SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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CAERUS GROUP 4E34 LLC,

Plaintiff,

Index No. 155045/2015

-against-

DECISION/ORDER
Mot. Seq. 001

B. BOMAN & CO., INC.,

Defendant.

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KELLY O'NEILL LEVY, J.:

Plaintiff Caerus Group 4E34 LLC (Caerus) moves to dismiss defendant B. Boman & Co., Inc.'s (Boman) counterclaims pursuant to CLPR 3211 (a) (5) and (7). Defendant Boman cross-moves for summary judgment dismissing Caerus's complaint.

Caerus brought this action for tortious interference, alleging that Boman, a former retail tenant at a certain property, was deliberately and wrongfully interfering with the sale of the property by the owner, Zionist Organization of America (ZOA), to Caerus. Caerus had entered into a purchase agreement with ZOA after a six-month bidding process in which Boman chose not to participate. Boman sued ZOA for breach of their lease, even though the lease terminated more than seven months before the purchase agreement was signed, claiming that it had a right of first offer under the expired lease, and sought to block the property sale by filing a lis pendens. Caerus now claims that Boman's action was meritless and filed in bad faith. It seeks recovery for Boman's tortious interference with the sale, asserting that Boman was attempting to extort ZOA and Caerus to pay Boman off rather than risk further delays in the property sale. Boman counterclaims against Caerus for its alleged tortious interference with Boman's right of first offer

which Boman claims vested before Caerus's execution of the purchase agreement.

Caerus contends in this motion that Boman does not and cannot allege that it induced ZOA to breach the lease because Caerus was not in existence when the breach allegedly occurred, had no role in ZOA's purported desire to sell before the lease expired, and Boman fails to allege that "but for" Caerus's actions, ZOA would not have violated the lease. Boman urges in its cross motion that Caerus cannot show that Boman commenced its action for the sole purpose of harming Caerus, and that it was a sham, or that the purchase agreement was breached rather than that it terminated under its own terms. It further urges that Caerus commenced this action solely to interfere with Boman's ability to exercise its rights under the lease, and to bully it into discontinuing or settling its action with ZOA.

BACKGROUND

Pursuant to a lease dated May 24, 1982, ZOA leased to Boman retail space in a building at 4 East 34th Street, New York, New York (the Property) (exhibit 3 to aff of Jason W. Myatt in support, dated August 31, 2015 [Myatt aff]). This lease was amended and its term extended several times, and it ultimately expired by its own terms on January 31, 2014 (exhibit E to notice of cross motion, decision and order in *B. Boman & Co., Inc. v Zionist Organization of Am.*, Index No. 159730/2014, dated Sept 25, 2015 [Boman Decision], at 2). In a July 1, 1997 amendment, in exchange for a loan to ZOA, Boman was to have a right of first offer to purchase the Property until the loan was repaid or the lease terminated, whichever came later (*id.* at 2-3). The loan was repaid on or before July 22, 2003, at which point the lease was extended to January 31, 2014 (*id.* at 3). There was no further extension, and the lease, along with Boman's right of first offer, expired on January 31, 2014, but Boman continued to occupy the space as a month-to-month

tenant through September 30, 2014 (*id.* at 4).

As alleged, Boman's right of first offer was triggered by ZOA's "desire to sell" the Property (*id.* at 3; *see also* exhibit 2 to Myatt aff, Answer with Counterclaims [Counterclaims], ¶ 61). While Boman's counterclaims fail to allege a specific date that ZOA "desired to sell," Boman alleged in its complaint in its action against ZOA, entitled *B. Boman & Co., Inc. v Zionist Organization of Am.*, Index No. 159730/2014 (exhibit 7 to Myatt aff, Boman Complaint), that ZOA desired to sell at some point prior to February 1, 2014 (exhibit 7 to Myatt aff, Boman Complaint, ¶ 16). Without a "desire to sell," and the associated failure to give notice to Boman, on or before January 31, 2014, ZOA could not have violated the lease (*see* exhibit 2 to Myatt aff, Counterclaims, ¶ 62).

In December 2013, ZOA requested an appraisal of the Property as a future development site. The appraisal report indicated that the intended use was "'valuation for potential sale of property'" (Boman Decision at 3-4 [citation omitted]).

On February 12, 2014, marketing efforts for the Property began (*id.* at 4; *see also* exhibit 8 to Myatt aff). Three rounds of bids occurred during March and April 2014. The marketing brochure was sent to Boman, but Boman did not place a bid (Boman Decision at 4). Caerus is not alleged to have any involvement in the decision to appraise or market the Property (*see* Counterclaims, ¶ 62).

On June 17, 2014, Caerus was formed (exhibit 9 to Myatt aff, Certificate of Formation of Caerus Group 4E34 LLC).

On August 6, 2014, ZOA's Board of Directors approved a resolution permitting ZOA to sell the Property. On that same date, Caerus entered into a purchase and sale agreement with

ZOA to purchase the property for $38 million cash (Boman Decision at 4-5). The purchase and sale agreement required that ZOA, among other things, obtain a waiver from Boman of the right of first offer, which was to be delivered at closing (exhibit 10 to Myatt aff, Purchase and Sale Agreement [PSA] §§ 10.10, 11.1t).

On September 26, 2014, Boman demanded that ZOA comply with its right of first offer, and refused to provide the waiver of such right (Boman Decision at 5). On October 2, 2014, Boman commenced a breach of contract action against ZOA, and filed a lis pendens on the Property to prevent the sale to Caerus (Counterclaims, ¶¶ 66, 71; *see* exhibit 7 to Myatt aff, Boman Complaint).

The PSA failed to close on March 17, 2015. Caerus then brought a breach of contract action against ZOA, seeking specific performance of the PSA (exhibit 11 to Myatt aff, *Caerus Group 4E34 LLC v Zionist Organization of Am.*, Index No. 152648/2015).

Caerus then brought this tortious interference action against Boman, alleging that Boman's action against ZOA was not commenced in good faith, but rather was only brought to obtain a settlement from ZOA and Caerus (exhibit 1 to Myatt aff, Complaint). Caerus asserts two claims: tortious interference with contract, and tortious interference with prospective economic advantage (*id.*, Complaint, ¶¶ 38-51).

Boman answered the complaint, denying the material allegations, and asserted counterclaims for tortious interference with contract and with prospective economic advantage (first and second counterclaims). It also seeks a declaratory judgment, declaring that its right of first offer is superior to any right Caerus has to purchase the Property (third counterclaim), and an injunction, enjoining Caerus from taking any steps to encumber the Property (fourth

counterclaim) (exhibit 2 to Myatt aff, Counterclaims, ¶¶ 79-102).

In the Boman action, upon ZOA's motion to dismiss, this court dismissed Boman's complaint, finding that it was undisputed that the lease expired by its own terms on January 31, 2014, the right of first offer also expired on that date, and that the documentary evidence demonstrated that ZOA's "desire to sell" did not arise, and was not expressed, until after the lease had already expired (Boman Decision at 7-12).

Caerus now moves to dismiss Boman's counterclaims. First, it argues that it is impossible for it to have induced ZOA to breach its lease with Boman as the lease expired before Caerus was even formed, and before it had a contract with ZOA. In addition, there are no allegations that it induced any breach. Further, Boman does not allege that "but for" Caerus's actions, ZOA would have sold the property to Boman. With regard to the interference with prospective economic advantage counterclaim, Caerus asserts that Boman fails to allege that it had any ongoing or prospective relationship with ZOA with which Caerus could have interfered since Boman's lease expired on January 31, 2014. In addition, it fails to allege precisely how Caerus interfered with this purported relationship, and fails to identify acts that were solely to harm Boman, or that Caerus used wrongful means. On the declaratory counterclaim, Caerus urges that Boman has no standing to challenge the PSA because it was not a party or third-party beneficiary thereof, and there is no justiciable controversy, because Boman lacks an enforceable right of first offer. Further, Caerus asserts that it has not been determined that the PSA has been terminated, and Boman fails to establish a basis to find the PSA unenforceable. Moreover, the injunction counterclaim is procedurally improper – Boman's relief is to challenge Caerus's lis pendens under CPLR 6514, not to have Caerus enjoined. Finally, Caerus contends that Boman

cannot show irreparable harm.

Boman cross-moves for summary judgment, arguing that Caerus's claims lack merit. It asserts that the tortious interference claim must be dismissed, because Boman's alleged wrongful acts in filing its complaint, and the lis pendens, are immune from suit under the *Noerr-Pennington* immunity doctrine, which gives civil litigants immunity for bringing their claims to court as long as the litigation is not a sham. It urges that its action was based on its right of first offer in its lease with ZOA. It further urges that Caerus fails to allege that Boman commenced its litigation solely to harm Caerus. It submits the affidavit of Albert Erani, an owner and officer of Boman, who attests that Boman stands ready, willing, and able to purchase the Property subject to an opportunity to conduct due diligence (aff of Albert Erani, dated Oct 10, 2015, ¶ 12). Boman also argues that the PSA expired by its own terms so that it was not breached by ZOA, and thus, Boman could not have induced any breach. It counters Caerus's motion by asserting that Caerus commenced this action solely to interfere with Boman's ability to exercise its rights under the lease, and that, while its right of first offer vested prior to Caerus's appearance and/or execution of the PSA, ZOA's actual breach occurred when it failed to give Boman the first opportunity to purchase under the terms in the PSA. On the declaratory counterclaim, Boman asserts that it seeks a declaration that its right under the lease is superior to Caerus's right to purchase, not a declaration that the PSA terminated. With respect to the injunction, Boman contends that it has shown a likelihood of success on the merits of its claim that ZOA had the "desire to sell" before the lease expiration, and that Boman has a right of first offer, and has suffered irreparable harm, because the breach of a right of first offer tends to be unique in nature.

DISCUSSION

Caerus's motion to dismiss Boman's Counterclaims is granted, and the Counterclaims are dismissed. Boman's cross motion for summary judgment dismissing Caerus's complaint is granted, and the complaint is dismissed.

To assert a claim for tortious interference with an existing contract, the plaintiff must allege: (1) the "existence of its valid contract with a third party;" (2) "defendant's knowledge of that contract;" (3) "defendant's intentional and improper procuring of a breach" of the contract; and (4) resulting damages (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007], citing in n 6, *inter alia*, *Lama Holding Co. v Smith Barney*, 88 NY2d 413 [1996]; *see also Law Offs. of Ira H. Leibowitz v Landmark Ventures, Inc.*, 131 AD3d 583, 585 [2d Dept 2015]; *AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]).

Here, Boman's counterclaim fails for several reasons. First, as this court already found in the Boman action, there was no breach of the lease by ZOA (Boman Decision at 7-12). The lease expired by its own terms on January 31, 2014, and with it Boman's right of first offer. The documentary evidence demonstrated that ZOA did not have any "desire to sell," as those terms are interpreted under the lease, before that expiration date. Second, the counterclaim fails because Boman fails to allege that Caerus induced a breach by ZOA (*see AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d at 403). Caerus was not formed until June 2014, five months after the lease had already expired, and there are no allegations that Caerus had any contact with ZOA before the lease terminated (*see* exhibit 9 to Myatt aff, Certificate of Formation of Caerus Group 4E34 LLC). There also are no allegations that Caerus caused ZOA to violate the lease terms in any way, that "but for" Caerus's action ZOA would not have

breached the lease (*see* exhibit 2 to Myatt aff, Counterclaims, ¶ 62). ZOA sought to sell the property by soliciting bids in March and April 2014, before Caerus was formed. Boman did not bid, though it was given notice, and after several rounds of bidding, ZOA entered into the PSA with Caerus (*see Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006] [claim dismissed for failure to allege "but for" causation]). There is no basis for Boman's tortious interference with contract counterclaim.

While a claim for tortious interference with prospective business relations does not require a breach of an existing contract, it requires that the plaintiff's claim meet a more culpable standard of conduct (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]). Thus, the plaintiff must allege that the interference was accomplished by wrongful means, or the defendant acted for the sole purpose of harming the plaintiff (*Law Offs. of Ira H. Leibowitz v Landmark Ventures, Inc.*, 131 AD3d at 585-586). "Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980] [internal quotation marks and citation omitted]). Where the defendant's actions are motivated, at least in part, by economic self-interest, they cannot be considered solely malicious (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 577 [2d Dept 2008]).

In this case, Boman fails to allege that it had an ongoing business relation with ZOA with which Caerus could have interfered. In its counterclaim, Boman alleges just that Caerus was "intentionally preventing Boman from realizing its rights under the Lease" (exhibit 2 to Myatt aff, Counterclaims, ¶ 90). Again, the lease expired on January 31, 2014, before Caerus was formed or acted. In addition, Boman fails to allege how Caerus interfered with its purported

relationship with ZOA, and makes no allegation that Caerus played any role in ZOA's decision to sell the Property. Further, Boman does not allege any wrongful means by Caerus. Economic persuasion alone, even if it is directed at interference with the contract, does not constitute wrongful means (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d at 191). Caerus's attempt to purchase the property in response to ZOA's request for bids, and its attempt to enforce the PSA, fails to constitute wrongful means. Thus, this counterclaim fails, and is dismissed.

Boman's declaratory judgment counterclaim similarly is insufficient to state a claim. Contrary to Boman's attempt to rewrite the claim in its brief in opposition, the counterclaim clearly seeks a declaration that the PSA terminated by its own terms because the sale was not approved by the Attorney General, and ZOA was unable to get a waiver by Boman of its right of first offer (exhibit 2 to Myatt aff, Counterclaims, ¶ 94). As Caerus correctly contends, Boman lacks standing to seek a declaration of the validity and enforceability of the PSA because it is not a party, nor an intended third-party beneficiary therein (*see Nanomedicon, LLC v Research Found. of State Univ. of N.Y.*, 112 AD3d 594, 596 [2d Dept 2013]). Moreover, as this court already held, Boman's right of first offer expired with the lease, therefore, there is no basis for the declaration it seeks.

Finally, the counterclaim for an injunction is dismissed. Boman fails to satisfy the requirements for such a claim, which requires that Boman assert that it has no adequate remedy at law, and that it suffered irreparable harm. To assert a claim for an injunction, the plaintiff must allege that there is a "violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that serious and irreparable harm will result absent

the injunction, and that the equities are balanced in his or her favor" (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014] [citations and internal quotation marks omitted]; *see Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, 134 AD3d 1119, 1120 [2d Dept 2015] [drastic remedy]). Here, since Boman's claims against ZOA have been dismissed, Boman has no presently occurring, or threatened and imminent, right for Caerus to violate (*Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, 134 AD3d at 1120). Moreover, Boman has a legal remedy to challenge Caerus's lis pendens by moving under CPLR 6514. Therefore, this counterclaim is dismissed.

Caerus's claims for tortious interference with contract, and with prospective economic advantage, also are dismissed. These claims are based on Caerus's contentions that Boman's acts, in initiating and pursuing its litigation against ZOA, were wrongful, because Boman knew that it did not have a legitimate basis for its claims therein, and nevertheless filed and continued to pursue that litigation. Boman's actions, however, are immune from liability by the *Noerr-Pennington* doctrine (*see United Mine Workers of Am. v Pennington*, 381 US 657 [1965]; *Eastern R.R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127 [1961]). As the First Department stated in *I.G. Second Generation Partners, L.P. v Duane Reade* (17 AD3d 206, 208 [1st Dept 2005]), that doctrine "holds, essentially, that parties may not be subjected to liability for petitioning the government" ([citations omitted]). It specifically held that the filing of litigation fell within the protection of the doctrine, and that it applied to bar claims of tortious interference based on the commencement of a lawsuit (*id.*; *see Concourse Nursing Home v Engelstein*, 278 AD2d 35 [1st Dept 2000] [doctrine protects against tortious interference claims]; *Matsushita Elec. Corp. v Loral Corp.*, 974 F Supp 345, 354-355 [SDNY 1997]). In order to

overcome the bar posed by the doctrine, the plaintiff must assert sufficient facts from which it can be inferred that the prior lawsuit was a "sham," that is, that it was objectively baseless, and that no reasonable litigant could reasonably expect success on the merits (*Matsushita Elec. Corp. v Loral Corp.*, 974 F Supp at 354). If not objectively baseless, then the inquiry ends. If the action was a sham, then the plaintiff must show the subjective motivation of the offending party, that the baseless action concealed an attempt to directly interfere with a competitor's business through using government process (*id.*).

Based on this doctrine, Caerus must allege and show that Boman had no genuine interest is pursuing the Boman action (*see Villanova Estates, Inc. v Fieldstone Prop. Owners Assn., Inc.*, 23 AD3d 160, 161 [1st Dept 2005]; *Alfred Weissman Real Estate v Big V Supermarkets*, 268 AD2d 101, 109-110 [2d Dept 2000]). Caerus fails to make this threshold showing. A reasonable litigant in Boman's position, as a tenant with a right of first offer in its lease which expired shortly before the property owner sought bids to sell the property, would have perceived some reasonable possibility of success in advancing its arguments, particularly where the property owner sought an appraisal before the lease expired. Simply because the action was dismissed and, thus, unsuccessful, does not mean the action was without a foundation, or a sham (*see Matsushita Elec. Corp. v Loral Corp.*, 974 F Supp at 356). Contrary to Caerus's argument, the court in *I.G. Second Generation Partners, L.P. v Duane Reade* (17 AD3d 206) did not hold that the filing of a prior lawsuit was protected only where the underlying action was successfully prosecuted, because the underlying action therein actually had been reversed, and, therefore, the defendant's prior action was unsuccessful, as Boman's was here (*id.* at 207). Thus, this court finds that Boman's action was not objectively baseless, and Boman is entitled to immunity from

these tortious interference claims under *Noerr-Pennington*.

Accordingly, it is

ORDERED that the plaintiff's motion to dismiss the counterclaims is granted, and the counterclaims are dismissed; and it is further

ORDERED that the defendant's cross motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed without costs and disbursements to either party; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 16, 2016

ENTER:

Kelly O'Neill Levy
J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.