

**Winter Bros. Recycling Corp. v Jet Sanitation Serv.  
Corp.**

2011 NY Slip Op 30821(U)

March 23, 2011

Supreme Court, Nassau County

Docket Number: 020347-08

Judge: Timothy S. Driscoll

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SCAN

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL  
Justice Supreme Court**

-----X  
**WINTER BROS. RECYCLING CORP.,**

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Plaintiff,**

**Index No: 020347-08  
Motion Seq. Nos: 2, 3 and 4  
Submission Date: 2/4/11**

**-against-**

**JET SANITATION SERVICE CORP.,  
JAMAICA ASH & RUBBISH  
REMOVAL CO., INC., and WESTBURY PAPER  
STOCK CORP.,**

**Defendants.**

-----X

**The following papers having been read on these motions:**

- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Notice of Cross Motion, Affidavit in Opposition/Support and Exhibits.....X**
- Memorandum of Law in Opposition/Support.....X**
- Memorandum of Law in Opposition/Support.....X**
- Notice of Cross Motion, Affidavit in Opposition/Support and Exhibits.....X**
- Affirmation in Opposition/Further Support, Reply Affidavit and Exhibits....X**
- Affirmation in Opposition/Further Support, Reply Affidavit and Exhibits....X**
- Affirmation in Reply/Further Opposition/Further Support.....X**
- Affirmation in Reply, Affidavit in Reply and Exhibits.....X**
- Reply Memorandum of Law in Further Support/Opposition.....X**
- Reply Memorandum of Law in Further Support/Opposition.....X**
- Correspondence dated February 25, February 28 and March 1, 2011.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff Winters Bros. Recycling Corp. (“Winters” or “Plaintiff”) on June 16, 2010, 2) the cross motion filed by Defendants Jamaica Ash & Rubbish Removal Co., Inc. (“Jamaica Ash”) and Westbury Paper Stock Corp. (“Westbury Paper”) on August 6, 2010, and 3) the cross motion filed by Defendant Jet Sanitation Service Corp. (“Jet Sanitation”) on August 19, 2010, all of which were submitted on February 4, 2011 following oral argument before the Court. For the reasons set forth below, the Court denies the motion and cross motions, without prejudice to the parties moving for summary judgment following the completion of discovery.

### BACKGROUND

#### A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212, 1) granting Plaintiff summary judgment against Defendants Jamaica Ash and Westbury Paper dismissing their second counterclaim alleging intentional interference with prospective business relations, third counterclaim also alleging intentional interference with prospective business relations, and fourth counterclaim alleging conversion, contained in their joint Amended Verified Answer and Counterclaims dated March 30, 2010; and 2) granting Plaintiff summary judgment against Defendant Jet Sanitation dismissing Jet Sanitation’s second counterclaim alleging intentional interference with prospective business relations and third counterclaim alleging *prima facie* tort contained in Jet Sanitation’s Amended Verified Answer and Counterclaims dated March 31, 2010.

Jamaica Ash and Westbury Paper oppose Plaintiff’s motion and move for an Order, pursuant to CPLR § 3212, 1) granting them summary judgment against Plaintiff, dismissing Plaintiff’s second cause of action for injunctive relief as set forth in the Amended Verified Complaint dated February 12, 2010 (“Complaint”); and 2) granting them summary judgment against Plaintiff, dismissing the entire Complaint as against Westbury Paper.

Jet Sanitation opposes Plaintiff’s motion and moves for an Order, pursuant to CPLR § 3212, granting Jet Sanitation summary judgment dismissing the Plaintiff’s second cause of action for injunctive relief.

## B. The Parties' Background

The background of this matter is set forth in the March 13, 2009 decision of the Honorable Leonard B. Austin ("Prior Decision") (Ex. G to Birney Aff. in Supp.). In the Prior Decision, Justice Austin outlined the instant action as follows:

The parties in this action are competing solid waste removal companies. Claiming that, without any justification or excuse, Defendants intentionally induced at least Fifty Winters Bros.' customers to abandon or breach their service agreements with Plaintiff, Winters Bros. commenced this action against Defendants seeking injunctive relief and monetary damages based on a cause of action sounding in tortious interference with contract. The tortious interference with contract cause of action is the underlying claim in support of a preliminary injunction restraining Defendants from entering into contracts for waste removal and recycling services with any of Plaintiff's existing customers and communicating with and/or soliciting said customers in an effort to induce them to abandon or breach their Winters Bros service agreements.

In support of its request for injunctive relief, Winters Bros. alleges that Defendants have targeted and solicited at least 50 of its customers inducing them, by the use of misleading statements, to breach their contracts [footnote omitted] resulting in a loss of good will, reputation and customer relationships, all of which Winters Bros. contends will lead to irreparable harm if a preliminary injunction is not granted. In this regard, Winters Bros. urges that damages alone cannot begin to compensate for the loss of potential renewal and referral business which might possibly have been generated by lost customers.

In opposition to Plaintiff's application, [Jet Sanitation] maintains that, regardless of the manner in which a potential new customer approaches Jet [footnote omitted], Jet consistently employs practices and procedures designed to ensure that a prospective customer is not currently under contract with another waste hauling company...Moreover, Jet counters that Winters Bros., on a number of occasions, has interfered with valid existing contracts between Jet and its customers. Jet further maintains that, were the Court to grant preliminary injunctive relief, Jet's ability to conduct business and to compete freely and fairly in the marketplace would be hampered.

Prior Decision at pp. 3-4.

Concluding that Plaintiff's claim of irreparable harm based on a loss of customer goodwill and existing competitors to a competitor was "overstated and unsubstantiated" (Prior Dec. at p. 8), the Court concluded that injunctive relief was not warranted.

### C. The Parties' Positions

The parties have outlined in detail their positions in support of their motions, which were further developed during oral argument before the Court. The Court is also mindful of Plaintiff's affirmation, in response to Defendants' claims that further discovery is needed, that Plaintiff has already produced over 4300 pages of documents in discovery (Birney Aff. in Opp./Further Supp. at p.4). Defendants, however, dispute Plaintiff's assertion that there has been substantial discovery. Jet Sanitation affirms that it has had "no opportunity to conduct discovery in connection with the counterclaims interposed..." (Murphy Aff. in Reply/Further Opp/Further Supp. at pp. 3-4) and cites, by way of example, its need for documentation relevant to Winters' purported contract with USA Industries, which documentation is solely within Winters' knowledge (*id.* at p. 4). Jamaica Ash and Westbury affirm that they have not yet had an opportunity to conduct discovery on their pleadings as amended, and that Plaintiff has "improperly refused to comply" with the discovery demands they made prior to the amendments, which may relate to the current counterclaims (Caputo Aff. in Reply at p. 2).

### RULING OF THE COURT

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

CPLR § 3212(f) provides as follows:

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Based on the Court's review of the motion papers, and the applicable law, the Court denies the motion and cross motions, pending the completion of discovery, without prejudice to

the parties moving for summary judgment after the completion of discovery, in light of the Court's conclusion that there are factual issues, relevant to the determination of summary judgment, that will be further explored during discovery.

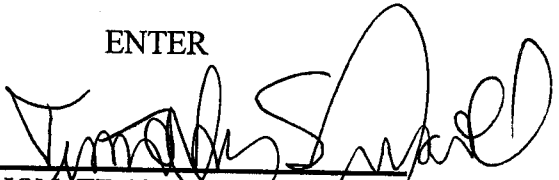
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on April 28, 2011 at 9:30 a.m. The Court further directs counsel for the parties, prior to that date, to comply with any outstanding discovery requests. The Court also directs counsel for the parties, prior to the April 28, 2011 conference, to prepare a list of witnesses to be deposed, to confer with opposing counsel regarding mutually convenient deposition dates and, if possible, to prepare a stipulation for the Court to so-order at the April 28, 2011 conference.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on April 28, 2011 at 9:30 a.m., as directed herein.

DATED: Mineola, NY  
March 23, 2011

ENTER  
  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
MAR 25 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE