

**US E. Co. of N.Y., Ltd. v JPMorgan Chase  
Bank, N.A.**

2007 NY Slip Op 33438(U)

October 18, 2007

Supreme Court, New York County

Docket Number: 0603558/2005

Judge: Richard B. Lowe

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

PRESENT:

PART file

Index Number : 603558/2005  
US EAST COMPANY OF NEW YORK  
vs  
JPMORGAN CHASE BANK N.A.  
Sequence Number : 005  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE 10/18/07  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

**FILED**  
OCT 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION

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

Dated: 10/18/07

**RICHARD B. LOWE III**

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

..... X  
US EAST COMPANY OF NEW YORK, LTD.,

Plaintiffs,

Index No. 603558/2005

-against-

JPMORGAN CHASE BANK, N.A.,

Defendants.

..... X

**Hon. Richard B. Lowe, III:**

This action arises out of a dispute over alleged tortious interference with prospective business relations and breach of the implied covenant of good faith and fair dealing. In motion sequence 005, Defendant JPMorgan Chase Bank (“Chase”) moves for summary judgment pursuant to CPLR 3212 seeking an order dismissing the complaint of Plaintiff US East Company (“US East”).

**BACKGROUND**

The following statement of facts are taken from the parties’ Rule 19-A Statement of Material Facts. The general facts of this matter were discussed in this Court’s prior decisions and shall not be repeated here, except to the extent necessary to decide this motion.

The relationship of the parties was governed by a Master Agreement, which provided for the services to be rendered by US East when requested by Chase.

In 2002, Chase initiated a vendor program pursuant to which some vendors were designated “non-preferred.” Non-preferred vendors who wished to continue to provide staffing services to Chase were required to join the vendor program and become subcontractors of

Chase's designated managed service provider.

In 2003, US East was notified that it had been designated a non-preferred supplier. US East, however, was not inclined to join the vendor program. Chase subsequently withdrew the designation.

In 2004, US East and other vendors received a Request-for-Proposal from Chase intended to reduce the number of preferred vendors. Among other things, US East was required to submit audited financial statements, including balance sheet and income statement, staffing capabilities, and a rate submission matrix.

Later in 2004, US East was again notified that it would no longer be a preferred vendor. Again, US East was not inclined to join the vendor program.

In April 2005, US East was notified that its contract with Chase would be terminated and that US East could become a subcontractor under the vendor program. US East believed that Chase might be able to restore its preferred supplier status, otherwise it would no longer provide services to Chase.

Also in April 2005, Chase decided that some US East employees were candidates for conversion to full-time employees of Chase and should be offered positions at Chase.

In May 2005, Chase offered full-time employment to US East employees, most of whom accepted. All offers were made on the same day and would expire after twenty-four hours. The manner in which Chase hired US East employees goes to the heart of this matter. Chase allegedly poached fourteen of US East's twenty-four employees using US East pricing information and at a time when US East was assured that Chase would continue to need its services.

The underlying action contained five causes of action: wrongful interference with prospective contractual relationships (first cause of action); breach of oral agreement (second cause of action); unjust enrichment (third cause of action); breach of the Master Agreement (fourth cause of action); and promissory estoppel (fifth cause of action). In this Court's decision dated May 10, 2006, Chase's motion to dismiss was granted to the extent that the second, third, and fifth causes of action were dismissed. In this motion, Chase moves for summary judgment dismissing the two remaining causes of action: tortious interference and breach of the Master Agreement.

### **DISCUSSION**

#### ***Summary Judgment***

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment' in its favor (*CPLR 3212 [b]*), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). To defeat a summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact" (*CPLR 3212 [b]*).

#### ***Tortious Interference***

As the Court of Appeals recently stated:

It is a familiar proposition that one who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract

(*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 425 [2007] [internal citations

omitted]). The underlying policy directs courts to balance protection of enforceable contracts and promotion of free and robust competition in the marketplace. (*Id.*) “A competitor’s ultimate liability will depend on a showing that the inducement exceeded ‘a minimum level of ethical behavior in the marketplace’” (*id.*, quoting *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 200 [1980]).

In the context of contracts terminable at will,<sup>1</sup> actions have been sustained where the interference resulted from wrongful means, such as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure (*Guard-Life*, 50 NY2d at 190-91) As the Court of Appeals stated in *Carvel Corp. v. Noonan*, “[c]onduct that is not criminal or tortious will *generally* be ‘lawful’ and thus insufficiently ‘culpable’ to create liability for interference with prospective contracts or other nonbinding economic relations (3 NY3d 182, 190 [2004] [emphasis added]).<sup>2</sup> “Absent [ ]such misconduct, no liability has resulted to one whose actions have induced nonperformance of a contract deemed to be voidable and thus unenforceable” (*Guard-Life*, 50 NY2d at 194). However, the Court of Appeals in *Carvel* also noted that an “exception has been recognized where a defendant engages in conduct ‘for the sole purpose of inflicting intentional harm on plaintiffs’”<sup>3</sup> (*Carvel*, 3 NY3d at 190). Thus,

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<sup>1</sup>As is the case with US East’s employment agreements between it and its employees.

<sup>2</sup>The Court of Appeals in *Carvel* acknowledged that “extreme and unfair” “economic pressure” may amount to the wrongful conduct envisioned under *Guard-Life* and *NBT*. Without discussing what types may amount to wrongful conduct, the court simply held that the conduct in *Carvel* did “not come close to showing the kind of ‘economic pressure’ that might support a claim for tortious interference with economic relations” (*Carvel*, 3 NY3d at 194).

<sup>3</sup>That court also left unanswered whether other exceptions could serve as a basis for similar liability (*Carvel*, 3 NY3d at 190-91).

conduct is wrongful where it is criminal, tortious, or for the sole purpose of harming the plaintiff.

To prevail on its motion for summary judgment, Chase must demonstrate the absence of each element on a claim of tortious interference with prospective contractual relationships. If any element presents an issue of fact, summary judgment will be inappropriate. Chase contends, among other things, that US East is unable to establish from the record that Chase engaged wrongful means in hiring US East's employees. Thus framed, this Court addresses whether a triable issue of fact exists as to whether Chase employed wrongful means in hiring US East's employees.

Chase does not establish the absence of triable issues of fact as to whether its conduct rises to the level of culpability warranting liability for tortious interference. In its May 10, 2006 decision denying Chase's motion to dismiss US East's tortious interference claim, this Court noted that issues of fact precluded dismissal in light of "Chase's knowledge of US East's relationship with its employees and the alleged breach of that relationship due to Chase's misrepresentations and intimidations" (May 10, 2006 Decision, at 6). Chase claims that the allegations of misrepresentations and intimidations cannot be supported by evidentiary proof. However, US East contends that documentary evidence shows that Chase acted solely out of malice in hiring US East's employees. The language in Chase's emails shows that it "need[ed] to lose its dependency on US East,"<sup>4</sup> that it considered "zapping" US East,<sup>5</sup> declared "game on"

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<sup>4</sup>In response to one Chase manager's email, another manager responds: "I think we need to lose our dependency on US East. We just need to be clever about it."

<sup>5</sup>Chase's chief technology officer states in an email: "I seriously want to consider zapping them and do this in house - is there savings to be had?" In response, a Chase manager states: "Savings yes... Have to work on who we want to flip and what/where we have risk."

when US East CEO's access card was terminated,<sup>6</sup> and generally made unflattering remarks at US East's expense.<sup>7</sup> Furthermore, emails between Chase employees show a concerted effort to hide Chase's intention of hiring US East's employees.<sup>8</sup>

Chase responds that it acted to advance its own economic interests. To be sure, that the alleged tortfeasor was acting to advance its own economic interests may be raised as a defense. However, that too involves triable issues of fact (*Zimmer-Masiello, Inc. v Zimmer, Inc.*, 159 AD2d 363, 363 [1st Dept 1990]). Namely, whether Chase's conduct was wrongful or merely in its own competitive interest. Because the question of whether Chase employed wrongful means in hiring US East's employees involves triable issues of fact, summary judgment dismissing this cause of action is denied.

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<sup>6</sup>In response to learning that US East CEO's access card to Chase had been cancelled, a Chase manager stated in an email: "the fun begins." Another Chase manager adds: "it's going to be ugly ... game on."

<sup>7</sup>US East CEO sent an email to a Chase manager stating: "How are things going? I hope all is well. I understand that you are looking for a Desktop Mgr. Outside of the bank. Do you want me to help you with the search?" In a forwarded message to another Chase manager, the recipient of Mr. Lebonitte's message states: "maybe we should take him up on his offer!! not!" The recipient of the forwarded message adds to the thread: "Piss him off and put his resume's [sic] into the VMO [Vendor Management Office] ...."

<sup>8</sup>In an email, a Chase senior manager wrote: "I'm most concerned about Todd Peterson. Think he is very loyal to Joe L. He told me as much in my first meeting with him. He should be the last person approached right as we are about to pull the trigger."

In an email, Chase's chief technology officer wrote: "You will see 12-15 job postings that are coming thru that I don't want to appear in the internal job posting database or discussed publicly in the approvals forum. These are the ones I touched based with you on today that will be replacements for the US [E]ast contractor engagement that we intend to discontinue in [NY]. There is a concern that we would run the risk of a walk out of this vendor if we tip them to [sic] early in the recruitment process. Appreciate if we could keep this on the quiet for now."

In an email, a Chase manager wrote: "I think we may have to approve [the task orders for two US East employees] so as not to raise suspicion from the vendor. I was thinking maybe we only renew them until 6/1 but that might tip our hand as well."

### *Implied Covenant of Good Faith*

The covenant of good faith and fair dealing is implied in all contracts (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]).

This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion.

(*Id.* [internal quotation marks and citations omitted].) The duty of good faith includes “any promises which a reasonable person in the position of the promisee would be justified in understanding were included” (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]). This duty, however, “is not without limits, and no obligation can be implied that ‘would be inconsistent with other terms of the contractual relationship’” (*Dalton*, 87 NY2d at 389, quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]).

Here, Chase contends that the record cannot support the allegations that Chase engaged in bad faith conduct, that Chase’s conduct did not deprive US East of any reasonably expected benefit of the contract, or that Chase’s conduct resulted in damages. US East, however, contends that Chase engaged in bad faith conduct because Chase assured US East that it would continue to use US East’s services while concealing the fact that it intended to extend job offers to sixteen US East employees. US East also contends that Chase engaged in bad faith conduct by using US East’s confidential price information as a basis for calculating the salaries at which Chase offered jobs to US East employees.

Chase argues that US East cannot show that Chase acted in bad faith when the Master Agreement provided Chase with the unqualified right hire US East employees. Contrary to that

contention, when Chase decided to exercise its right to hire US East employees, Chase also triggered its obligation to do so in good faith (*see Dalton*, 87 NY2d at 190). Indeed, as this Court stated in its May 10, 2006 decision:

It is one thing for Chase to hire and solicit away US East's employees, which is explicitly provided for and allowed pursuant to the Master Agreement. It is another thing, however, for Chase to engage US East's employees using tactics such as making undue economic threats, utilizing US East's confidential and proprietary information, and, at the end of the day, hiring fourteen out of [] US East's total of twenty-four employees away from plaintiff.

Thus, the Court must determine whether Chase exercised good faith when it hired US East's employees. Part of this inquiry requires determining whether US East had a reasonable expectation that Chase would not conceal its intentions of hiring US East employees while giving assurances to the contrary, and whether US East had a reasonable expectation that its price information would not be used by Chase to prepare salary offers. In its motion papers, US East submitted evidentiary proof that Chase assured US East there would be work for its employees; that Chase planned to convert US East employees to Chase employees; that Chase knew that US East's assignment of twenty-four employees at Chase represented a significant portion of US East's business; and that Chase used US East's price information in calculating its salary offers. For the purposes of opposing summary judgment on this cause of action, US East has raised triable issues of fact.

To be clear, this is not a case in which duties inconsistent with other terms of the contractual relationship are being created by implying this obligation. In *Richbell Info. Servs. v Jupiter Partners, L.P.*, the First Department explained the concern for the avoidance of a newly created contract right inconsistent with the express rights already in the contract (309 AD2d 288,

302 [1st Dept 2003]). In that case, the defendant had exercised its contractual right malevolently, for its own gain, as part of a purposeful scheme designed to deprive the plaintiffs of the benefits of their contract. The court found that “[t]hese allegations do not create new duties that negate [] explicit rights under a contract, but rather, seek imposition of an entirely proper duty to eschew this type of bad faith targeted malevolence in the guise of business dealings.” (*Id.*) The allegations in this case do not seek to preclude Chase from exercising its contractual right. Rather, the allegations seek to impose a limitation of good faith on the exercise of that right.

Given the factual disputes regarding the circumstances under which Chase hired US East’s employees, triable issues of fact arise regarding why US East’s employees were hired and whether Chase acted in good faith in obtaining the outcome. Because the plaintiff has not met its burden of demonstrating the absence of triable issues of fact, summary judgment dismissing this cause of action is denied.

#### CONCLUSION

Accordingly, it is hereby

ORDERED that defendant’s motion for summary judgment dismissing the complaint is denied.

**Dated:** October 18, 2007

ENTER:



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J.S.C.

**FILED**  
OCT 23 2007  
NEW YORK  
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