

New Stadium LLC v Greenpoint-Goldman Corp.

2010 NY Slip Op 30869(U)

April 12, 2010

Supreme Court, New York County

Docket Number: 600493/2005

Judge: Shirley Werner Kornreich

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

PRESENT: ~~JUSTICE~~ JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 600493/2005

NEW STADIUM LLC

vs.

GREENPOINT-GOLDMAN

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/12/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

1-3

4-5

6

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED

APR 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/12/10

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
NEW STADIUM LLC,

Plaintiff,

-against-

GREENPOINT-GOLDMAN CORP.,

Defendant.

-----X
SHIRLEY WERNER KORNREICH, J.

Index No. 600493/2005

DECISION & ORDER

FILED

APR 15 2010

EX-1011

In this action for tortious interference with contract and prospective economic relations brought by a proposed assignee of the tenant, the defendant/landlord, Greenpoint-Goldman Corp. (Goldman), moves for summary judgment of dismissal, pursuant to CPLR 3212.¹ The first cause of action alleges that Goldman tortiously interfered with two existing contracts: 1) a March 18, 2004 Sale Purchase Agreement (SPA) between Goldman's tenant, non-party Vanderbilt Holdings LLC (Vanderbilt) and plaintiff, New Stadium LLC; and 2) an alleged Litigation Agreement. Plaintiff contends that Goldman tortiously interfered with the SPA by failing to consent to the assignment of Vanderbilt's lease and demanding an extortionate consent fee that amounted to economic duress. In addition, plaintiff alleges that Goldman tortiously interfered with the Litigation Agreement by pressuring Vanderbilt to withdraw an action it was prosecuting against Goldman for, *inter alia*, refusing to consent to assignment of Vanderbilt's lease. The second cause of action alleges that the same actions by Goldman interfered with plaintiff's prospective

¹ These two causes of action were held to be adequately pleaded by the Appellate Division, 44 AD3d 449 (1st Dept 2007), while plaintiff's claims for breach of contract and specific performance were held to have been properly dismissed.

economic relationship with Vanderbilt.

Background

Goldman, as landlord, and Vanderbilt, as tenant, entered into a net ground lease, dated February 2, 2000 (Lease),² for the premises located at 470 Vanderbilt Avenue, Brooklyn, NY (Property). The original term of the Lease will end in 2077.

On February 9, 2000, the Lease was guaranteed (Guaranty) by four Delaware limited partnerships (Carlyle Guarantors),³ whose general partner was Carlyle Realty II, L.P. The Carlyle Guarantors were part of The Carlyle Group (Carlyle). Vanderbilt was a related entity, part of the Carlyle real estate fund. The Guaranty provided that it would be unchanged by an assignment of the Lease, whether or not Goldman's consent to the assignment was obtained. Guaranty, §2(a) and (b), Defendant's Moving Papers, Exh. 9.

Article 12 of the Lease governed Vanderbilt's right to assignment. If Vanderbilt were not in default, it could assign the Lease, with Goldman's consent. Consent could not be withheld or delayed, provided that the assignee had a net worth of \$35,000,000.00, or the assignee's guarantor or the guarantor of the guarantee then in place, had a net worth in excess of \$35,000,000.00. Article 12 contained the further condition that the net worth of the assignee or guarantor had to be certified by an accountant in accordance with generally accepted accounting principles (GAAP).

Carlyle's development of the Property for use as a data support center was completed by

² The Lease was amended on February 23 and November 30, 2000, and April 2001. The term "Lease" in this opinion refers to the original document as amended.

³ Carlyle Realty Partners II, L.P., Carlyle Realty Qualified Partners II, L.P., Carlyle Realty Qualified Partners II(A), L.P. and Carlyle Realty Foreign Investors II, L.P.

late 2000 to early 2001 at a cost of approximately \$77,000,000.00. In 2003, Carlyle felt that the Property would be best positioned economically if it were redeveloped into residential, office or another alternative use because it would be several years before market conditions would favor its use as a data support center.

It is undisputed that in 2004, Vanderbilt’s annual rent under the Lease was \$2,500,000.00 and that it was not in default. In addition, Carlyle’s Managing Director and Vice President, Thomas Ray, testified that in March 2004, 35 to 40 % of the Property was leased and it was 5 to 6% occupied by sub-tenants. He also said that it “generated positive cash flow from operations” or was “close to break[ing] even.” Plaintiff disputes this. It points to the testimony of Goldman’s General Counsel, Judith Brener, who said that before plaintiff came into the picture, Mr. Ray told her that the building was not significantly occupied and “we may have to just hand you the keys.” Brener EBT, pp. 36-37. However, Ms. Brener also said that one of the sub-tenants, WilTel, was paying \$4,000,000.00, which was more than Vanderbilt’s rent. *Id.* at 35. In addition, plaintiff’s principal, David Bistricher, admitted that part of the consideration Vanderbilt gave for the SPA was that plaintiff would receive rent from sub-tenants at the Property. Mr. Bistricher said that there were “cages” that generated half a million dollars in rent and that WilTel’s rent would generate “multiple millions of dollars for several years going forward.” Bistricher EBT, pp. 195-196. Mr. Bistricher’s affirmation⁴ contradicts his deposition testimony. His affirmation states that Vanderbilt “had no tenants in occupancy to speak of.”

On March 18, 2004, Vanderbilt and plaintiff entered into the SPA, pursuant to which

⁴ Mr. Bistricher submitted a notarized “affirmation” rather than an affidavit. The court will overlook the defect in form. CPLR §104.

Vanderbilt agreed to assign the Lease in return for \$9,500,000.00. In §6 of the SPA, Vanderbilt agreed that it would deliver promptly, plaintiff's unaudited financial statement to Goldman and a request for its consent to an assignment of the Lease to plaintiff that included a release of the obligations of Vanderbilt and Carlyle under their respective Lease and Guaranty. SPA §6(c) further provided that plaintiff had to promptly supply any additional information that Goldman reasonably requested in connection with the proposed Lease assignment. Goldman's Consent to the Lease assignment and its release of Carlyle under the Guaranty are defined in the SPA as the "Consent and Release." SPA §6(d). The SPA gave Vanderbilt thirty days from the date of the SPA (defined by the SPA as the "Initial Period") to obtain Goldman's Consent and Release, *i.e.*, until April 17, 2004. *Id.*

After the Initial Period, SPA §6 gave Vanderbilt sixty more days, *i.e.*, until June 17, 2004, defined as the "Second Period," in which to obtain Goldman's "Omnibus Consent and Release." The Omnibus Consent and Release was defined to include the Consent and Release, as well as a "Conversion Consent," which was defined as Goldman's consent to and cooperation with rezoning and conversion of the Property to residential or residential and commercial use. *Id.* During the Second Period, Vanderbilt could, after consultation with plaintiff, require it to pay to Goldman, at the closing of the Lease assignment, a "Consent Fee" of up to \$1,500,000.00. *Id.* Vanderbilt could, but was not obligated to, pay all or a portion of the Consent Fee. *Id.*

If the Omnibus Consent and Release was not obtained during the Second Period, plaintiff or Vanderbilt could terminate the SPA by written notice. SPA §6(f). On February 1, 2005, Vanderbilt sent plaintiff a written notice of termination, citing the failure to obtain the Omnibus Consent and Release during the Second Period. Plaintiff also had the right, in its sole discretion,

[* 6]

to terminate the SPA if Vanderbilt was unable to perform for reasons other than its own willful default. SPA §22. Plaintiff did not exercise this option.

At the closing of the SPA, Vanderbilt was required to deliver to plaintiff either Goldman's Consent and Release or, if applicable, the Omnibus Consent and Release. SPA §9(A)(I). Vanderbilt could waive the release of itself and Carlyle. *Id.* However, the waiver had to be in writing. SPA §28. Although plaintiff claims in conclusory fashion that Vanderbilt did waive the release clause [Affirmation of David Bistricher, dated November 9, 2009, ¶18], there is no written waiver in the record.

After the SPA was signed, Vanderbilt and/or Carlyle engaged in lengthy negotiations with Goldman. Mr. Ray, Carlyle's representative, testified that at the initial meeting with Ms. Brener, she first discussed a payment of up to \$15,000,000.00 in return for Goldman's consent to requests it was not obligated to consent to under the Lease. Ray EBT, pp. 39-40. Various proposed term sheets were exchanged during 2004 and 2005. For example, the term sheets included in the record proposed that Goldman would receive up to \$5,000,000.00 upon the sale of the Lease to plaintiff, with two installments of \$2,000,000.00, one to be paid to Goldman upon approval of rezoning of the Property and one upon approval of a cooperative or condominium offering plan by the New York State Attorney General (AG). Other terms that were discussed included lowering plaintiff's required net worth to \$10,000,000.00 and changing the required proof of net worth to a fair market value, rather than a GAAP financial statement.

During the SPA's Initial Period, on April 13, 2004, Mr. Ray sent Ms. Brener an e-mail requesting that Goldman sign an estoppel certificate and a consent to an assignment of the Lease to plaintiff. The proposed consent to assignment form contained a release of Vanderbilt and the

Carlyle Guarantors. On May 17, 2004, Goldman refused to consent to this assignment of the Lease on the ground, *inter alia*, that plaintiff had not produced “financials in an acceptable form.”⁵ In her affidavit on the motion, Ms. Brener correctly contends that Vanderbilt was not entitled to a release under any circumstances and the Carlyle Guarantors were not entitled to a release absent proof that plaintiff or a replacement guarantor provided financial statements certified in accordance with GAAP demonstrating the requisite net worth.

On May 28, 2004, during the Second Period, Vanderbilt sent Goldman a proposed assignment that did not include a release of the Carlyle Guarantors. However, it contained a release of Vanderbilt. On May 29, 2004, Mr. Ray sent an e-mail to Mr. Bistricher, plaintiff’s principal. In the e-mail, Mr. Ray said that he had submitted a “separate request for consent to assignment making it clear that we were leaving our Fund guaranty in place.” The e-mail further stated that Mr. Ray had made it very clear to Ms. Brener that Goldman was required to consent and, if it did not, all remedies would be pursued, including a lawsuit for tortious interference. On June 8, 2004, Mr. Ray sent to Goldman a Combined Financial Statement of Carlyle Real Estate Fund II for 2001 and 2002, of which the Carlyle Guarantors were a part. Moving Papers, Exh. 14. The Combined Financial Statement was prepared “in accordance with auditing standards generally accepted in the United States,” not GAAP. On June 14, 2004, Ms. Brener responded that Goldman would not release Vanderbilt; that plaintiff had not proven sufficient net worth for the assignment; that the Tenant and Carlyle Guarantors had to give assurance that the Guaranty

⁵ Ms. Brener also stated that there were violations recorded against the Property. As to the latter, Vanderbilt’s failure to cure a violation for twenty days after notice thereof, was a default under the Lease. Lease Articles 20 and 34. It is undisputed that Vanderbilt cleared the violations.

would stay in place for the term of the Lease; and that Goldman would not consent to convert the Property to a cooperative.

On July 1, 2004, after the Second Period ended and the SPA was terminable at will, Vanderbilt sent Goldman a proposed consent to assignment of the Lease that did not release Vanderbilt or the Carlyle Guarantors. In the July 1 letter, Vanderbilt, however, stated that Goldman was not within its rights to demand that the Carlyle Guarantors give assurance that the Guaranty would remain in place for the term of the Lease. No GAAP financial statement accompanied the request.

Although the July 1 request did not contain a release of the Carlyle Guarantors, Mr. Ray testified that Carlyle never indicated that it would remain as guarantor under the Lease and that Carlyle was “emphatic to the opposite.” Ray EBT, pp. 54-55. Further, he said that Carlyle’s primary interest was to be released from a liability of over a hundred million dollars under the Guaranty and the amount it received for the sale of the Lease was not significant. *Id.* at 149-150. Mr. Ray also said that Carlyle “declined to give assurances” that it would stay as guarantor after the moment of verification, that he “worked diligently” to get GAAP financials from plaintiff or Mr. Bistricher, but never got them, and that Ms. Brener insisted on GAAP financials. *Id.* at 57-58, 70-71 and 73-74. Mr. Bistricher testified that in 2004, he personally had a net worth of \$35,000,000.00 and that plaintiff’s partners had no problem confirming a net worth according to GAAP of \$35,000,000.00 or more. Bistricher EBT, pp. 118-120. He did not testify that he submitted GAAP financials to this effect.

On or about July 2, 2004, Vanderbilt sued Goldman in this court for: a declaratory judgment declaring that the Lease required Goldman to consent to the changed use of the

Property; breach of the Lease for failure to consent to conversion of the Property; and breach of the implied covenant of good faith and fair dealing for failing to consent to the change of use (Vanderbilt Action).

Days later, on July 7, 2004, Vanderbilt sent Ms. Brenner a new term sheet. The proposed terms included: 1) an assignment to and assumption of the Lease by plaintiff; 2) Goldman's waiver of the Article 12 net worth requirement, for plaintiff; 3) Goldman's Omnibus Consent and Release; 4) a \$5,000,000.00 fee to Goldman from Vanderbilt or plaintiff; 5) plaintiff's payment of an unspecified additional amount upon approval of the rezoning and the acceptance by the AG of an offering plan; and 6) dismissal of the Vanderbilt Action.

On July 29, 2004, Vanderbilt amended its complaint in the Vanderbilt Action to add causes of action for tortious interference with prospective economic advantage and for declaratory judgments declaring that Vanderbilt was not in default under the Lease, that it could assign the Lease to New Stadium, and that the Carlyle Guarantors had a net worth in excess of \$35,000,000.00.

On February 1, 2005, Vanderbilt sent plaintiff a written notice terminating the SPA. On February 10, 2005, Vanderbilt withdrew its pending summary judgment motion and stipulated to discontinue the Vanderbilt Action, both without prejudice. Subsequently, Carlyle engaged in unsuccessful negotiations to assign the Lease to an entity called Extel. Ultimately, in 2007, the Lease was assigned to an entity called Atara, in which Carlyle has a limited partnership interest. As part of the deal, Atara is indemnifying Goldman in this action.

With respect to formation of the Litigation Agreement, Mr. Bistricher testified that Vanderbilt promised to sue Goldman and pursue the action to judgment. He said that the alleged

Litigation Agreement was part of Vanderbilt's obligation of good faith and fair dealing arising out of the SPA, as well as an oral promise made by Mr. Ray that occurred during discussions over a period of time, culminating when it became apparent that Goldman would not consent.

Plaintiff's claims rest on the premise that: 1) Goldman was legally required to consent to the Lease assignment because Vanderbilt was not in default thereunder and the Carlyle Guarantors agreed to remain in place; and 2) Goldman demanded amounts for its consent to the Lease assignment that amounted to extortion or improper economic pressure or extortion.

Discussion

The elements of a claim for tortious interference with an existing contract are: 1) the existence of a valid contract with a third party, 2) defendant's knowledge of that contract, 3) defendant's intentional and improper procuring of a breach, and 4) damages. *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007). A defendant may raise as a defense that it acted to protect its own legal or financial stake in the breaching party's business. *Id.* Examples of a financial stake are: where defendant is a significant stockholder in the breaching party's business; where defendant and the breaching party have a parent-subsidary relationship; where defendant is the breaching party's creditor; and where defendant has a managerial contract with the breaching party at the time defendant induced the breach. *White Plains Coat & Apron, supra* at 426.

Where the defendant has an economic interest to protect, in order to recover for tortious interference with contract, the plaintiff must show malice, fraud, illegal conduct, or some degrees of economic pressure, but not persuasion alone. *Foster v Churchill*, 87 NY2d 744 (1996)(even where defendants acted in bad faith, actions taken for economic health of company were defense

to tortious interference with contract absent malice or illegal conduct); *Felsen v Sol Café Mfg. Corp.*, 24 NY2d 682 (1969)(defense of economic interest defeats tortious interference with contract absent proof of malice or fraudulent or illegal conduct); *E. F. Hutton International Assoc. Ltd. v Shearson Lehman Bros. Holdings, Inc.*, 281 AD2d 362 (1st Dept 2001); *Ultramar Energy Ltd. v Chase Manhattan Bank*, 179 AD2d 592 (1st Dept 1992); *Guard-Life Corp. v S. Parker Hardware Mfg.*, 50 NY2d 183, 191 (1980). *See also, Restatement 2d of Torts*, §773. In ruling on a claim of economic justification, courts must “strike a balance between two valued interests: protection of enforceable contracts, which lends stability and predictability to parties’ dealings, and promotion of free and robust competition in the marketplace.” *White Plains Coat & Apron, supra* at 425.

When a contract is terminable at will, a claim for interference with contract does not lie. *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, *supra* at 191-192; *accord Miller v. Mount Sinai Med. Ctr.*, 288 A.D.2d 72 (1st Dept 2001). The reason is that the plaintiff has no assurance of future performance if the contract may be terminated at any time. *Guard-Life, supra*, at fn. 4. Where a suit is based on interference with a non-binding economic relationship, the plaintiff must show that defendant’s conduct was not “lawful” but “more culpable,” such as a crime or an independent tort, or conduct intended to inflict harm on the plaintiff. *Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004). Other wrongful means that would support the claim are physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some sorts of economic pressure. *Id.* at 191-192. Examples of economic pressure are a cooperative board member demanding a real estate commission and discontinuance of a lawsuit against him personally in exchange for the board’s approval of an apartment sale [*Kravtsov v Thwaites Terrace House*

Owners Corp., 267 AD2d 154 (1st Dept 1999), or demanding a bribe, and financial statements not required by the lease, in return for a lease assignment after the tenant defaulted in paying rent [*Maruki, Inc. v Lefrak Fifth Ave. Corp.*, 161 AD2d 264 (2d Dept 1990)].

Plaintiff urges that Goldman's conduct amounted to extortion. The crime of extortion requires proof of intent to harm another's business. Penal Law §155.05(2)(c).

Here, prior to the end of the SPA's Second Period, a contract existed, and Goldman had an economic justification for refusing its consent. After the Initial Period, in order to close under the SPA, Goldman was required to consent to rezoning and conversion to a cooperative or condominium, concessions not within the Lease, which was an economic justification for Goldman's refusal. There is no evidence that during the Second Period, Goldman was presented with a proposal that met the conditions under the Lease for an assignment, without again demanding additional concessions from Goldman. Each proposal required Goldman to make concessions or to waive some of its contractual rights to security under the Lease.

Goldman's position was analogous to a creditor entitled to protect its security. *See, Ultramar Energy Ltd., supra*. In April 2004, the proposal contained a release of Vanderbilt and the Carlyle Guarantors. In May, it contained a release of Vanderbilt. Release of a tenant upon an assignment is the waiver of a valuable right. After an assignment, the original tenant remains contractually liable to the landlord for rent, absent a contrary express agreement or facts from which such an agreement can be implied. *Halbe v Adams*, 176 AD 588 (1st Dept 1917); *Howard Stores Corp. v Robison Rayon Co.*, 64 Misc. 2d 913, 915 (App Term, 1st Dept 1970), *aff'd* 36 AD2d 911 (1st Dept 1971). Here, there was no provision in the Lease or implied agreement by Goldman to release Vanderbilt upon an assignment. Although plaintiff alleges that in May the

Carlyle Guarantors agreed to forego their release under the SPA, the record is otherwise. There is no written waiver of the release of the Carlyle Guarantors as a condition for closing. Even if Goldman were required to consent to the Lease assignment based upon the non-GAAP statement Mr. Ray supplied on June 8, 2004 because the Lease did not require an assurance that the Carlyle Guarantors remain on for the remainder of the Term, at that point in time, in order to close under the SPA, Goldman's Omnibus Consent and Release was required.⁶ Therefore, Goldman's consent to the assignment would not have enabled plaintiff to close.

Further, although plaintiff claims that Goldman's monetary demands amounted to economic duress, since Vanderbilt was losing money. However, plaintiff also argues that Goldman should have consented to the assignment because there was no default under the Lease. Hence, plaintiff admits that Vanderbilt was current on its Lease obligations and Mr. Bistricher admitted at his deposition that there were sub-tenants paying significant rent. Mr. Bistricher's contrary affirmation submitted on this motion does not create an issue of fact. *Phillips v. Bronx Lebanon Hospital*, 268 AD2d 318 (1st Dept 2000)(no issue of fact created by affidavits of plaintiff and her relatives that contradicted plaintiff's deposition testimony); *Kistoov v City of NY*, 195 AD2d 403 (1st Dept 1993)(error to rely on plaintiff's affidavit that contradicted her prior deposition testimony). Nor did Goldman's conduct amount to the crime of extortion, because there is no evidence from which it can be inferred that Goldman had intent to harm Vanderbilt or plaintiff. This case is distinguishable from *Maruki*, as Vanderbilt was not in default under the Lease, Goldman's demand for GAAP financial statements was vouchsafed by the Lease, and

⁶ Curiously, Goldman does not argue that the Carlyle Real Estate Fund II financial statement was not in accordance with GAAP and was not a net worth statement of the Carlyle Guarantors.

Goldman's demand for a fee was for release of its contractual rights and changing the use of its Property, not a bribe.

In essence plaintiff seeks to hold Goldman liable for protecting its contractual rights rather than plaintiff's. The fact that Goldman wanted a payment in return for relinquishment of its contractual rights and consent to the change of use of its Property, larger than plaintiff wished to pay, particularly in light of the fact that Goldman was asked to release more than a one hundred million dollar Guaranty, was negotiation, but not a tort, crime or undue economic pressure. In addition, to lay at Goldman's door all of the blame for the failure of the SPA to close ignores the fact that plaintiff did not provide a GAAP statement of net worth, despite Mr. Bistricher's testimony that he was of sufficient means to do so.

Nor does the court agree that there is evidence that Goldman tortiously interfered with a Litigation Agreement. Clearly, there is economic justification for settling a lawsuit. Its compromise here cannot be said to have been illegal, malicious or the result of undue economic pressure.

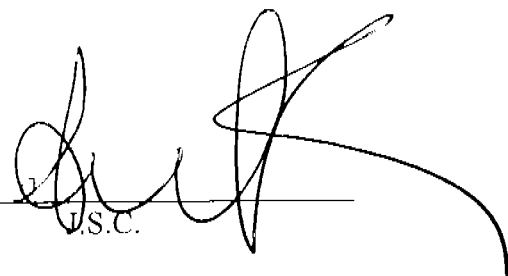
As plaintiff cannot prove interference with contract in the face of Goldman's economic justification, it follows that plaintiff cannot prove a claim for interference with prospective economic relations, which requires the same proof, or proof of an independent tort, which is not present here. Accordingly, it is

ORDERED that defendant's motion to dismiss the first and second causes of action in the complaint is granted, the first and second causes of action are dismissed with prejudice and the Clerk is directed to enter judgment in favor of defendant Greenpoint-Goldman Corp. and against

plaintiff New Stadium LLC.

April 12, 2010

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