Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

F&R HOLDING CORP.,

Plaintiff,

- against -

ROFFE ACCESSORIES INC., MURRAY ROFFE AND MARK PTAK,

Defendants.

Index Number 24259 2008

Motion Date January 28, 2009

Motion Cal. Numbers 4 & 5

Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 22 read on this motion by defendant Mark Ptak (Ptak) dismissing plaintiff's complaint on the grounds that the claim is barred by the statute of limitations and fails to state a cause of action, or, in the alternative, disqualifying Mark E. Arroll, Esq. (Arroll), from serving as plaintiff's attorney; and by separate notice of motion by defendants Roffe Accessories Inc. (Roffe) and Murray Roffe (Murray) disqualifying Arroll from serving as plaintiff's attorney.

	Papers Numbered
Notice of Motions - Affidavits - Exhibits.....	1-10
Answering Affidavits - Exhibits.....	11-16
Reply Affidavits.....	17-22

Upon the foregoing papers it is ordered that the motions are determined as follows:

Insofar as motions made pursuant to CPLR 3211 require this court to construe the complaint in a light most favorable to plaintiff, and to accept as true the allegations set forth therein (see e.g. Euell v Incorporated Vil. of Hempstead , 57 AD3d 837 [2008] [regarding 3211(a)(7)]; Island ADC, Inc. v Baldassano Architectural Group, P.C. , 49 AD3d 815 [2008] [regarding 3211(a)(5)]), the underlying facts are as follows: On July 1, 1998, plaintiff entered into a lease agreement whereby Roffe would lease the subject premises from plaintiff for a period of seven years, said lease terminating on June 30, 2005.

In its complaint, plaintiff alleges that Roffe breached said lease in that it failed to pay certain rent and security payments, certain percentages of fuel, water, and sewer charges, certain repairs of and maintenance for the premises in which it occupied, its portion of certain real estate taxes, and a portion of the brokerage commission.

Notably, plaintiff contends that on June 30, 2005, the lease termination date, Roffe failed to remove a substantial amount of its property from the subject premises and failed to leave the premises broom clean as prescribed by the lease; that as a result, Roffe held over the premises; that on June 30, Ptak requested that plaintiff not change the locks to afford Roffe an opportunity to remove its property from the subject premises; that Roffe's property was not thereafter removed; that Murray and Ptak agreed with Arroll, on September 12, 2005, that Ptak would come to the premises to remove the abandoned property; that, on the same day, Murray indicated to Arroll that the property would be removed only if plaintiff agreed to settle all claims against Roffe; that, because of plaintiff's refusal to agree to such terms, Murray instructed Ptak not to clear out the premises; and that Murray and Ptak tortiously induced Roffe to breach its contractual obligation under the lease to restore the premises broom clean and in a vacant condition. Plaintiff therefore claims damages in the amount of $690,000 plus interest for the use and occupancy of the premises from July 1, 2005 through May 2007.

Plaintiff's second cause of action against Ptak, sounding in tortious interference with the parties' lease agreement, is barred. A claim for tortious interference with contract is subject to a three-year statute of limitations (CPLR § 214[4]; see also Kronos, Inc. v AVX Corp., 81 NY2d 90 [1993]; Marine Midland Bank v Renck, 208 AD2d 688 [1994]; Mannix Indus. v Antonucci, 191 AD2d 482 [1993]). Such a cause of action accrues when the contract is breached, regardless of when defendant allegedly induced the breach (see Kartiganer Assoc. v Town of New Windsor, 108 AD2d 898 [1985]), and when the plaintiff first suffers actual damage as a result of defendant's tortious conduct (see Kronos, Inc., 81 NY2d at 94; see also 74 NY Jur 2d, Interference § 21).

According to the allegations set forth in the complaint, Roffe failed to remove its property from the subject premises and failed to leave the premises broom clean on June 30, 2005, the lease termination date. Thus, plaintiff's claim accrued on that date. Since the complaint was filed on October 1, 2008, that portion of the claim for tortious interference with contract is time-barred (see Spinap Corp. v Cafagno, 302 AD2d 588 [2003]). Even if the claim accrued on September 12, 2005, the date in which Ptak allegedly refused to remove its property from the premises, the complaint was still filed more than three years later and is barred (see id. at 588).

Plaintiff's attempts to obviate the mandates of CPLR § 214(4) are unavailing. Plaintiff's assertion that its second cause of action – based upon Ptak's inducement and breach – is a continuous tort, which existed until May 2007, is a misstatement of the law. It is axiomatic that tortious interference with contract is not a continuing tort (see Spinap Corp., 302 AD2d at 588; 4A New York Practice, Commercial Litigation in New York State Courts § 80:62 [2d ed.] [stating that the three-year statute of limitations cannot be avoided by alleging that the claim is a "continuing tort"]).

Furthermore, contrary to plaintiff's assertion that there is a six-year statute of limitations for "prima facie tort" against Ptak – purportedly relying on CPLR § 213(1) – a cause of action for prima facie tort is subject to a three-year statute of limitations, inasmuch as plaintiff's second cause of action alleges an economic injury and fails to allege either damage to plaintiff's reputation or special damages (see Marine Midland Bank , 208 AD2d at 688; Classic Appraisals Corp. v DeSantis, 159 AD2d 537 [1990]; Jemison v Crichlow, 139 AD2d 332 [1988]).

In any event, plaintiff's complaint still fails to state a cause of action against Ptak for tortious interference with contract. The elements for tortious interference are: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff (see Kronos, Inc., 81 NY2d 94; M.J. & K. Co. v Matthew Bender and Co., 220 AD2d 488 [1995]). According to the facts set forth in plaintiff's complaint, Roffe had already unauthorizedly held over the premises well before Ptak's alleged intentional inducement; thus, his actions could not have induced a breach of a lease which had already been breached approximately two months prior (see generally 4A New York Practice Commercial Litigation in New York State Courts § 80:48 [2d ed.] [instructing that, in order for the necessary element of causation to be present, defendant must have actually induced the breach]).

In opposition, plaintiff contends that its complaint nevertheless states an additional cause of action for trespass. While this may ultimately be the case, such a claim is simply not alleged against Ptak. The cause of action asserts that Roffe held over the premises by unauthorizedly leaving behind its property; on the other hand, the complaint later alleges that Ptak himself induced Roffe to breach its lease with plaintiff by refusing to remove Roffe's property (emphasis added). Plaintiff plainly makes the distinction between Roffe, who allegedly engaged in a holdover/breach of the lease agreement (amounting to an alleged trespass), and Ptak, who allegedly engaged in inducing said breach.

Turning now to the disqualification claim made by Roffe and Murray, these defendants assert that Arroll, as President of plaintiff corporation, was the primary representative for plaintiff and has personally and exclusively dealt with defendants throughout the lease period. Defendants contend, then, that Arroll should be disqualified from serving as plaintiff's counsel under the advocate-witness rule, as Arroll will certainly be a central witness for plaintiff. This court finds that, under the unique circumstances of this case, defendants have not met their burden to demonstrate that Arroll should indeed be disqualified.

Generally, "[a] lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client" (Code of Professional Responsibility DR 5-102 [22 NYCRR 1200.21]). This court takes into consideration, though, that (1) it is well-settled that a party's entitlement to be represented by counsel of its choice is a "valued right" and should not be impinged upon unless removal is clearly warranted (see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 443 [1987]; Hudson Val. Mar., Inc. v Town of Cortlandt, 54 AD3d 999 [2008]; Goldstein v Held, 52 AD3d 471 [2008]); and (2) the advocate-witness disqualification rule provides guidance, not binding authority, for courts faced with this issue (see S & S Hotel Ventures Ltd. Partnership, 69 NY2d at 440; Ahrens v Chisena, 40 AD3d 787 [2007]).

In the case at bar, inasmuch as it is undisputed that Arroll is President and one of only three shareholders in plaintiff corporation, and Arroll's interests seem to be identical to those of plaintiff, "disqualification would have little or no effect upon the nature or extent of [his] participation in the action" (Stuart v WMHT Educ. Telecom., 195 AD2d 918 [3d Dept 1993]; see also Omansky v Bermont Holdings Ltd., 15 Misc 3d 11 [App Term, 1st Dept 2007] [attorney was not disqualified when he acted as counsel for limited liability corporate defendant for whom he was one of two shareholders]; Old Saratoga Sq. Partnership v Compton, 19 AD3d 823 [3d Dept 2005] [advocate-witness rule generally does not apply where attorney is litigant]). Defendants agree that Arroll was the primary individual with whom they had dealings, and defendants regarded him as plaintiff's "only" representative since 2002, and would, therefore, be privy to intimate details regarding the claims which are currently in contention. Thus, plaintiff cannot be said to be an entity entirely separate from Arroll himself (see Old Saratoga Sq. Partnership, 19 AD3d at 825); therefore, there is no danger that, if called as a witness for defendants, Arroll's testimony would somehow be detrimental to his client (see e.g. Ocean-Clear, Inc. v Continental Cas. Co., 94 AD2d 717 [1983]).

The aforementioned discussion is further bolstered by the clear and unequivocal language set forth in the parties' lease agreement, which states, in relevant part, that:

> "In the event of any dispute between the parties of any nature, [plaintiff] F & R Holding Corp. may retain any attorney it wishes including but not limited to Mark E. Arroll, one of its officers, directors and shareholders. Tenant consents to such representation. Tenant further consents that Mark E. Arroll may testify as a witness notwithstanding his legal representation of F & R Holding Corp. (Landlord). Tenant further consents and agrees not to make any motion to disqualify Mark E. Arroll from acting as Landlord's attorney in any action or proceeding or suit."

Accordingly, the portion of Ptak's motion to dismiss plaintiff's second cause of action as it exists against him is granted. The remaining portion of Ptak's motion, and the motion by Roffe and Murray to disqualify Arroll, are denied.

Dated: April 17, 2009

J.S.C.