County of Nassau v 100 Black Men of Long Is. Dev. Group, Inc.
2008 NY Slip Op 30751(U)
March 7, 2008
Supreme Court, Nassau County
Docket Number: 0867-06/
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

COUNTY OF NASSAU,

Plaintiff,

INDEX NO.: 020867/2006
MOTION DATE: 10/12/2007
MOTION SEQUENCE: 006 and 007

-against-

100 BLACK MEN OF LONG ISLAND DEVELOPMENT GROUP, INC., INCORPORATED VILLAGE OF HEMPSTEAD COMMUNITY DEVELOPMENT AGENCY, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, EDWARD DICKMAN, THE UNITED STATES POSTAL SERVICE, NEW YORK CONTRACTING MANAGEMENT CORP., MICHAEL BLADYKAS, ARC MECHANICAL CORP., ALL SERVICE ELECTRIC, INC., NAHAS RUG COMPANY and "JOHN DOE" #1 through #100 inclusive, the last 100 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or corporations having an interest in the property described in the complaint,

Defendants.

100 BLACK MEN OF LONG ISLAND DEVELOPMENT GROUP, INC.,

Third Party Plaintiff,

- against -

VILLAGE OF HEMPSTEAD, WAYNE J. HALL, SR., as MAYOR of the VILLAGE OF HEMPSTEAD, and CLAUDE GOODING, as COMMISSIONER of the INCORPORATED VILLAGE OF HEMPSTEAD COMMUNITY DEVELOPMENT AGENCY,

Third Party Defendants.

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The following papers read on this motion:

Notice of Motion, Affirmation & Exhibit Annexed..	1
Amended Notice of Motion, Affirmation, Affidavit & Exhibits Annexed.................	2
Affirmation of Kennisha Austin in Opposition, Memorandum of Law in Opposition to the Village of Hempstead and the Incorporated Village of Hempstead community Development Agency's Motions to Dismiss & Exhibits Annexed..	3
Affirmation in Support of Reply to Opposition to Motion to Dismiss First Amended Third Party Complaint and Cross-Claims..	4
Reply Affirmation of Thomas J. Garry, Esq.	5

The court sua sponte directs that the prior Order of this court dated December 21, 2007 is vacated and the following Order is issued in its place.

This motion by third party defendants Claude Gooding as Commissioner of the Incorporated Village of Hempstead Community Development Agency and the Incorporated Village of Hempstead Community Development Agency (CDA) for an order pursuant to CPLR §§ 3211(a)(7), 3013 and 3016(b) dismissing the complaint, (Motion Seq. #006), and the motion by third party defendants The Incorporated Village Of Hempstead and Wayne J. Hall, Sr., as the Mayor of the Village of Hempstead to dismiss the amended complaint, (Motion Seq. #007), are determined as follows.

This action has been the subject of other motions decided of even date and familiarity with the facts is presumed. The Court previously dismissed without prejudice the cross-claims asserted by defendant-third party plaintiff, One Hundred Black Men of Long Island Development Group, Inc.,(OBM) against the co-defendants on the grounds that the same claims are plead as third party claims and hence will be addressed in the decision that follows.

The additional facts pertinent to the causes of action subject to dismissal in this motion are as follows.

OBM had a goal of leasing the building at 80% occupancy. Seemingly that occupancy rate would have qualified OBM for conventional financing to pay off the HUD loan. For the first three years of the HUD Loan, or from 2002 - 2004, pursuant to Section 108 of the Loan Agreement, OBM had only to make semi-annual interest payments on the 10 million dollars. OBM represents it made those payments. In 2005, payments for principal and interest in the aggregate amount of $1.2 million were due annually. Such payments were projected to become

available from a rental income stream. Without the ability to lease the premises there would be no money to pay the mortgage.

A major proposed tenant was B.O.C.E.S. and to this end a 10 year Lease contract was entered into and funds spent on the space for a build out to accommodate their needs. At approximately the same time, OBM was receiving information that the new mayor who was elected in 2005, had a different proposal for, inter alia, this space and advocated a mixed use of residential and commercial use. Ultimately, B.O.C.E.S. did not occupy the space, allegedly because the fire alarm system was not properly installed. OBM contends that it was because movants tortuously interfered with the Lease; B.O.C.E.S. has allegedly stated that movants told them not to move in.

The second tenant to be considered was Nassau University Medical Center which would have operated a clinic in the same space altered for B.O.C.E.S.. OBM alleges that at the same time Mayor Hall on behalf of the Village and Commissioner Gooding on behalf of the Village CDA were communicating with a builder-developer for the same, and/or nearby space. There was an effort by the municipality to interest OBM in selling the building to such developer.

Ultimately, NUMC did not occupy the space; the Mayor allegedly expressed his opinion that the clinic did not fit in with his vision for 100 Main. Although the Mayor alleges that they were not current on the rent for a smaller space in the Village which they were operating out of, and, therefore, presumptively would not be able to afford 100 Main either, defendant OBM claims that it was the municipality's disagreement with OBM's plan and a preference for residential and commercial uses that interfered with that lease by discouraging NUMC from taking steps antagonistic to the Mayor. See Complaint ¶¶ 23, 44, 47, 48, 49 and 51.

Further, it is alleged that the Mayor interfered with a refinance of the loan with HUD, or with outside lenders, by his disapproval of the tenants with whom OBM had done business, which caused the property to remain empty and to remain non income producing. Complaint at ¶36. The Mayor failed to cooperate with OBM and held fast to his plan, seemingly unaware of the consequences likely to result. Taken to its ultimate conclusion, the moving defendants are charged with liability for defendant-third party plaintiff's default on it's mortgage debt since it could never, ironically, lease the building to provide work, jobs and a presence in the Village of Hempstead and raise money to sustain the building.

The Village of Hempstead and the Mayor move for dismissal on the grounds of governmental immunity, failure to file Notice of Claim and the failure to state a cause of action for tortuous interference with contract and future business relations, with specificity or sufficiently to sustain the elements of the causes of action.

Movants argue that the claims for tortuous interference with contract and interference with prospective economic relations are based on conclusory statements unsupported by facts. Further that Commissioner Gooding and Mayor Hall are cloaked with governmental immunity and cannot be the subject of the claims. The Village claims that OBM failed to timely file a Notice of Claim.

The Court, in addressing a motion to dismiss for failure to state a cause of action must determine whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. Guggenheimer v Ginzberg, 43 N.Y.2d 268 (1977). The court must afford the pleadings a liberal construction, and the complaint will be construed in the light most favorable to plaintiffs (see generally Leon v Martinez, 84 N.Y.2d 83; Rovello v Orfino Realty Co., 40 N.Y.2d 633.) Plaintiff's allegations must be taken as true. Pietropaoli Trucking v Nationwide Mutual Insurance Co., 100 A.D.2d 680 (3d Dept 1984).

To recover on a claim for tortuous interference with contract a proponent must establish "the existence of a contract between the plaintiff and a third party, the defendant's knowledge of the contract, the defendants intentional inducement of the third party to breach or otherwise render performance impossible, [by improper means], and damages to the plaintiff." Bayside Carting Inc. C Chic Cleaners, 240 A.D.2d 687 (2d Dept 1997) citing to Kronos, Inc. v AVX Corp., 81 N.Y.2d 90, 94 "One who intentionally and improperly interferes with the performance of a contract ... 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." Guard-Life Corp., v S. Parker Manufacturing Corp., 50 N.Y.2d 183, 189 (1980). An essential element of such a claim is that but for the intentional interference there would have been no breach. Lana & Sama, Inc. v Goldfine, 7 AD3d 300, 301 (1st Dept. 2004); Cantor Fitzgerald Associates, L.P. v Tradition North, 299 AD2d 204 (1st Dept. 2002), *lv denied* 99 NY2d 508 (2003).

Applying the dismissal standard for a 3211(a)(7) motion to the aforestated elements and facts alleged in the complaint, there is little trouble seeing that a cause of action is stated against the moving defendants - the Mayor, the Village, the Commissioner and the CDA - for tortuous interference with contract.

OBM had a contract with B.O.C.E.S. to lease space in 100 Main Street, (enough of a commitment to justify investing money in refitting it), movants were elected to office in late 2005, after execution of the contract, they disapproved of that use of 100 Main Street and B.O.C.E.S. allegedly bowed to their wishes and the space lay vacant, and seemingly the municipality was empowered by its success which may even have lead to more far reaching damages. The Court is of the view that the facts are more than adequately plead to inform the defendants of circumstances of the claim and satisfy the requisite pleading elements..

The elements of tortuous interference with prospective economic advantage are some what different. "A plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." Snyder v Sony Music Entertainment Inc, 252 A.D.2d 294, 299-300 (1st Dept 1999). It requires an allegation that the "plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct." Vagoda v DCA Productions Plus, Inc., 293 A.D.2d 265, 266 (1st Dept 2002). Knowledge of the prospective economic relation is an implicit element of relation. Caprer v Nussbaum, 36 A.D.3d 176, 204 (2d Dept 2006).

Analyzing those elements with the facts of the Nassau University Medical Center proposed tenancy the plaintiff has come up short in pleading wrongful means. No contract had been made between the owner and the proposed tenant, N.U.M.C. There is no denial in the record compiled heretofore that Mayor Hall was not pleased with the prospect of their tenancy at 100 Main Street. That is his perogative. The Mayor was elected by a majority of the people eligible to vote, and presumptively his duty was to lead the Village to a sustainable economic and social position. The Mayor and the Commissioner made their position known. It cannot be said that the act of discouraging to the point of negating N.U.M.C.'s thought to use the B.O.C.E.S. space, standing alone, was wrongful or entered into out of malice. Again ironically, both factions were, on the surface, seeking to accomplish the same goal but with a different philosophy of

means.

To recap, the first cause of action is sustained as stating a cognizable claim, but the second cause of action for tortuous interference with "Prospective Economic Advantage/Business Relations against Defendants for the Loss of the NUMC Tenancy" is dismissed for failure to state a cause of action.

That brings up for review the third cause of action, or third claim for relief, for tortuous interference with prospective economic advantage/ business relations against defendants for "100BMDG"s Lost Financing Opportunities."

This claim focuses on OBM's inability to achieve an 80% occupancy rate and restructure or refinance its 10 million dollar loan.

Defendant-third party plaintiff alleges that "Defendants, intent on thwarting any attempt by 100 BMDG to refinance their debt, frustrated 100BMDG's efforts to secure an 80% occupancy rate in the 100 Main Street building, depriving 100BMDG of the ability to either restructure the HUD loan or to obtain alternate financing to pay off the HUD loan in its entirety." They continue in the following numbered paragraphs:

> 80. Defendants' scheme was accomplished by a variety of illicit means, including but not limited to defendants deliberately inducing BOCES to breach its contract with 100BMDG and repeatedly discouraging NUMC from entering into a lease with 100 BMDG.
>
> 81. Such inducement and interference was accomplished through wrongful, tortious and fraudulent means, as set forth above.
>
> 82. By virtue of defendants' tortious acts, to date, 100 BMDG have not been able to obtain at least an 80% occupancy rate in the 100 Main Street building.
>
> 83. By reason of defendants' tortious acts, 100BMDG have not been able to successfully refinance their loan, depriving 100BMDG of the business opportunities and profits available through restructuring its loan debt that would enable 100BMDG to avoid foreclosure. Complaint ¶¶ 80-83.

Unlike the second claim for relief, this third claim for relief, to the view of the court, pleads facts capable of sustaining a finding of illegal, or unlawful means or acting with an intent to harm the pleader. See Snyder v Sony Music Entertainment, Inc., 252 A.D.2d 294, 299-300.

OBM entered into the agreement to buy 100 Main Street in 2001 while another mayor

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was in office. They allege that their acquisition of the property, rehabilitation and economic development was generally welcomed. OBM accepted $10 million dollars to buy 100 Main Street which consisted of the purchase price at $6.5 million and the remainder to retire the previous owner's deficit on the building.. Complaint ¶ 21. OBM then had one foot in each of two camps; it had a conventional mortgage debt for which it was liable, but it was in the midst of a political arena that affected the exercise of their free will over their property, except to the extent that has been pointed out many times in this decision, that they are a not-for-profit organization and had a HUD Section 108 Loan with it's restrictions.

To the extent that the pleadings allege that they were thwarted from renting 100 Main and from refinancing their debt by the moving defendants animus, they have plead arbitrary deprivation of prospective economic advantage and business relations. See Id. at 300 ("'Wrongful means' includes physical violence, fraud, ... and some degree of economic pressure, but more than simple persuasion is required.") The resultant damage is no means to retire a 10,000,000 debt. To the view of the court, it is a very different thing to dissuade N.U.M.C., just one prospect, from leasing a target parcel of real property, from, as is alleged in the complaint, thwarting OBM, through informal action from putting the property to any economic use. All that is necessary in this procedural context is that the pleader sustain the elements of any cognizable cause of action and this has been done in the third claim. NGH Assoc v United Parcel, 17 Misc. 3d 746, 749 (Sup Nas 2007).

The fourth claim does not sustain a cause of action. OBM bases the tortuous interference with contract claim on the contract with the CDA for the mortgage, note and loan of 10 million dollars. The pleadings do not credibly allege that it was the intent of the municipal defendants to cause a default on that loan. Although that may have been the ultimate result in is not made clear from the pleadings that that was the goal. Furthermore, it is so obvious that it hardly needs stating that the CDA and Comissioner Golding could not interfere with its own contract. Therefore, the fourth claim is dismissed for failure to state a claim.

Having reviewed the pleadings to determine if any cognizable claim is stated, it remains to be determined whether the individual defendants are entitled to sovereign immunity. 'The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties" Burns v Red, 500 U.S. 478, 486-87(1991). Qualified

immunity extends to government officials performing discretionary functions if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v Fitzgerald, 475 U.S. 800, 818 (1982). The state of the law in this State is essentially the same. Haddock v City of New York, 75 N.Y.2d 478, 484 (1990)("when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial a municipal defendant generally is not answerable in damages for the injurious consequences of that action.")

This case is much like the concern of the Court of Appeals in Haddock. There is no evidence in the pleadings that the Mayor made a discretionary decision to deny OBM any tenants. As alleged in the pleadings Mayor Hall had a plan for redevelopment of the Village of Hempstead. He knew how he wanted it to be recreated. He did not appear to know how he was going to handle 100 Main Street if OBM did not sell out to him at a greatly reduced price. In effect the pleadings convey the view that he elected to proceed without 100 Main Street and did not decide what could or should be done with that piece of the downtown Village real property.

It is difficult not to include the Commissioner of the CDA in the seemingly critical omission. He is of course charged with the responsibility of improving a blighted area. Another abandoned building is a dereliction of that duty. It does not counter the allegations in the complaint that the municipal defendants made a value judgment as to how to use 100 Main Street. The allegations in the pleadings taken as true could support a finding that the Mayor and the CDA exercised no judgment or discretion vis-a-vis 100 Main in their plan for the Village.

Accordingly, the motion to dismiss the pleadings on the grounds of sovereign immunity is denied.

Finally, it must be determined whether the action should be dismissed against the Village on the grounds of the Statute of Limitations. A notice of claim must be made and served within 90 days of the date the claim accrued in compliance with section 50-e of the General Municipal Law. CPLR 9802. Thereafter the action must be commenced within one year.

In effect there are two claims against the Village which remain in this law suit and two Notices of Claim should have been filed. The first claim asserted is for interference with contractual relations incidental to the aborted B.O.C.E.S. lease. That cause of action accrued when the proposed tenant rejected the lease on or about March 24, 2006. Complaint ¶ 37. A

Notice of Claim was filed on March 1, 2007, well past the 90 day period and the first cause of action must be dismissed against the Village.

The third cause of action is concerned with defendants' alleged tortuous interference in prospective contractual or business relations. The Village argues that plaintiff's cause of action accrued on August 1, 2005 the date OBM defaulted on its mortgage. However that argument is rejected in so far as a default in payment of a mortgage payment on the date it becomes due does not a priori equate to a loss of the property. When the mortgagor prospectively loses title to the property occurs when the mortgagee commences an action to foreclose on the mortgage which in this case was on December 12, 2006. It is then that the prospects of attaining an 80% occupancy was a lost hope and the damage resulting from the third cause of action was unavoidable. Insofar as the Notice of Claim was filed on March 1, 2007 it is within the 90 day period.

On the basis of the foregoing, it is

ORDERED that the first cause of action is dismissed against the Village of Hempstead as being time barred and is dismissed against Mayor Hall individually and Commissioner Gooding individually insofar as they exercised their discretion in acting, as alleged, to divert B.O.C.E.S. from renting 100 Main, but remains viable against the CDA. It is further

ORDERED that the second and fourth causes of action are dismissed for failure to state a claim.

The application is denied to dismiss the third cause of action on any of the grounds asserted.

All counsel shall appear for the previously scheduled conference on April 30, 2008, at 9:30 A.M.

Dated: March 7, 2008

J.S.C.

ENTERED

MAR 11 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE