

Lockett v Tuff City Records

2009 NY Slip Op 31171(U)

May 20, 2009

Supreme Court, New York County

Docket Number: 602900/08

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 602900/2008
LOCKETT, ERIC
vs.
TUFF CITY RECORDS
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
MAY 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Aaron Fuchs, pursuant to CPLR §3211(a)(1) and (a)(7), to dismiss plaintiffs' Complaint for failure to state a cause of action and upon the ground that there is a defense based on documentary evidence, is denied; and it is further


ORDERED that plaintiffs' cross-motion to dismiss the defendants' tortious interference with contract counterclaim is granted; and it is further

ORDERED that plaintiffs serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that all parties appear for a preliminary conference on August 4, 2009, 2:15 p.m. in Part 35.

This constitutes the decision and order of the Court.

Dated: 5/20/09


HON. CAROL EDMEAD J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ERIC LOCKETT, p/k/a Funkmaster Wizard Wiz;
CURTIZ BROWN p/k/a Grandmaster Caz; CARLOS
MANDES p/k/a DJ Charlie Chase, individually and as
The recording artist p/k/a THE COLD CRUSH
BROTHERS; THEODORES LIVINGSTONE p/k/a
Grand Wizard Theodore; ROBIN DIGGS, p/k/a Master
Rob; KEVIN FERGUSON p/k/a Waterbed Kev;
DARRYL MASON p/k/a Dot-A-Rock; JAMES
WHIPPER p/k/a Prince Whipper Whip; and RUBIN
GARCIA p/k/a Ruby Dee, individually and as the
recording artist p/k/a THE FANTASTIC FIVE,

Index No. 602900/08

Plaintiffs,

-against-

TUFF CITY RECORDS; TUFAMERICA, INC.; OL'
SCHOOL FLAVA, a division of TufAmerica, Inc.;
STREET TUFF TUNES; and AARON FUCHS,

Defendants.

-----X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

The plaintiffs¹ in this action are pioneers of two “hip-hop” groups dating back from the 1970's known as the Cold Crush Brothers and the Fantastic Five.

Plaintiffs commenced this action against record companies Tuff City Records, TufAmerica, Inc. (“TufAmerica”), Ol’ School Flava, a division of TufAmerica, Street Tuff Tunes (collectively, the “Tuff Entities”), and Aaron Fuchs (“defendant Fuchs”), the Chief Executive Officer of TufAmerica (collectively, “defendants”), alleging that defendants have sold

¹ Plaintiffs are Eric Lockett p/k/a Funkmaster Wizard Wiz (“Lockett”), Curtiz Brown p/k/a Grandmaster Caz (“Brown”), Carlos Mandes p/k/a DJ Charlie Chase (“Mendez”) individually and collectively p/k/a the Cold Crush Brothers, Theodores Livingstone p/k/a Grand Wizard Theodore, Robin Diggs, p/k/a Master Rob, Kevin Ferguson p/k/a Waterbed Kev, Darryl Mason p/k/a Dot-A-Rock, James Whipper p/k/a Prince Whipper Whip, and Rubin Garcia p/k/a Ruby Dee, individually and as collectively p/k/a the Fantastic Five (collectively, the “plaintiffs”).

their music compositions to the general public without compensating plaintiffs.

Defendant Fuchs now moves pursuant to CPLR §3211(a)(1) and (a)(7) to dismiss the plaintiffs' Complaint for failure to state a cause of action and upon the ground that there is a defense based on documentary evidence.

In response, plaintiffs cross move to dismiss the defendants' tortious interference with contract counterclaim.

Complaint

In the 1980s, Lockett and Brown, as the Cold Crush Brothers, executed a recording contract with one of the Tuff Entities to become exclusive recording artists. Lockett and Brown claim that the Tuff Entities have exploited their musical compositions and are required to pay them certain royalties and other license fees. Despite Lockett and Brown's requests for copies of the contracts, the Tuff Entities failed and refused to provide them with a copy of such contracts.

The members of the Fantastic Five similarly allege that they executed a recording contract with Soul Wax Records to become exclusive recording artists. At some time after the Fantastic Five recordings were created, Soul Wax Records sold the same to the Tuff Entities. It is claimed that the Tuff Entities began to exploit the Fantastic Five recordings and compositions as owners of same and are obligated to pay royalties to the Fantastic Five.

Thus, plaintiffs commenced this action for breach of contract, an accounting, unjust enrichment and rescission.

Motion by Defendant Fuchs

Defendant Fuchs argues that plaintiffs failed to plead facts sufficient to pierce the corporate veil of the Tuff Entities. Plaintiffs failed to allege (1) that defendant Fuchs exercised

domination or control over the corporation, (2) that defendant Fuchs abused the privilege of doing business in the corporate form, or (3) that defendant Fuchs conducted TufAmerica's affairs so as to render it his alter ego. Plaintiffs failed to even assert that defendant Fuchs was conducting the business in an individual capacity. Defendant Fuchs did not conduct business in an individual capacity or exercise dominion or control; instead he headed an entire staff of employees who executed all duties in accordance with the corporate form.

According to the sworn affirmation of defendant Fuchs, TufAmerica, a New York corporation, which produces, distributes and sells pre-recorded music, contracted with Lockett, Brown and Mendez whereby TufAmerica became the producer of their recorded product. TufAmerica thereafter entered into an agreement with a record label for which the Fantastic Five recorded, but never entered into an agreement with the Fantastic Five. Defendant Fuchs never represented to plaintiffs that TufAmerica would agree to contract with plaintiffs. All negotiations regarding plaintiffs' representations, correspondence forwarded to plaintiffs, and invoices, were signed by either defendant Fuchs or an employee of TufAmerica in his or her corporate capacity. Correspondence was on TufAmerica's corporate letterhead and advertising promotions were created by TufAmerica and included the TufAmerica corporate logo. All payments to plaintiffs were made by TufAmerica in its corporate capacity. Nowhere in TufAmerica's contracts with plaintiffs is there any intentions to bind anyone other than TufAmerica.

Defendant Fuchs also argues that BCL §715(h) protects officers in the ordinary course of duties. The Complaint fails to allege actions of defendant Fuchs outside normal duties. Plaintiff cannot impose liability upon defendant Fuchs as there is no allegation in the Complaint that

Fuchs did not perform his duties as an officer in good faith and with ordinary prudence. Defendant Fuchs relied upon TufAmerica's competent staff and representatives in order to complete services for all representation of photographers and stylists.

Further, the Court may take judicial notice of documentary evidence that defeats plaintiffs' claims. In addition to the affidavit of defendant Fuchs, defendant Fuchs submits printouts from the New York State Department of State website showing that he is the Chief Executive Officer of TufAmerica. As the documents obtained from the New York State Department of State online are available for public inspection, they qualify as public records. Data culled from public records is, of course, a proper subject of judicial notice. It is therefore proper for the court to take judicial notice of these documents that demonstrate TufAmerica's adherence to the corporate form and TufAmerica's holding itself out to be a corporation.

Plaintiffs' Opposition

Plaintiffs argue that a party seeking to pierce the corporate veil generally requires discovery in order to prove the allegations set forth in the complaint. Also, since relevant facts are within the exclusive control of defendant Fuchs plaintiff need not establish a *prima facie* case, and may conduct discovery, pursuant to CPLR § 3211(d). Plaintiffs need only make a "sufficient start" by demonstrating that facts may exist that would justify denial of the motion, and that those facts are currently unavailable to the plaintiffs. Should this Court decide to treat defendant's Fuchs's motion as one for summary judgment per CPLR § 3211(c), CPLR § 3212, authorizes this Court to deny summary judgment or grant a continuance pending discovery to demonstrate that there are essential issues of fact within defendants' exclusive knowledge. Plaintiffs served document requests, interrogatories, and a notice to take Fuchs's deposition, in

order to obtain information concerning: (i) the nature and extent of Fuchs's control and domination, and decision making authority over the Tuff Entities; (ii) his role in the transactions set forth in the Complaint; (iii) whether the Tuff Entities observed corporate formalities; and/or (iv) whether the Tuff Entities are properly capitalized. And, plaintiffs have plead all facts that are currently available to them in support of this claim.

In further opposition, plaintiff Brown attests that defendant Fuchs introduced himself to Brown as someone who "ran" various music related companies, including, but not limited to, Tuff City Records. Further, Fuchs repeatedly represented to Brown that Fuchs runs the business known as Tuff City Records, that Fuchs makes all decisions, and that Fuchs tells his "people" exactly what to do. Based on his numerous encounters with Fuchs and Tuff City Records since the 1980s, Brown believes that defendant Fuchs is the only person who makes decisions at Tuff City Records, and is in absolute, total, sole control of any business that he operates. Finally, when this action commenced, Fuchs himself contacted Brown and offered Brown various sums of money to end this action.

Nor does the "Entity Status Information" sheet downloaded from the Department of State constitute documentary evidence that contradicts the Complaint. Such document only states the various required addresses for the company and whether the corporation is active, and does not prove TufAmerica's "adherence to corporate formalities." No information regarding the filing of, or failure to file, any other required corporate documents are available online. The only other "document" proffered to contradict plaintiffs' allegations, is the affirmation of defendant Fuchs, which is self-serving and unsupported factual claims. Plaintiffs are unaware of any facts evidencing that Fuchs is a licensed attorney, physician, osteopath, or dentist in the State of New

York, which would entitle him to submit an affirmation in accordance with CPLR § 2106.

Assuming Fuchs's factual claims can be supported by evidence, they still fail to prove that Fuchs did not exercise complete domination over the Tuff Entities; they further fail to prove that Fuchs did not abuse the privilege of doing business in the corporate form.

Further, the Business Judgment Rule cannot protect defendant Fuchs from liability for the claims alleged in the Complaint; plaintiffs are not shareholders of and do not claim any ownership or interest in any of the Tuff Entities. Nor is there any showing of what "service" that any specific person employed by TufAmerica performed that relates to the "representation" of any plaintiff named herein.

Defendant Fuchs's own personally verified original Answer and Counterclaim contradict his own motion by affirming under penalty of perjury that he personally entered into a "business relationship with Plaintiffs." By his own Counterclaim, defendant Fuchs, along with the remaining defendants, alleges to have entered into a contract individually with the Plaintiffs. Defendant Fuchs verified that the factual statements set forth in his Counterclaim were true, including his unequivocal allegation that he "entered into a business relationship with Plaintiffs." As such, defendant Fuchs cannot escape personal liability by hiding behind his corporate entities.

In support of their cross-motion to dismiss defendants' Counterclaim pursuant to CPLR § 3211 (a) (7), plaintiffs argue that defendants' "interference with contractual relation" counterclaim must be dismissed because defendants failed to plead (1) the existence of a contract or business relation with a third party; (2) plaintiffs' knowledge of any alleged contract between defendants and a third party; (3) facts evidencing that any plaintiff induced a third party to breach a contract with defendants; and (4) defendants suffered any damages from the alleged tortious

interference.

The Tuff Entities allege the existence of two contracts, dated March 15, 1983 and November 16, 1986 respectively, by and between the Tuff Entities and the Plaintiffs, which is contradicted by their own Answer which denies any contractual relationship with plaintiffs Livingstone and the members of the Fantastic Five. No contract with a third party is mentioned in the counterclaim. It is nonsensical for plaintiffs to interfere with their own contracts and/or for one plaintiff to interfere with the Tuff Entities' contract with a different plaintiff since the plaintiffs' interests are so intertwined with each other. Moreover, the Tuff Entities fail to plead any facts demonstrating plaintiffs' knowledge of a contract between the Tuff Entities and a third party, or knowledge of any of the other plaintiffs' contracts. And, no third party agreements or parties are even mentioned in the counterclaim. Finally, the Tuff Entities fail to plead facts that show the plaintiffs' intentional inducement of the non-existent third party to breach or otherwise render performance of the contract impossible. Thus, it is equally as unreasonable to assume that any one of the plaintiffs induced any of the other plaintiff to interfere with his own contracts with the Tuff Entities. Additionally, because the Tuff Entities have not alleged the breach or hindrance of a third party contract that would in any way harm the Tuff Entities, the Tuff Entities have failed to plead any damages from the alleged tortious interference.

Defendants' Opposition to Cross-Motion

Defendants argue that there is nothing "incredible" about their tortious interference with contractual relations claim. By entering into a contractual relationship with defendants, plaintiffs granted rights to defendants to license copyrighted materials. Plaintiffs' subsequent actions proceeded to interfere with the defendants' exploitation of those rights. If any action is

cognizable from the facts alleged, a motion to dismiss fails. Further, plaintiff improperly seeks to dispute factual allegations. The proper remedy for is for plaintiff to serve a demand for a Bill of Particulars, not to seek dismissal.

Plaintiffs' Reply in Support of Cross-Motion

Defendants' opposition to plaintiffs' cross-motion is fatally defective. In their Answer and Counterclaim (both versions), "Defendants" are defined as only "Tuff City Records, TufAmerica, Inc., Ol' School Flava [and] Street Tuff Tunes." Notwithstanding, defendants' Opposition fails to include defendant Fuchs as a responding party. Therefore, defendant Fuchs has not opposed the cross-motion and, at a minimum, it must be granted as to him.

Defendants also fail to address any of the elements required to plead a claim for tortious interference with contractual relations. The only additional "facts" alleged to possibly satisfy these specific pleading requirements is defendants' counsel statement that "Plaintiffs granted rights to . . . Defendant[s] to license copyrighted materials, then proceeded to interfere with the exploitation of those rights." However, such statement still does not meet the pleading requirements.

Further, a claim for tortious interference with contractual relations cannot be premised on conduct of a party that is designed to interfere with that party's own contract; and plaintiffs have not requested, nor do they seek "amplification of the pleadings."

And, plaintiffs have not disputed any facts; they only assert that none of the required elements of a claim for "tortious interference with contractual relations" have been or could be plead. Moreover, plaintiffs have not sought "amplification" of any fact. Accordingly, the service of a demand for a bill of particulars is irrelevant.

Analysis

In determining a motion to dismiss pursuant to CPLR §3211(a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Mfg. Co., Inc. v Blumberg*, 242 AD2d 205, 660NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR §3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d at 87-88). In assessing a motion under CPLR § 3211(a)(7), however, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" and the criterion is "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d at 87-88l, *citing Rovello v Orofino Realty Co.*, *supra*, 40 NY2d 633, 635, 389 NYS2d 314 [1976] and *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

Generally, to pierce the corporate veil and impose alter ego liability, a plaintiff must show that: (1) the owners of the corporation exercised complete domination of the corporation in

respect to the transactions at issue; and (2) such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff's injury (*BT Americas Inc. v ProntoCom Marketing, Inc.*, 18 Misc 3d 1141, 859 NYS2d 893 [NY Sup 2008] citing *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339-40 [1998], *Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141-42 [1993] and *Teachers Ins. Annuity Assn. of Amer. v Cohen's Fashion Optical of 485 Lexington Ave. Inc.*, 45 AD3d 317 [1st Dept 2007]). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*BT Americas Inc. v ProntoCom Marketing, Inc.*, supra citing *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d at 339). Several factors are considered in determining domination and control, including the absence of corporate formalities, inadequate capitalization of the corporation, personal use of corporate funds, commingling of personal funds, overlap in officers, directors and personnel, and common office space, phone numbers and addresses with other commonly owned corporate entities (*BT Americas Inc. v ProntoCom Marketing, Inc.*, supra citing *William Passalacqua Builders, Inc. v Resnick Developers South, Inc.*, 933 F2d 131, 139 [2d Cir 1991]). The theory of piercing the corporate veil "involves a fact laden inquiry that is not well suited for resolution on a pre-answer, pre-discovery motion to dismiss" (*BT Americas Inc. v ProntoCom Marketing, Inc.*, supra citing *Ledy v Wilson*, 38 AD3d 214, 214 [1st Dept 2007], *Kralic v Helmsley*, 294 AD2d 234, 235-36 [1st Dept 2002], and *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1st Dept 1999]).

Accepting the allegations in the Complaint as true, as this Court must, it appears that plaintiffs have alleged a cognizable claim for piercing the corporate veil as to defendant Fuchs and the Tuff Entities. Here, plaintiffs alleged that defendant Fuchs (i) is the sole owner of the

Tuff Entities, (ii) personally controls and dominates the Tuff Entities, (iii) has not observed the corporate formalities of the Tuff Entities, and (iv) that Fuchs is, as an individual, so intertwined with the actions of the Tuff Entities that the action and conduct of said entities should be deemed that of Fuchs, rendering him personally liable for the same. Brown's affidavit indicates that defendant Fuchs also makes all decisions. It is also alleged that defendant Fuchs's domination has caused plaintiffs to suffer damages. Such allegations are sufficient, at this juncture, to permit plaintiffs to assert a claim against defendant Fuchs under the theory of piercing the corporate veil.

Further, plaintiffs have served discovery demands for information pertaining to whether defendant Fuchs commingled the Tuff Entities' assets and business activities with his own assets, whether the Tuff Entities were undercapitalized, and whether the Tuff Entities disregarded the required corporate formalities. Thus, at the very least, plaintiffs are entitled to obtain the necessary discovery to ascertain whether further factors exist to support piercing the corporate veil (*see BT Americas Inc. v ProntoCom Marketing, Inc, supra*). Therefore, the motion by defendant Fuchs to dismiss the Complaint for failure to state a claim to pierce the corporate veil is denied.

Defendant Fuchs also failed to submit documentary evidence establishing his defense as a matter of law. Pursuant to CPLR §3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." The test on a CPLR §3211 (a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v*

Martinez, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]). Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211(a)(1) (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

In support, defendant Fuchs submits his own sworn affirmation (made under the penalties of perjury and notarized), and the Entity Information page downloaded from the New York State Division of Corporations website. However, affidavits do not qualify as “documentary evidence” for purposes of this rule (*see Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court Bronx County 2004]). Nor does the “Entity Status Information” page constitute documentary evidence that contradicts the allegations in the Complaint. Such document only states that TufAmerica is an active corporation, was incorporated as a domestic corporation in 1991, that defendant Fuchs is its “Chairman or Chief Executive Officer,” and that its address for service of process and principal executive office are located at 250 West 49th Street, New York, New York. Such information does not disprove any of the allegations in the Complaint pertaining to piercing the corporate veil. Such document does not establish that TufAmerica adhered to corporate formalities, filed corporate documents. Therefore, as neither the sworn affirmation of defendant Fuchs nor the Entity Information page address any of the factors that are

required to be considered in order to determine whether a corporation's veil should be pierced, dismissal pursuant to CPLR §3211(a)(1) is also denied.

Cross-Motion to Dismiss

Tortious interference with contractual relations consists of four elements: (1) the existence of a contract between the defendants and a third party; (2) plaintiffs' knowledge of the contract; (3) plaintiffs' intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to defendants (*see Kronos, Inc. v AVXCorp.*, 81 NY2d 90, 94, 595 NYS2d 931 [1993]; *KSL Recreation Corp. v Boca Raton Hotel and Club Ltd. Partnership*, 168 Misc 2d 18, 637 NYS2d 261 [Sup Ct New York County 1995]).

The factual allegations in support of this claim are found in two (2) paragraphs,

to wit:

112. Defendants entered into a business relationship with Plaintiffs as of contracts dated March 15, 1983 and November 16, 1986.

113. Plaintiffs have interfered with this contractual relationship through a number of actions including, but not limited to, the theft of master tapes from the Tuff City office, the assault of a Tuff City employee, the collection of royalties from products which contain a number of musical compositions controlled by Tuff City, frivolous claims, threatening letters, overpayments, and physical intimidation.

Defendants' claim for tortious interference with contractual relations fails to include the necessary allegations of the existence of a contract between defendants and a third party, not the plaintiffs, and that plaintiffs' intentionally induced any such party to breach such a contract, or otherwise render performance impossible. Further, it is alleged that plaintiffs and defendants entered into a contract, and that plaintiffs "interfered with this contractual relationship" by engaging in various activities. However, the Complaint does not allege that any of said plaintiffs

were third parties to the contracts alleged in the Complaint. Therefore, having failed to sufficiently allege the elements for a tortious interference with contract claim, defendants' counterclaim alleging same is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Aaron Fuchs pursuant to CPLR §3211(a)(1) and (a)(7) to dismiss the plaintiffs' Complaint for failure to state a cause of action and upon the ground that there is a defense based on documentary evidence, is denied; and it is further

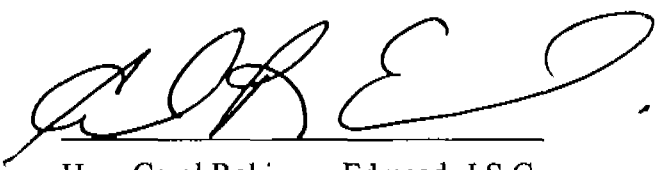
ORDERED that plaintiffs' cross-motion to dismiss the defendants' tortious interference with contract counterclaim is granted; and it is further

ORDERED that plaintiffs serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that all parties appear for a preliminary conference on August 4, 2009, 2:15 p.m. in Part 35.

This constitutes the decision and order of the Court.

Dated: May 20, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
MAY 21 2009
COUNTY CLERKS OFFICE
NEW YORK