

Wilderhomes, LLC v Zautner
2010 NY Slip Op 33284(U)
November 30, 2010
Sup Ct, Albany County
Docket Number: 71582-04
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

WILDERHOMES, LLC,

Plaintiff,

DECISION and ORDER
INDEX NO. 7158-04
RJI NO. 01-04-080372S

-against-

DONALD G. ZAUTNER and ROBERT N. ZAUTNER,

Defendants.

DONALD G. ZAUTNER and ROBERT N. ZAUTNER,

Third-Party Plaintiffs,

-against-

PETER SMITH and JENNIFER L. SMITH,

Third-Party Defendants.

Supreme Court Albany County All Purpose Term, November 1, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

This litigation stems from Plaintiff¹ and Defendants' 2004 real estate contract, which never closed. Previously, Plaintiff's complaint was dismissed by the Appellate Division - Third Department (Wilderhomes, LLC v. Zautner, 34 AD3d 1062 [3d Dept. 2006]), and this Court, by Decision and Order dated April 2, 2009, dismissed all of the Defendants' causes of action except their claim sounding in "tortious interference with prospective contract rights." Plaintiff now moves for summary judgment dismissing such cause of action, and Defendants also moves for summary judgment granting their sole remaining claim.² Because Plaintiff demonstrated its entitlement to judgment as a matter of law and Defendants raised no issue of fact, Plaintiff's motion for summary judgment is granted.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law" (Barra v. Norfolk Southern Ry. Co., 75 A.D.3d 821 [3d Dept. 2010], quoting Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]) "tendering sufficient evidence to demonstrate the absence of any material issues of fact." (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect

¹ Because Third Party Defendants are the members/managers of Plaintiff, all will be collectively referred to herein as "Plaintiff."

² Although both summary judgment motions are untimely filed (CPLR §3212[a]) due to Plaintiff's attorney's recent health issues and no objection being made, good cause exists to consider the submitted motions on their merits.

Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

“[T]o state a claim for tortious interference with prospective [contract rights], the plaintiff must allege that (1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant’s interference caused injury to the relationship.” (Kirch v. Liberty Media Corp., 449 F.3d 388, 400 [2d Cir. 2006][internal quotation marks omitted], quoting Carvel Corp. v. Noonan, 350 F.3d 6, 17 [2d Cir.2003]; see also Carvel Corp. v. Noonan, 3 NY3d 182 [2004]; NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 87 NY2d 614, 621 [1996], Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 NY2d 183 [1980]). Moreover, “the party asserting such a claim must allege a particular business relationship or contract with a third party that was affected by the offending party's actions.” (White v. Ivy, 63 AD3d 1236 [3d Dept. 2009]; Pacheco v United Med. Assoc., 305 AD2d 711 [3d Dept. 2003][stating that the culpable conduct must be “the proximate cause of the rejection of the... proposed contractual relations”]).

On this record, Plaintiff affirmatively negated the second element of Defendants’ “tortious interference” claim. In support of its motion Plaintiff submits Peter Smith’s affidavit, signed both individually and as Plaintiff’s member/manager. Mr. Smith alleged that Plaintiff “never contacted the tenants of the defendants or any other business contacts of Defendants.” Moreover, he alleged that Plaintiff had “no knowledge of any other business relations of Defendants.” Upon such allegations, Plaintiff affirmatively demonstrated that it did not

“intentionally interfere with” Defendants’ particular business relationships, thereby establishing its entitlement to judgment as a matter of law.

In opposition, Defendants failed to raise a triable issue of fact with any admissible proof. Although Defendants’ attorney’s affirmation is of no “probative value” (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]), Defendants properly offered their own jointly signed affidavit. Such affidavit exhibits Defendants’ business relationships with a third party purchaser of the property at issue and their generalized business relations with unnamed tenants. Although it is uncontested that Plaintiff knew of these business relationships, Defendants failed to demonstrate Plaintiff’s intentional interference with either business relation.

Defendants allege that Plaintiff, by “publicizing” this litigation, interfered with their relationships with actual and potential tenants. This, Plaintiff alleges, caused tenants to leave the apartment building at issue and kept potential tenants from renting. Such allegations are wholly speculative, as no tenant or potential tenant was named. Defendants’ claim also constitutes inadmissible hearsay because it is based solely upon information received from “several third parties.” Moreover, the generalized “tenant” relationship alleged fails to specify a “particular business relationship” as required for this cause of action. (White v. Ivy, supra).

Similarly unavailing is Defendants’ contention that Plaintiff, by commencing this action, intentionally interfered with their contract to sell the property at issue to a third party purchaser. First, Defendants failed to demonstrate that the commencement of this suit constitutes the “wrongful conduct” necessary for their tortious interference claim. (Carvel Corp. v. Noonan, supra; NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., supra). Especially in light of this Court’s prior Decision and Order, dated April 2, 2009, which found that Plaintiff had

probable cause to commence this action and dismissed Defendants' tortious interference with a contract, abuse of process, prima facie tort and malicious prosecution causes of action.

Moreover, Defendants offered no proof that Plaintiff was not merely protecting its own economic self interest by commencing this action. (Carvel Corp. v. Noonan, supra).

Accordingly, Plaintiff's motion for summary judgment dismissing Defendants' "tortious interference with prospective contract rights" cause of action is granted, and Defendants' motion is denied as moot.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 30, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated October 8, 2010; Affirmation of Steven Gottmann, dated October 8, 2010, with attached Exhibits 1-4; Affidavit of Wilderhomes, LLC and Peter Smith, dated October 8, 2010, with attached Exhibits 1-5.
2. Notice of Motion, dated October 8, 2010; Affirmation of Christian Morris, dated October 8, 2010, with attached Exhibits 1-2; Affidavit of Donald and Robert Zautner, dated October 8, 2010, with attached Exhibits 1-3.
3. Affirmation of Steven Gottmann, dated October 20, 2010.
4. Christian Morris, dated October 18, 2010.