued for Brown's life. On this motion, counsel disagree on the meaning of

"recoupment", and final determination of this action may hinge on its interpretation. Not surprisingly, plaintiffs contend that the RBS transaction did not involve a "recoupment."

By its terms, the May 2006 Letter is notice regarding Pullman's opinion that the proposed transaction violated its rights under the Engagement Letter. Nothing prevented plaintiffs from providing RBS with a copy of the Engagement Letter if clarification was needed. If it clearly did not apply to the proposed transaction, as plaintiffs contend, then RBS presumably could be persuaded to consummate the deal.

In sum, the text of the May 2006 Letter shows that it is meant to persuade; it is neither wrongful nor unlawful. Therefore, the only question is whether plaintiffs allege facts to support a claim that Pullman sent the letter with the sole purpose of harming plaintiffs.

The complaint makes specific reference to the Engagement Letter. The Engagement Letter, together with the facts alleged in the complaint about the proposed RBS transaction, show that Pullman acted, at least in some part, with respect to its economic interest in the payment stream from Brown's music. No reasonable jury could find otherwise. Indeed, there is no allegation to suggest that Pullman was motivated by anything but a desire to assert its economic interest. See, Carvel Corp., 3 NY3d at 191.

Plaintiffs also argue that James Brown, LLC was not a party to the Engagement Letter, so Pullman's May 2006 letter could not have been directed at protecting any legitimate right under the Engagement Letter. This argument fails because the Engagement Letter binds Brown, and he could not avoid his obligation by acting through another entity. Accordingly, it hereby is

ORDERED that defendant's motion to dismiss the second cause of action is granted.

Dated: January ~~29~~, 2007
August 20, 2007

ENTER:

J.S.C.
JANE S. SOLOMON

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