

**Bartucca v DeSanto**

2011 NY Slip Op 33007(U)

November 4, 2011

Supreme Court, Wayne County

Docket Number: 65996/2008

Judge: Daniel J. Doyle

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

DOMENICO BARTUCCA d/b/a  
EMPIRE TREE SURGEONS,

Plaintiff/Petitioner,

Index# 65996

-vs-

2008

JOSEPH DESANTO, Individually and as Supervisor  
of the Town of Arcadia, New York, DAVID SARACINO,  
Individually and as Town Attorney of the Town of Arcadia,  
New York, and the TOWN OF ARCADIA, NEW YORK,

Defendants/Respondents.

APPEARANCES:

Richard T. Bell, Esq. Of Counsel  
GATES & ADAMS, P.C.  
Attorneys for Plaintiff

Sandra A. Allen, Esq., Of Counsel  
LYNCH LAW OFFICE  
Attorneys for Defendants

DECISION

**DANIEL J. DOYLE, J.**

In this action for tortious interference with a contract, the defendants move for summary judgment dismissing the case pursuant to CPLR § 3212.

Plaintiff Domenico Bartucca is a former Supervisor of the Town of Arcadia and is the proprietor of a tree service company known as Empire Tree Service. In 2007, the defendant Joseph Desanto was the supervisor of the Town of Arcadia and the defendant David Saracino was the town attorney for the Town of Arcadia. The plaintiff alleges that

the defendants interfered with his contract with the Village of Newark for disposal of trees, branches and other brush at the plaintiff's property. The Village of Newark is located within the Town of Arcadia.

The defendants made a motion for summary judgment, pursuant to CPLR § 3212, on the grounds that (1) the defendants are not liable under the theory of interference with an existing contract because there was no contract, (2) the defendants' actions were justified, (3) the defendants are not liable under theory of interference with a prospective contract because there was no showing that defendants acted wrongfully, (4) they are immune from suit under the doctrine of sovereign immunity. Alternatively, defendants ask the Court to dismiss claim for punitive damages and preclusion.

On a motion for summary judgment the moving party must make a prima facie showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact (CPLR 3212[b], *Winegrad v. N.Y. Univ. Med. Center*, 64 NY 2d 851[1985]), *Zuckerman v. City of N.Y.*, 49 NY2d 557 [1980]). If the proponent demonstrates entitlement to summary judgment, the burden shifts to the opposing party to demonstrate the existence of a factual issue requiring trial (*Zuckerman v. City of N.Y.*, 49 NY2d 557). In deciding a summary judgment motion, the evidence must be construed in a light most favorable to the party opposing the motion (See *Cappuccilli v. Krupp Equity Ltd. Pshp.*, 269 AD2d 822 [4<sup>th</sup> Dept 2000]).

The tort of interference with contract can be based upon an existing contract or a

prospective contract (*see White Plains Coat & Apron Co., Inc. v. Cintas Corp.* 8 NY3d 422, 425-426 [2007]). A claim for tortious interference with an existing contract requires "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413 [1996]).

Generally, a claim for tortious interference with a prospective contract requires that a defendant's conduct amount to a crime or an independent tort (*Carvel Corp. v. Noonan*, 3 NY3d 182, 190 [2004]). However, other behavior may also be actionable where it is conducted "for the sole purposes of inflicting intentional harm of the plaintiffs" (*Carvel Corp. v. Noonan*, 3 NY3d at 190- 191 *citing NBT Bancorp, Inc. V. Fleet/Norstar Fin. Group Inc.* 215 AD2d 990 (3<sup>rd</sup> Dept 1995), *affd* 87 NY2d 614 [1996]). The Court in *Carvel*, while declining to set forth examples of "culpable" conduct other than a crime or tort, referred to *Guard-Life Corp v Parker Hardware Mfg Corp* 50 NY2d 183 (1980) and the Restatement [Second] of Torts §768 wherein wrongful means included physical violence, misrepresentation, civil suits, criminal prosecutions, and some degrees of economic pressure (*Carvel Corp. v. Noonan*, 3 N.Y.3d at 190- 191).

On August 7, 2007 the Village of Newark Board of Trustees unanimously resolved as follows:

The Village will be allowed to dump the spoils from road work and other projects (dirt, concrete, asphalt, etc...) for no charge at their Route 88 North location. The

Village will pay \$15,000 to dump and have grinded (also at the Route 88 location) brush, leaves, shrubs, trees and other environmentally friendly yard waste. The contract will run from September 1, 2007 to August 21, 2008.

The Court finds that a contract existed upon the adoption of the resolution (*See, In the Matter of Municipal Consultant & Publishers, Inc v Town of Ramapo* 47 NY2d 144 (1979) and *Village of Lake George v. Town of Caldwell* 3 AD2d 550 [1957]).

It is not disputed that at the August 14, 2007 Arcadia Town Board meeting Saracino advised the board that the agreement between the Village of Newark and the Plaintiff was in violation of the town's Solid Waste Management Facilities Law. Although neither the nature of the material to be dumped nor the chipping of the material was alleged to be in violation of the law, the violation allegedly was created by the Village's agreement to pay a fee to the Plaintiff. The defendants contend that the Town Board did not wish to become involved with an enforcement action and instead directed defendants Saracino and DeSanto to attend the meeting of the Village Board to represent the town's position (Deposition of David Saracino pp 91-95). There has been no suggestion that the board made any other directive to Saracino and/or DeSanto. It is also not disputed that following the Village Board meeting on August 21, 2007, the Village of Newark elected not to proceed with the contract with plaintiff and the proposed written contract was never executed. Thereafter the plaintiff commenced this action against the Town of Arcadia, Saracino and DeSanto. No action was commenced against the Village of Newark for enforcement of the contract.

Having concluded that a contract existed, the factual dispute is now whether the

defendants were justified in their actions and if justified whether the defendants acted with malice or used wrongful means. The defendants have the burden of proof on the issue of justification. The plaintiff has the burden of proof on the issue of malice or wrongful means (*See NY Pattern Jury Instr. - Civil 3:56 [2011]*).

Defendants contend that they “never intentionally procured the Village’s ‘breach’...” and that their actions were justified “due to their interest in enforcing their local law.” Although section IX of the law provides for penalties and enforcement of violations, the defendants elected not to seek those remedies.

In opposition to the summary judgment motion, the plaintiff submitted an affidavit wherein he claims that defendants DeSanto and Saracino were motivated by “political and personal malice” dating back to plaintiff’s tenure as supervisor for the Town of Arcadia. With respect to Saracino, Bartucca avers that when plaintiff was supervisor, he attempted to replace Saracino as town attorney. With respect to DeSanto, plaintiff avers that after DeSanto unseated Bartucca as town supervisor, plaintiff sued DeSanto claiming DeSanto knowingly made false statements to the newspaper during the course of the campaign.

In further support of his claim that the actions of DeSanto and Saracino were motivated by malice, plaintiff submitted certified minutes of the Village of Newark Board meetings. Minutes of the August 21, 2007 meeting show that the plaintiff’s proposal would save the village \$5,000. The minutes also show that DeSanto called the village attorney and sent a letter to the Village advising them that the plaintiff had many issues and problems with

his landfill permit. The minutes further show that Saracino called the village attorney and told him that the Village should not have to pay for grinding.<sup>1</sup> The defendants' depositions corroborate plaintiff's allegations. DeSanto was evasive when asked if the campaign between plaintiff and himself was contentious. Although he claimed not to know why the plaintiff sued him after the election, DeSanto admitted that the commencement of that action was upsetting to him and to his wife. DeSanto also testified that Bartuccia ran against him again in 2004. Saracino testified that when Bartuccia was first elected, Bartuccia was not going to appoint him as Town attorney and that Bartuccia contacted another attorney to act as counsel.

Upon review of the depositions attached to the defendants' papers and the plaintiff's affidavit, the Court finds that there are questions of fact to be determined by a jury with respect to whether the actions of DeSanto and Saracino were justified and if justified whether the defendants acted with malice or used wrongful means.

### **Sovereign Immunity**

Defendants argues that their acts were discretionary acts and therefore are not actionable. "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule of standard with a compulsory result" (*Tango*

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<sup>1</sup>A reply affirmation was submitted by defendants' attorney arguing that the allegations in plaintiff's answering affidavit were speculative, but no affidavit from one with knowledge of the facts was submitted.

*v. Tulevech* 61 NY2d 34, 41 [1983]). While ministerial actions may be actionable if they violate a special duty owed to the plaintiff, discretionary government action is not actionable (*McLean v. City of New York* 12 NY3d 194 [2009]). That immunity is limited to acts within the scope of employment. The acts alleged by plaintiff and the motivations attributed by plaintiff to DeSanto and Saracino are personal in nature, outside the scope of their employment and not in furtherance of the town's business. Accordingly, the Town cannot be held responsible for the alleged intentional torts of DeSanto and Saracino (*See, Curtis by Curtis v. County of Oneida*, 248 A.D.2d 999 (4th Dept 1998) *see also, Arteaga v. State* 72 N.Y.2d 212 [1988]). At oral argument, plaintiff conceded that punitive damages could not be recovered.

**Now therefore, it is**

**ORDERED**, that the motion for summary judgment by the Town of Arcadia is granted, and it is further

**ORDERED**, that the motion for summary judgment by defendants Joseph DeSanto and David Saracino is denied, and it is further

**ORDERED**, that the defendants' motion striking plaintiff's demands for punitive damages is granted, and it is further

**ORDERED**, that plaintiff comply with defendants' discovery demands within 30 days, and it is further

**ORDERED**, that all discovery shall be complete within 60 days of the date of this order, and it is further

**ORDERED**, that a Note of Issue and Statement of Readiness shall be filed within 90 days of the date of this Order, and it is further

**ORDERED**, that failure to file a Note of Issue, as provided herein shall result in the case being marked "Off" and stricken from the calendar, pursuant to CPLR 3404.

Dated: 11-4-11

A handwritten signature in dark ink, consisting of stylized, overlapping loops and a trailing flourish, positioned above a horizontal line.

Hon. Daniel J. Doyle, JSC