

**Trans-World Trading, Ltd. v North Shore Univ.
Hosp. at Plainview**

2007 NY Slip Op 33982(U)

November 30, 2007

Supreme Court, Nassau County

Docket Number: 1065-02/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice.

-----x **TRIAL/IAS PART 12**

TRANS-WORLD TRADING, LTD. d/b/a
ATLANTIC BALLOON,

INDEX NO.: 001065/2002
MOTION DATE:10/04/2007
MOTION SEQUENCE: 001 and 002

Plaintiff,

-against-

NORTH SHORE UNIVERSITY HOSPITAL AT
PLAINVIEW, DELUXE FOOD, INC. and
ANTHONY SARACCO, d/b/a DELUXE FOODS,

Defendants,
-----x

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed.....	1
Notice of Cross-Motion, Affirmation & Exhibits Annexed.....	2
Memorandum of Law in Opposition to Plaintiff's Motion to Amend the Complaint, and in Support of the Hospital's Cross-Motion for Summary Judgment Dismissing the Complaint and to Dismiss and Strike Co-Defendants' Cross-Claims.....	3
Affidavit in Opposition to Motion for Summary Judgment and in Further Support of Motion to Amend Complaint of Denise M. Sirigo & Exhibits Annexed.....	4
Affirmation in Opposition to Co-Defendant's Motion for Summary Judgment of Martin Silver & Exhibits Annexed.....	5
Reply Memorandum of Law in Further Support of the Hospital's Cross-Motion for Summary Judgment Dismissing the Complaint and to Dismiss and Strike Co-Defendant's Cross-Claims.....	6
Supplemental Affirmation in Opposition to Motion for Summary Judgment of Bernard A. Nathan & Supplemental Affidavit in Opposition to Motion for Summary Judgment of Denise M. Sirigo.....	7

Plaintiff's motion for Leave to Amend the Complaint pursuant to CPLR 3025(b) is before the Court. Plaintiff seeks to amend the complaint to first, clarify the second cause of action as to the location of the goods converted and then to add a cause of action for interference with contractual relations based on the facts in the original pleadings. Conversely, Defendant North Shore University Hospital at Plainview has two motions before the court: (i) Motion for Summary Judgment dismissing Plaintiff Trans-World Trading, Ltd.'s complaint, pursuant to CPLR§3212(b), and (ii) Motion to Dismiss and Strike Co-Defendants Deluxe Foods' Answer with Cross-Claims, pursuant to CPLR §3126.

James Saracco, father of defendant Anthony Saracco, had contracted with defendant North Shore University Hospital to operate the Deluxe Coffee & Gift Shop. Subsequent to the death of James Saracco, Anthony took over the operation of the Shop. Anthony maintained a business relationship with Plaintiff, who supplied Mr. Saracco with various gift items, such as balloons and stuffed animals, which were sold to Hospital visitors. On or about February 2, 1999, two Hospital visitors were injured as consequence of a physical altercation between Anthony and his brother at the Shop. Inasmuch as the right to operate the Shop was given solely to James Saracco under a non-assignable lease, neither brother had a right to occupy the Shop at that time.

Therefore, following the aforementioned incident, the Hospital chose to temporarily close the Shop. Even though the brothers attempted to reclaim the items within the Shop, the Hospital thought it best to retain possession of the merchandise until proper ownership could be proven. The Hospital transported the merchandise to an off-site storage facility, where it has securely remained, at the Hospital's expense.

Plaintiff's motion for Leave to Amend the Complaint pursuant to CPLR 3025(b) is denied for both requests: clarification and new cause of action. According to that provision, Leave to Amend shall be "freely given," but the terms must be just. Moreover, courts are given the discretion to deny such a request should unjustified delay and prejudice to the opposing party, be present. *Shanahan v. Shanahan*, 92 A.D.2d 566, 568, 459 N.Y.S. 2d 319 (2d Dep't. 1983); *James Smith v. Rottenberg*, 32 A.D.2d 792, 792, 302 N.Y.S. 2d 355 (2d Dep't. 1962).

In this matter, five years have passed between the filing of the initial Complaint (*See* Plaintiff- Exh. A) and the first acknowledgement of the possibility that merchandise was stored

in the Hospital basement as opposed to a “storage room.” (See Defendant Hospital- Exh. L at 185-87). This is definitely a substantial delay and it is particularly notable that Plaintiff has failed to give a reasonable explanation. *Greenstone Roberts Advertising, Inc. v. Bernard Hodes Advertising, Inc.*, 260 A.D.2d 601, 688 N.Y.S.2d 665 (2d Dep’t 1999). Upon verification of the Complaint, Plaintiff should have been aware that the term “gift shop” did not encompass the alleged basement storage area too. In the alternative Plaintiff’s attorney should have offered an explanation. Therefore, due to the “delay in moving to amend their [complaint], their failure to provide a reasonable explanation for the delay, the prejudice the proposed amendment would cause the [defendants], and the apparent lack of merit of the proposed amendment,” the amendment must be denied. *Greenstone*, 260 A.D.2d at 601, 688 N.Y.S. at 665.

Likewise, plaintiff’s leave to amend the complaint with a claim for tortious interference is also denied. A claim of tortious interference with contract requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant’s knowledge of the contract, (3) defendant’s intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages. *American Preferred Prescription, Inc. v. Health Management, Inc.*, 252 A.D.2d 414, 417, 678 N.Y.S.2d 1, 4(1 Dep’t 1998). This cause of action would not stand inasmuch as there is a justification. The Hospital’s interference was merely incidental to a lawful purpose. *Murtha v. Yonkers Child Care Ass’n*, 59 AD2d 925, 399 NYS2d 260 (2d Dep’t 1977), *mod on other grounds* 45 NY2d 913, 411 NYD2d 219, 383 NE2d 865, *on remand to* 69 AD2d 813, 415 NYS2d 52 (2d Dep’t 1979). The merchandise in question has not been converted, but is currently being stored in a secure storage facility at the Hospital’s expense pending a resolution of the ownership disputes. (Hosp. Memo. Page 19). Therefore, it is unnecessary to address each element of tortious interference with the contract.

Defendant Hospital’s Cross-Motion for Summary Judgment Dismissing the Complaint as it pertains to the Hospital under CPLR §3212(b) is granted. While the rightful owner of the gift shop merchandise has not yet been determined, it has been shown that the Hospital did not convert said merchandise. As the lessor of the gift shop property, the Hospital retained the merchandise after the lessee died, and Mr. Anthony Saracco involuntarily vacated the premises. *8902 Corp. v. Helmsley-Spear, Inc.*, 23 A.D.3d 316, 804 N.Y.S.2d 725 (1st Dep’t 2005). “Where a person is rightfully in possession of property, continued custody of the property and refusal to

deliver on demand of the owner until the owner proves his right, constitutes no conversion.”
Bradley v. Roe, 282 N.Y. 525, 531, 27 N.E.2d 35 (1940).

Defendant Hospital’s Motion to Dismiss and Strike Co-Defendant’s Answer and Cross-Claims pursuant to CPLR §3126 is granted.

Defendant Saracco has produced no evidence in admissible form in support of his cross-claims against the defendant Hospital for lost profits and conversion of profits. He cannot establish on the basis of the documents exchanged either a right to occupy the gift shop with the Hospital or the value of what he claims to have earned or lost.

Notwithstanding an order recited on the record in open court on May 21, 2007 to produce specified material and relevant information, and the repeated requests forwarded to him over the five years that this action has been pending, Defendant Saracco has not turned over any requested information and has not offered an exonerating excuse. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 122, 722 N.E.2d 55, 58-58, 700 N.Y.S.2d 87, 90 (1999).

Accordingly it is ORDERED that the Complaint is dismissed against Defendant Hospital and the cross-claims asserted against Defendant Hospital are dismissed.

Dated: November 30, 2007



J.S.C.

ENTERED

DEC 07 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**