

O'Neill v Cohen
2015 NY Slip Op 32451(U)
December 18, 2015
Supreme Court, New York County
Docket Number: 152004/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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THOMAS O'NEILL,

Index No. 152004/2015

Plaintiff

- against -

DECISION AND ORDER

MAXI COHEN,

Defendant

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff O'Neill sues defendant Cohen to recover damages for malicious prosecution and tortious interference with a contract or with prospective business relations. O'Neill's claims arise from an action that Cohen commenced in this court against O'Neill and other defendants in that action. Cohen v. CASSM Realty Corp., Index No. 105460/2011 (Sup. Ct. N.Y. Co.). That pending action concerns Cohen's alleged constructive eviction from her cooperative unit and noncompliance by O'Neill, who is another unit owner in the same cooperative building, and by the cooperative corporation with their proprietary lease, by-laws, and statutes governing buildings with artists in residence.

Cohen moves to dismiss this action based on the complaint's failure to state a claim. C.P.L.R. § 3211(a)(7). For the reasons explained below, the court grants her motion.

II. APPLICABLE STANDARDS

In determining defendant Cohen's motion to dismiss the complaint under C.P.L.R. § 3211(a)(7), the court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff O'Neill's favor. JF Capital Advisors, LLC v. Lightstone Grp., LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015). The court may not rely on facts alleged by defendant unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against defendant. Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d at 351; Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008).

III. PLAINTIFF'S CLAIMS

A. Malicious Prosecution

To sustain a prima facie claim for malicious prosecution, plaintiff O'Neill must allege that defendant Cohen commenced or continued a frivolous action against O'Neill, with malice and without probable cause to believe the action would succeed, and that the action, after causing injury to O'Neill, terminated in his favor. Martinez v. City of Schenectady, 97 N.Y.2d 78, 84 (2001); Smith-Hunter v. Harvey, 95 N.Y.2d 191, 195-96 (2000); Engel v. CBS, Inc., 93 N.Y.2d 195, 206 (1999); Honzawa v. Honzawa, 268 A.D.2d 327, 329 (1st Dep't 2000). See Fischer v.

Chevra Machziket H'Shechuna, 295 A.D.2d 227, 228 (1st Dep't 2002). A finding that Cohen's claims were frivolous would demonstrate a lack of probable cause for commencing the action. See Galland v. Kossoff, 34 A.D.3d 306, 307 (1st Dep't 2006); Black v. Green Harbour Homeowners' Assn., Inc., 37 A.D.3d 1013, 1014 (3d Dep't 2007); Fink v. Shawanqunk Conservancy, Inc., 15 A.D.3d 754, 755 (3d Dep't 2005).

As Cohen's action against O'Neill, Cohen v. CASSM Realty Corp., Index No. 105460/2011 (Sup. Ct. N.Y. Co.), still is pending, and there has been no determination in that action in O'Neill's favor, the allegedly malicious prosecution has not terminated in his favor. Until it is finally terminated, it is unknown whether that action was unfounded and unjustly prosecuted. Britt v. Legal Aid Socy., 95 N.Y.2d 443, 448 (2000); Smith-Hunter v. Harvey, 95 N.Y.2d at 197. See Engel v. CBS, Inc., 93 N.Y.2d at 206; Honzawa v. Honzawa, 268 A.D.2d at 329. If the court allows this malicious prosecution claim to proceed before the final termination of the prior action, a decision in this action may conflict with a decision in the prior action: a decision in one action may find Cohen's claims against O'Neill frivolous, while a decision in the other action may find her claims against him more meritorious. Britt v. Legal Aid Socy., 95 N.Y.2d at 448; Smith-Hunter v. Harvey, 95 N.Y.2d at 197. Therefore the court grants Cohen's motion to dismiss O'Neill's malicious prosecution claim based on his failure to allege a material element of that claim: a termination of the allegedly

malicious prosecution in his favor. C.P.L.R. § 3211(a)(7).

B. Tortious Interference With a Contract or
With Prospective Business Relations

A claim of tortious interference with a contract requires (1) a valid contract to which plaintiff O'Neill was a party, (2) an actual breach of that contract by another party to the contract, (3) defendant Cohen's knowledge of the contract, (4) her intentional procurement of the breach, and (5) damages to O'Neill from that interference. White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007); Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996); Foster v. Churchill, 87 N.Y.2d 744, 749-50 (1996); Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dep't 2006). To claim tortious interference with non-binding or prospective business relations, O'Neill must allege that (1) he engaged in business relations with a nonparty, (2) Cohen knew of the relationship and interfered with it, (3) her interference derived solely from her malice or from her criminal or independently tortious conduct, and (4) her interference injured those business relations. Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 47 (1st Dep't 2009); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 108 (1st Dep't 2009). A claim for interference with business relations requires a showing that Cohen engaged in more culpable conduct than for interference with a contract. Carvel Corp. v. Noonan, 3 N.Y.3d 182, 189-90 (2004); NBT Bancorp v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614, 621 (1996); Leonard v. Gateway II, LLC, 68 A.D.3d 408, 409-10 (1st Dep't 2009); Lobel v. Maimonides Med. Ctr., 39

A.D.3d 275, 277 (1st Dep't 2007). See Schorr v. Guardian Life Ins. Co. of Am., 44 A.D.3d 319, 319 (1st Dep't 2007).

The complaint alleges that "Maspeth Federal Savings agreed to provide Plaintiff a mortgage," Aff. of Carol A. Sigmond Ex. A ¶ 17, but that "Plaintiff's application for financing was denied solely because of the frivolous lawsuit that the Defendant has started against Plaintiff." Id. ¶ 20. The complaint does not specify whether the contract that Cohen allegedly interfered with was the bank's agreement to provide O'Neill a mortgage, a contract, or his application for financing, merely his unilateral request, even if presumed to have been to the same bank. Risley v. Rubin, 272 A.D.2d 198, 198 (1st Dep't 2000); American Preferred Prescription v. Health Mgt., 252 A.D.2d 414, 416-17 (1st Dep't 1998). See Havana Cent. NY2 LLC v. Lunney's Pub, Inc., 49 A.D.3d 70, 72 (1st Dep't 2007); 330 Acquisition Co., LLC v. Regency Sav. Bank, F.S.B., 19 A.D.3d 174, 174-75 (1st Dep't 2005). The complaint connects the interference to the application, not to the contract. Drawing all reasonable inferences in O'Neill's favor for purposes of a tortious interference with a contract, however, the court construes the complaint to mean that, because Cohen's frivolous lawsuit against O'Neill interfered with his application for financing, the bank breached its agreement to provide him a mortgage.

Nowhere, however, does the complaint allege any facts indicating Cohen's knowledge of either the bank's agreement to provide O'Neill a mortgage or his application for financing.

Thome v. Alexander & Louisa Calder Found., 70 A.D.3d at 108;
Preamble Props. v. Woodard Antiques Corp., 293 A.D.2d 330, 331
 (1st Dep't 2002); Bogoni v. Friedlander, 197 A.D.2d 281, 288 (1st
 Dep't 1994); Mautner Glick Corp. v. Edward Lee Cave, Inc., 157
 A.D.2d 594, 594 (1st Dep't 1990). See Havana Cent. NY2 LLC v.
Lunney's Pub, Inc., 49 A.D.3d at 72; 330 Acquisition Co., LLC v.
Regency Sav. Bank, F.S.B., 19 A.D.3d at 174-75. Nor does the
 complaint indicate that Cohen knew of O'Neill's relationship with
 any prospective lender and interfered with that relationship.
 See Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d at 47-48;
Thome v. Alexander & Louisa Calder Found., 70 A.D.3d at 108.
 Equally absent is any allegation as to how Cohen procured the
 breach, since she commenced her lawsuit well before the alleged
 breach ever occurred, let alone that she interfered with any
 relationship between O'Neill and a prospective lender solely out
 of malice or through criminal or independently tortious conduct.
Thome v. Alexander & Louisa Calder Found., 70 A.D.3d at 108. See
Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d at 47-48;
Havana Cent. NY2 LLC v. Lunney's Pub, Inc., 49 A.D.3d at 74.

The complaint's bare allegations that Cohen's frivolous
 lawsuit directly or proximately caused the denial of O'Neill's
 application for financing regarding real property for which he
 sought a mortgage, Sigmond Aff. Ex. A ¶¶ 20, 24, 26, amount to no
 more than a legal conclusion. 57th St. Arts, LLC v. Calvary
Baptist Church, 52 A.D.3d 425, 426 (1st Dep't 2008). See, e.g.,
Naegele v. Archdiocese of N.Y., 39 A.D.3d 271, 271 (1st Dep't

2007); UMG Recs., Inc. v. FUBU Records, LLC, 34 A.D.3d 293, 294 (1st Dep't 2006); Delran v. Prada USA Corp., 23 A.D.3d 308, 308 (1st Dep't 2005). Such allegations are not entitled to the favorable inferences ordinarily accorded a pleading upon a motion to dismiss pursuant to C.P.L.R. § 3211(a)(7), Leder v. Spiegel, 31 A.D.3d 266, 267 (1st Dep't 2006), aff'd, 9 N.Y.3d 836 (2007); Delran v. Prada USA Corp., 23 A.D.3d at 308; Skillgames, LLC v. Brody, 1 A.D.3d 247, 250 (1st Dep't 2003), and contribute nothing toward withstanding dismissal. 57th St. Arts, LLC v. Calvary Baptist Church, 52 A.D.3d at 426. See, e.g., Naegele v. Archdiocese of N.Y., 39 A.D.3d at 271; UMG Recs., Inc. v. FUBU Records, LLC, 34 A.D.3d at 294; Leder v. Spiegel, 31 A.D.3d at 268, aff'd, 9 N.Y.3d 836.

In sum, the conclusory allegations of interference with O'Neill's application for financing or agreement to obtain a mortgage, by themselves, fail to allege what actions Cohen took that procured a prospective lender's breach of any agreement or cessation of business with O'Neill. These allegations are thus insufficient to plead the claim for tortious interference with a contract or with prospective business relations. Lama Holding v. Smith Barney, 88 N.Y.2d at 424-25; Thome v. Alexander & Louisa Calder Found., 70 A.D.3d at 108; 57th St. Arts, LLC v. Calvary Baptist Church, 52 A.D.3d at 426; Burrowes v. Combs, 25 A.D.3d at 373. See Nicosia v. Board of Mgrs. of the Weber House Condominium, 77 A.D.3d 455, 456 (1st Dep't 2010); Kralic v. Helmsley, 294 A.D.2d 234, 235 (1st Dep't 2002); William Kaufman

Org. v. Graham & James, 269 A.D.2d 171, 174 (1st Dep't 2000).

Finally, O'Neill fails to specify any economic damages from the breached contract or lost business relations with the bank or other prospective lender, as is necessary to support tortious interference either with a contract or with prospective business relations. Havana Cent. NY2 LLC v. Lunney's Pub, Inc., 49 A.D.3d at 74; Learning Annex Holdings, LLC v. Gittelman, 48 A.D.3d 211, 211 (1st Dep't 2008); American Preferred Prescription v. Health Mgt., 252 A.D.2d at 416; Mautner Glick Corp. v. Edward Lee Cave, Inc., 157 A.D.2d at 594. See Lansco Corp. v. Strike Holdings LLC, 90 A.D.3d 427, 428 (1st Dep't 2011). He alleges only that he "has lost the opportunity cost associated with the rejected financing," Sigmond Aff. Ex. A ¶ 21, and that Cohen's actions have caused him "to be damaged financially." Id. ¶ 22. A "lost . . . cost" is no damage whatsoever. If instead an "opportunity . . . was associated with the rejected financing," since the financing was rejected, he did not lose the opportunity. If O'Neill means, even though he has not so alleged, that he lost an opportunity associated with the financing because the financing was rejected or that the rejected financing cost him an opportunity, he never specifies that opportunity or quantifies it economically to show actual financial damage. The rejected and thus lost financing itself does not amount to any damage, unless the financing was a donation, which he never suggests, rather than a loan that he would have been obligated to repay.

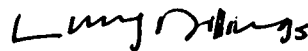
For all these reasons, the court grants Cohen's motion to

dismiss O'Neill's tortious interference claim based on his failure to allege material elements of tortious interference either with a contract or with prospective business relations. C.P.L.R. § 3211(a)(7). As delineated above, the complaint alleges neither Cohen's knowledge of a contract between O'Neill and another party, such that she intentionally procured the other party's breach, nor her knowledge of a business relationship between O'Neill and another party, such that she interfered with that relationship solely out of malice or through criminal or independently tortious conduct. The complaint specifies no economic injury from O'Neill's failure to obtain a mortgage, which he would have been obligated to repay, or from lost business, nor what any such lost business was.

IV. CONCLUSION

Consequently, the court grants defendant's motion to dismiss the complaint. Id. This decision constitutes the court's order and judgment dismissing the action.

DATED: December 18, 2015



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.