

Splash, LLC v Shullman Family Ltd. Partnership
2014 NY Slip Op 32996(U)
March 21, 2014
Supreme Court, Westchester County
Docket Number: 56585/2013
Judge: Francesca E. Connolly
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
SPLASH, LLC, SPLASH MANAGEMENT GROUP, LLC,
SPLASH BEDFORD HILLS, LLC, MARK CURTIS
and CHRISTOPHER FISHER

Plaintiffs,

-against-

DECISION and ORDER
Sequence No. 3
Index No.: 56585/2013

SHULLMAN FAMILY LIMITED PARTNERSHIP,
ROBERT SHULLMAN, MICHAEL SHULLMAN, and
RUSSELL SPEEDERS CAR WASH, LLC,

Defendants.

-----X

CONNOLLY, J.

The following documents were read in connection with the defendants' motion:

Order to show cause, affirmation, exhibits, memo of law	1-11
Affirmations in opposition, exhibits, memo of law	12-22

In a prior order dated October 8, 2013, this Court, among other things, denied the defendants' cross motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. The defendants now move (1) for leave to renew that prior motion, and (2) for removal of the property damage causes of action to the Town of Bedford Justice Court.¹ For the reasons that follow, the branch of the motion which is for leave to renew is granted, but upon renewal, the Court adheres to its prior determination denying the motion. Furthermore, the branch of the motion which is for removal of certain causes of action is denied.

¹ In their proposed order to show cause, the defendants also sought certain discovery-related relief. The Court declined to sign those portions of the proposed order to show cause and referred those matters to the Preliminary Conference Part pursuant to Court rules (*see* Westchester Supreme Court Differentiated Case Management Protocol Part Rules, Preliminary Conference Part Rules § I [C] ["No motions . . . relating to discovery may be interposed until a preliminary conference has been held in the [Preliminary Conference Part]"], *available at* <https://www.nycourts.gov/courts/9jd/diffCaseMgmt/CivilProtocols.pdf>).

Leave to renew is granted and the Court adheres to its prior determination

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]).

In the prior order dated October 8, 2013, this Court held that the plaintiffs stated a cause of action for tortious interference with prospective economic relationships:

While circulating coupons to potential customers, as the defendants did here, is not wrongful (*see Carvel Corp. v Noonan*, 3 NY3d at 192 [the mere institution of a coupon program to entice customers with a better price does not constitute "economic pressure" rising to the level of "wrongful" or "culpable" conduct]), the defendants are also alleged to have funded frivolous opposition to the plaintiffs' land use approvals, told the plaintiffs' customers and employees that the plaintiff would soon be out of business, and abused their status as the plaintiffs' landlord to confuse the plaintiffs' customers and employees and conduct burdensome inspections of the premises. This alleged conduct goes far beyond mere persuasion or legitimate economic pressure (*see Don Buchwald & Associates v Rich*, 281 AD2d 329 [1st Dept 2001] [actions of the defendant former employees in surreptitiously stealing clients “went far beyond mere persuasion”]). Further, at this preliminary stage of the action, it is too early to say whether the defendants' alleged involvement in the plaintiffs' permit application process was frivolous (*see Pagliaccio v Holborn*, 289 AD2d 85 [1st Dept 2001] [“civil suits and threats thereof constitute ‘improper means’ only if such tactics are frivolous”]). Accordingly, the plaintiffs have sufficiently alleged that the defendants employed wrongful means to interfere with the plaintiffs' prospective economic relations with their present and future car wash customers as well as the plaintiffs' economic relations related to opening their proposed new location.

(Order dated Oct. 8, 2013 at 7).

By way of background, the plaintiffs had sought various land use approvals in connection with their plan to open a car wash business at 562-570 North Bedford Road, Bedford Hills. The plaintiffs alleged that the defendants, their former landlords, sought to prevent them from opening that business by funding frivolous opposition to their land use approvals. The plaintiffs obtained the permits and variances that were required, but a proceeding pursuant to CPLR article 78 was commenced challenging those approvals. The plaintiffs alleged that the petitioner in that proceeding, Dino Defeo, was surreptitiously being funded by the defendants.

In support of their motion for leave to renew, the defendants proffer the order of the Hon. Barbara Zambelli, A.J.S.C., dated October 4, 2013, in *Matter of Defeo v Zoning Board of Appeals of the Town of Bedford, et al.* (Westchester County Supreme Court Index No. 1178/2013). In that order the Court held that the Town of Bedford Zoning Board of Appeal lacked a rational basis for issuing certain use variances and area variances necessary for the project.

Accordingly, the defendants seek renewal based upon this new fact, arguing that since the Court in *Matter of Defeo* found that land use approvals lacked a rational basis, the opposition to the plaintiff's permit applications was not frivolous.

Since this new fact was not available to the defendants at the time the prior motion was made, leave to renew is granted.²

The Court adheres to its prior determination denying the motion to dismiss

Upon renewal, the Court adheres to its prior determination, and the motion to dismiss is denied.

As stated in more detail in the prior order, to state a cause of action for tortious interference with prospective economic relations, where the alleged wrongful conduct cannot be characterized as "solely malicious," a plaintiff is required to plead that the "means employed by the defendants were wrongful" (*Out of the Box Promotion, LLC v Koschitzki*, 55 AD3d 575, 577 [2d Dept 2005]).

Construing the complaint and the affidavits of the plaintiffs submitted in opposition to the motion to dismiss in the light most favorable to the plaintiffs (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998] [in opposition to a motion to dismiss, "a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (internal quotation marks omitted)]), this Court found that the plaintiffs had satisfactorily alleged wrongful conduct. Specifically, this Court cited to the allegations that the defendants "funded frivolous opposition to the plaintiffs' land use approvals, told the plaintiffs' customers and employees that the plaintiff would soon be out of business, and abused their status as the plaintiffs' landlord to confuse the plaintiffs' customers and employees and conduct burdensome inspections of the premises," finding that this conduct "goes far beyond mere persuasion or legitimate economic pressure" (Order dated Oct. 8, 2013 at 7).

The question this Court must now decide is whether the Court's determination in *Matter of Defeo* would lead to a different conclusion. This Court finds that it would not.

Even assuming that the defendants were completely within their rights to fund opposition to the plaintiff's land use approvals (an allegation they deny), and assuming that the opposition to those approvals was not frivolous, as the Court in *Matter of Defeo* found, the remaining allegations of wrongful conduct on the part of the defendants would still be sufficient to state a cause of action for tortious interference with prospective economic relations. The holding in *Matter of Defeo* does not utterly refute—or even address—the allegations that the defendants told the plaintiffs' customers and

² The Court notes that the defendant's motion to dismiss was denominated as one pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, and the defendants now, in effect, ask the Court to consider documentary evidence in support of their motion, which is typically sought by way of motion pursuant to CPLR 3211 (a) (1). As the plaintiffs have had a full opportunity to be heard on this new evidence, the Court will treat the renewed motion as one pursuant to CPLR 3211 (a) (1).

employees that the plaintiff would soon be out of business, abused their status as the plaintiffs' landlord to confuse the plaintiffs' customers and employees, and conducted burdensome inspections of the premises (*see Nunez v Mohamed*, 104 AD3d 921, 922 [2d Dept 2013] ["A motion to dismiss a complaint based upon documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law"]). The Court finds these remaining allegations to be of a sufficiently wrongful character such that the motion to dismiss should be denied.

Removal to the Town of Bedford Justice Court is denied

The branch of the motion which is to remove the causes of action seeking to recover property damage to the Town of Bedford Justice Court pursuant to CPLR 325 (d) is denied. Matters of judicial efficiency dictate against severing those causes of action from the remaining causes of action. In any event, the "Supreme Court is a court of original, unlimited and unqualified jurisdiction and is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed" (*Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997] [citations and internal quotation marks omitted]).

Accordingly, it is hereby

ORDERED that the branch of the motion which is for leave to renew is granted, and upon renewal, the Court adheres to its prior determination; and it is further

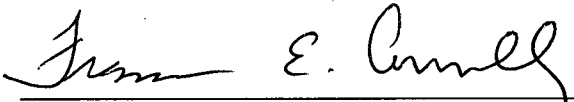
ORDERED that the branch of the motion for removal of certain causes of action to the Town of Bedford Justice Court is denied; and its is further

ORDERED that the parties are directed to appear in the Compliance Conference Part on May 9, 2014, at 9:30 a.m., in Room 800 of the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, NY 10601; and it is further

ORDERED, that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
March 21, 2014


HON. FRANCESCA E. CONNOLLY, J.S.C.

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By NYSCEF