SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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AMERICAN STEVEDORING, INC.,

Plaintiff,

-against-

RED HOOK CONTAINER TERMINAL, LLC,
SENECA INSURANCE COMPANY, INC.,
d/b/a THE SENECA COMPANIES,
PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
DEMON LOGISTICS LLC,
NAACO MATERIALS HANDLING GROUP, INC.,
MTC TRANSPORTATION COMPANY,
BEEHIVE BEER, PHOENIX BEVERAGES,
WINDMILL BEER, and EUGENE D'ABLEMONT,

Defendants,

-and-

THE ALEX N. SILL COMPANY,

Nominal Defendant.

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DECISION AND ORDER

Index No.: 651472/2012
Mot. Seq. Nos. 004 -and- 006

O. PETER SHERWOOD, J.:

Motion sequence numbers 004 and 006 are consolidated herein for disposition.

In sequence number 004, defendant Windmill Distributing Company, L.P. d/b/a Phoenix Beverages s/h/a Phoenix Beverages and Windmill Beer and defendant Beehive Distributing s/h/a Beehive Beer (collectively, "Windmill") move, pursuant to CPLR 3211 (a) (1) and (c), for an order dismissing the third, fourth, and eleventh causes of action for trespass to chattels, unjust enrichment, and tortious interference with a contract asserted in the second amended complaint. In sequence number 006, defendant Demon Logistics LLC ("Demon") similarly moves for an order dismissing those claims, as asserted against it.

Following adequate notification to the parties and the opportunity to submit additional papers, the court converted both motions to dismiss into summary judgment motions (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310,

319-320 [1st Dept 1987]; CPLR 3211 [c], 3212). The parties then submitted additional papers on the motions.

Relevant Background

By equipment lease agreement executed September 26, 2011, plaintiff American Stevedoring, Inc. ("ASI") leased inland marine equipment, then valued at approximately $10 million (the "Equipment"), to defendant Red Hook Container Terminal ("RHCT"). RHCT is in the business of loading and unloading ship cargo at the ports of New York and New Jersey.

The lease agreement includes provisions designed to protect ASI's Equipment and to assure the orderly transfer of the Equipment from RHCT to another lessee at the end of the lease period. These provisions include: an inspection provision obligating RHCT to permit ASI to inspect the Equipment, upon proper written notice (*see* lease agreement § 6.2); a delivery provision, obligating RHCT to return the Equipment to ASI at a specified location (*see id.* § 6.1); and an insurance provision, obligating RHCT to procure, and to maintain for the lease term, a $10 million insurance policy covering the leased Equipment and listing RHCT as the insured and ASI as an additional insured (*see id.* § 4.3).

In March, 2012, ASI notified RHCT that it was exercising its right to inspect the Equipment. ASI alleges that RHCT delayed its response, and then insisted that the inspection take place immediately prior to expiration of the lease term on March 31, 2012. ASI further alleges that RHCT's misconduct caused ASI to lose the opportunity to re-lease the Equipment upon the expiration of the lease term. ASI also alleges that RHCT improperly refused to comply with the delivery provision, in breach of the lease agreement.

There is no dispute that RHCT retained possession of the Equipment after the expiration of the lease term. ASI alleges that, after the expiration of the lease term, RHCT continued to use the Equipment, and permitted its co-defendants to use that Equipment free of charge. ASI further alleges that other defendants, including Windmill and Demon, were aware of the existence of the lease agreement, and intentionally induced RHCT to retain the Equipment past the expiration of the lease term and to permit them to use it without charge. ASI alleges that defendants, thus, sought to deprive ASI of rental income and force it into insolvency, with the goal of allowing defendants to purchase the Equipment for a sum far less than its value.

In October, 2012, while RHCT was still in possession of the Equipment, Hurricane Sandy made landfall in New York City, and allegedly destroyed the Equipment. RHCT had insured the Equipment pursuant to a policy obtained from defendant Seneca Insurance Company, Inc. (Seneca). Following the hurricane, RHCT filed a claim with Seneca to cover the damage to the Equipment. Seneca covered a portion of the claim and sent RHCT a series of checks made payable jointly to RHCT and the additional insureds, including ASI for approximately $5 million.

A dispute arose regarding Seneca's limitation of the total recovery available to $5 million and method of allocation of those funds among the additional insureds. Subsequently, allegedly in compliance with the terms of RHCT's agreement with a particular additional insured, RHCT either cashed the Seneca check naming ASI and placed the proceeds into an escrow account, or kept the check in its legal counsel's safe, pending the outcome of the dispute. ASI alleges that RHCT's counsel improperly refused to turn ASI's check over to ASI. The checks that were not cashed have now expired.

Windmill, one of the additional insureds, is a beer distributor in the New York metropolitan area doing business as Phoenix Beverages and Beehive Distributing.

Demon owns and leases inland marine equipment to companies that operate as stevedores in the New York and New Jersey harbors. Demon alleges that, in anticipation of the expiration of the lease agreement between ASI and RHCT, Demon purchased replacement equipment that it began to lease to RHCT.

In the second amended complaint, ASI asserts claims, in relevant part, against Windmill and Demon for trespass to chattels by allegedly interfering with ASI's right to possess the Equipment after expiration of the lease term; unjust enrichment by operating that Equipment without paying a rental fee; and tortious interference with a contract by allegedly inducing RHCT to refuse ASI's demands for access to, and return of, the Equipment, in breach of the lease agreement. On these claims, ASI seeks to replevy the Equipment, and to recover compensatory damages and reasonable attorneys' fees.

By stipulations dated May 22 and June 23, 2014, the parties voluntarily discontinued all claims and cross claims asserted against defendants MTC Transportation Company and Eugene D'Ablemont, a Kelley Drye & Warren LLP member. Kelley Drye & Warren represents Windmill and Demon in this action.

By letter dated June 5, 2014, ASI voluntarily withdrew the branches of the fourth cause of action for unjust enrichment asserted against Windmill and Demon.

Motions

Windmill and Demon now seek summary judgment on, and dismissal of, the claims for trespass to chattels, tortious interference with contracts, and punitive damages asserted against them in the second amended complaint, on the ground that nothing in that pleading ties either of them to the underlying dispute or the cause of ASI's alleged damages. In opposition, ASI contends that its claims are both properly pled against Windmill and Demon, and supported by sufficient factual allegations.

Summary judgment is granted in favor of Windmill and Demon, and the branches of the third and eleventh causes of action and demands for punitive damages asserted against them are dismissed. While summary judgment is a drastic remedy, it is warranted where, as here, the movant demonstrates that no genuine triable issues of material fact exist (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see* CPLR 3212).

Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or the motion will be granted (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York*, 49 NY2d at 562).

Information and Belief Allegations

ASI's claims asserted against Windmill and Demon are based on allegations made solely on "information and belief." For example, in the second amended complaint, ASI alleges that, "upon information and belief," during the period in which RHCT retained the subject Equipment beyond the lease term, that equipment was used by one or more of the defendants, including Windmill, Demon "and/or" others (second amended complaint, ¶ 90). ASI also alleges that, "upon information

and belief," one or more of the defendants, including Windmill, Demon,"and/or" others, discouraged RHCT from complying with the inspection and delivery obligations imposed upon it by the lease agreement (*id.* ¶ 91). As discussed in more detail below, allegations "in conclusory form, based upon information and belief, do not establish a sufficient factual showing, evidentiary in nature" (*see Lewis v Riklis*, 82 AD2d 789, 789 [1st Dept 1981]) to support ASI's claims asserted against movants.

Moreover, the undisputed documentary evidence conclusively demonstrates that, at all relevant times, neither Windmill nor Demon had any connection with RHCT's stevedoring activities.

Michael Stamatis, president of RHCT, attests that the Equipment has been in storage on RHCT's premises since March 31, 2012, the date of the expiration of the lease term, and has not been used by anyone, including RHCT, since that time (*see* Michael Stamatis Apr. 21, 2014 aff, ¶ 5 and exhibit G, photographs). He also attests that no one could have seen pallets of beer being unloaded by RHCT inasmuch as RHCT loads, and unloads, only sealed shipping containers, and does not open them (*see id.*, ¶¶ 7, 57-58 and exhibits A, B, photographs). He attests that the leased equipment was never cannibalized for parts to repair other equipment (*see id.*, ¶ 42). Last, Stamatis attests that the individuals identified by ASI as taking part in unloading beer onto pallets could not have done so because the Equipment was in storage, and because one, Daniel Drew, is not licensed to operate machinery (*see id.*, ¶¶ 59, 60).

Rodney Brayman, president and chief executive officer of Windmill Distributing Company, L.P., attests that Windmill is the exclusive distributor of well-known brands of beer, including Heineken, Miller, and Guinness, in the New York City area (*see* Rodney Brayman Jul. 23, 2013 aff, ¶¶ 1, 3). He further attests that Windmill employs more than 600 individuals, and is located at Pier 7 of the RHCT terminal, more than a mile away from RHCT's location at Pier 10 at the terminal, where RHCT operates as the terminal's cargo container stevedore (*see id.*).

Rodney Brayman also attests that Windmill has nothing to do with RHCT's stevedoring business, nor does it have any need, or use, for the inland marine Equipment that RHCT leased from ASI, and has never, at any time, used that Equipment (*see id.*, ¶¶ 6-7). He attests that Windmill uses its own custom-made side-loading trucks to deliver beer to its customers (*see id.*, ¶ 3). Last, he attests that Windmill has never taken any action to induce RHCT to ignore or delay performance of any of its lease agreement obligations (*see id.*, ¶ 8).

Gregory Brayman, Demon's member, attests that Demon is a limited liability company that owns, and leases, inland marine equipment to companies operating as stevedores, including RHCT, at the New York and New Jersey harbor terminals (*see* Gregory Brayman Jul. 23, 2013 aff, ¶¶ 1, 3). He further attests that, in anticipation of the expiration of the lease agreement between ASI and RHCT, Demon purchased replacement inland marine equipment that it began to lease to RHCT (*see id.*, ¶¶ 4-5). He also attests that the Demon is not in the stevedore business, and does not operate inland marine equipment, but merely leases such equipment to stevedores (*see id.*, ¶ 6). Last, he attests that Demon has never used any of the Equipment that ASI had leased to RHCT, and that it has never discouraged RHCT from complying with the lease agreement or taken any action to induce RHCT breach any of its contractual obligations owed to ASI (*see id.*, ¶¶ 7-8).

ASI has failed to create any genuine triable issues of material fact regarding whether Windmill or Demon used, or cannibalized, the Equipment during the relevant time period. ASI submitted an affidavit by Matthew Yates, an ASI employee and former commercial director, and supported Yates' allegations with an affidavit by Keith Catucci, president of ASI.

Yates attests that he visited the ports after expiration of the lease term to inspect the leased Equipment, and observed that Equipment, particularly fork lifts and top loaders, being used by "the Brayman Companies," identified as Phoenix, Windmill, Beehive, Demon, and RHCT, but could not identify which company, attesting that "they all seemed to work with each other and together on the beer distribution business" (Matthew Yates Apr. 8, 2014 aff, ¶¶ 6, 8, 9, 10, 11).

Catucci attests that he and Yates, together, observed employees of Brayman Companies using the leased equipment, or parts of that equipment, but could not, with any certainty, identify which Brayman company employed the workers (*see* Keith Catucci Apr. 21, 2014 aff, ¶¶ 2-3).

The Yates and Catucci affidavits set forth only speculation and general statements, unsupported by dates or details. With these affidavits, ASI has alleged, at most, that the leased Equipment was being used to unload beer, among other cargos, after expiration of the lease agreement.

Trespass to Chattels

In the third cause of action for trespass to chattels, ASI generally alleges that one or more defendants, including possibly Windmill and/or Demon, willfully, maliciously, and unlawfully

interfered with ASI's lawful and rightful possession of the leased Equipment after expiration of the lease term, resulting in damage to the Equipment beyond normal wear and tear, and exposing it to damage by Hurricane Sandy (*see* second amended complaint ¶¶ 175-177).

To demonstrate trespass to chattels, the plaintiff must allege and prove that the defendant "intentionally, and without justification or consent, physically interfered with the [plaintiff's] use and enjoyment of personal property . . . , and that [the plaintiff] was harmed thereby" (*School of Visual Arts v Kuprewicz*, 3 Misc 3d 278, 281 [Sup Ct, NY County 2003]). In addition, the plaintiff must allege harm "to the condition, quality or material value of the chattels at issue" (*"J. Doe No. 1" v CBS Broadcasting, Inc.*, 24 AD3d 215, 215 [1st Dept 2005]).

ASI fails to plead specific facts explaining when, how, and how often Windmill or Demon used the leased Equipment, nor does it allege how either Windmill or Demon would benefit from the use of the Equipment. ASI fails to allege any specific factual basis in support of its trespass claim against Windmill or Demon, but, instead, alleges merely conclusions of law.

Although ASI seeks compensatory damages equal to the value of defendants' alleged use and possession of the Equipment beginning on March 31, 2012, and for the alleged destruction of the Equipment, there is no dispute that the equipment was damaged by Hurricane Sandy. ASI alleges that RHCT failed to properly protect the leased Equipment from storm damage, but does not specifically allege any misconduct by Windmill or Demon that contributed to the alleged loss (*see* second amended complaint ¶ 179). ASI's conclusory allegation that Windmill and/or Demon caused unspecified harm to ASI does not constitute an allegation that either defendant actually harmed the Equipment, and its allegations of use and interference, on information and belief, amount to no more than mere speculation and guesswork.

For these reasons, the branches of the motions for summary judgment and dismissal of the portions of the third cause of action for trespass to chattels asserted against Windmill and Demon are granted, and those portions of the claim are dismissed.

Tortious Interference with a Contract

In the eleventh cause of action for tortious interference with a contract, ASI alleges that one or more defendants, including Windmill and/or Demon, used the leased Equipment during the lease term and after, and somehow intentionally induced RHCT to ignore or delay performance of its lease

agreement obligations in order to obstruct ASI's transfer of the Equipment from ASI to a new lessee (*see* second amended complaint ¶¶ 231-235).

To establish a claim for tortious interference with a contract, the plaintiff must plead "the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach, and damages" (*Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998]). "[T]he interference must be intentional, not merely negligent or incidental to some other, lawful, purpose" (*Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 281 [1978]). While the defendant's acts must be without reasonable justification (*id.*), actual malice is not a requirement (*A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 376 [1957]). Conclusory allegations are not sufficient to sustain a claim for tortious interference with a contract, particularly where the plaintiff alleges that the defendant's actions were financially motivated (*Ruha v Guior*, 277 AD2d 116, 116 [1st Dept 2000]).

Here again, ASI has failed to plead any specific facts involving the conduct of Windmill or Demon in support of this claim. As discussed above, ASI has failed to raise any triable issues sufficient to preclude summary judgment regarding the alleged use by Windmill and Demon of the Equipment. Absent specific facts based on more than "information and belief," rather than the cause of action fails.

For these reasons, the branches of the motions for summary judgment and dismissal of the portions of the eleventh cause of action asserted against Windmill and Demon are granted, and those portions of the claim are dismissed.

Punitive Damages

ASI's allegations do not support a claim for punitive damages as the result of trespass to chattels or tortious interference against either Windmill or Demon. "Punitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996], *appeal withdrawn* 89 NY2d 983 [1997]). Where the allegations of misconduct are solely asserted on information and belief, and are wholly conclusory, the claim for punitive damages will be dismissed (*Belco Petroleum Corp. v AIG Oil Rig*, 164 AD2d 583, 598-599 [1st Dept 1991]).

As discussed above, ASI has failed to assert sufficient facts in support of the claims for trespass to chattels or tortious interference with a contract asserted against Windmill or Demon. Further, even assuming those claims were properly asserted, the alleged misconduct does not constitute grounds for the imposition of punitive damages.

Therefore, the branches of the motions for summary judgment and dismissal of the portions of the punitive damages claim asserted against Windmill and Demon are granted, and those portions of the claim are dismissed.

Accordingly, it is

ORDERED that motion sequence number 004 is granted, and summary judgment on the third and eleventh causes of action and punitive damages claims in favor of defendant Windmill Distributing Company, L.P. d/b/a Phoenix Beverages s/h/a Phoenix Beverages and Windmill Beer and defendant Beehive Distributing s/h/a Beehive Beer is granted, and these claims are severed and dismissed with costs and disbursements to these defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion sequence number 006 seeking partial summary judgment is granted, summary judgment on the third and eleventh causes of action and punitive damages claims in favor of defendant Demon Logistics LLC is granted, and these claims are dismissed.

This constitutes the decision and order of the court.

DATED: September 16, 2014

ENTER,

O. PETER SHERWOOD
J.S.C.