Albert v Newtek Bus. Servs. Corp.
2017 NY Slip Op 33243(U)
November 1, 2017
Supreme Court, Nassau County
Docket Number: 607853/17
Judge: Timothy S. Driscoll
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ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

JONATHAN ALBERT,

Plaintiff,

-against-

NEWTEK BUSINESS SERVICES CORP. and PREMIER PAYMENTS LLC,

Defendants.

----------x

TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 607853/17
Motion Seq. No. 1
Submission Date: 9/20/17

Papers Read on this Motion:

Notice of Motion, Affidavits in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affidavit in Support and Exhibit.....x
Reply Memorandum of Law in Support.....x

This matter is before the court on the motion filed by Defendants Newtek Business Services Corp. ("Newtek") and Premier Payments LLC ("Premier") ("Defendants") on September 5, 2017 and submitted on September 20, 2017. For the reasons set forth below, the Court denies the motion. The Court reminds counsel for the parties of their required appearance before the Court on November 30, 2017 at 9:30 a.m. for a Preliminary Conference.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR §§ 3211(a), dismissing the complaint based on documentary evidence, lack of capacity to sue and failure to state a cause of action.

Plaintiff Jonathan Albert ("Albert" or "Plaintiff") opposes the motion.

B. The Parties' History

The Complaint (Ex. A to Schwartz Aff. in Supp.) alleges as follows:

Plaintiff is an individual residing in New York City. Defendant Newtek is a foreign corporation incorporated under the laws of Maryland, with its principal place of business in Lake Success, New York. Defendant Premier is a New York limited liability company with its principal place of business in Great Neck, New York.

Premier is a full-service credit and debit card processor that provides credit and debit card processing services to merchants for and on behalf of specific banks and credit card companies. Premier collects fees from its merchants electronically at the end of each month. Netwek provides a wide range of business services and financial products to the small and medium-sized business market. Newtek acquired Premier as a wholly owned portfolio company in July 2015 (the "Acquisition").

Albert started working with Premier over six (6) years ago and was its first employee. He solicited and referred merchants to Premier for credit and debit card processing services. Albert solicited applications from merchants that were interested in those services, and then the merchants entered into an agreement with Premier. Albert was responsible for training the merchants ("Merchants") that he brought to Premier regarding the necessary technology and equipment for card processing. Albert was also responsible for providing ongoing support to the Merchants, and for handling customer service problems encountered by the Merchants.

Albert was one of Premier's highest-producing and most successful agents. In June 2015, in connection with the Acquisition, Albert and Premier entered into an independent contractor agreement ("Agreement"). The Complaint alleges that the Agreement was executed by Premier and Albert and that, upon information and belief, Newtek is the successor-in-interest to Premier (Comp. at n. 1). Under the Agreement, Albert was entitled to be paid 50% of the net monthly credit and debit card processing revenue attributable to each Merchant. Albert was also entitled to collect residuals on every Merchant account brought to Defendants by Albert's sub-agents. Albert's commission on his sub-agents' accounts was 10%. Premier was responsible for paying Albert monthly and providing a report summarizing the basis on which the payment for each Merchant was computed. Albert had over 500 Merchant accounts when the Agreement was

executed, and was earning more than $12,000 per month.

Within months of the Acquisition, Albert began to notice that several Merchant accounts had been removed from his monthly residual reports. Upon realizing that certain accounts were missing, Albert sent several emails to Jordan Stein ("Stein"), Chief Operating Officer of Premier, to advise Defendants of the situation, thinking that an error may have been made. Albert requested that the accounts be returned to his monthly report and that he continue to receive his monthly residuals for these Merchants. Defendants responded "sporadically" (Comp. at ¶ 14) and did not return all of Albert's accounts. Albert realized that Defendants had intentionally removed these Merchants from Albert's report and discontinued paying Albert his commission on these accounts.

Albert retained counsel who sent a letter to Defendants dated February 17, 2017. In that letter, Albert's attorney advised Defendants that their wrongful failure to pay Albert constituted a breach of the Agreement, and suggested that Defendants' counsel contact Plaintiff's counsel to discuss a resolution of the matter. Defendants offered to buy out Albert's rights to all compensation and residuals payable under the Agreement for $285,000.[1] Immediately prior to Defendants extending this offer, Albert was advised that one of his sub-agents was closing a very lucrative deal for Defendants with a large merchant (the "Deal") that would result in significant commissions for Albert. In light of the Deal, Albert concluded that his residuals were worth much more than Defendants were offering, and he rejected their buy-out offer.

Defendants responded by "engaging in several acts of bad faith" (Comp. at ¶ 17), specifically: 1) Defendants sent Albert's sub-agent an email informing the sub-agent that the Deal would not move forward until Albert agreed to a buy-out, and forced the sub-agent to sign a non-disclosure agreement not to communicate with Albert; 2) Defendants advised Albert and his attorney that they would have to litigate in order to receive any compensation or residuals from the Deal; and 3) Premier sent Albert a letter dated March 29, 2016 ("March 2016 Letter"), falsely accusing Albert of breaching the Agreement by not training and servicing the Merchants and not addressing their customer service issues. Defendants had never before asserted that Albert had neglected his training or customer service responsibilities. The March 2016 Letter set forth

[1] The Agreement contains buy-out provisions in Schedules A-C (Comp. at n. 2).

several demands of Albert, to demonstrate his compliance with the Agreement, which exceeded Albert's obligations under the Agreement. These demands were overly broad and served no legitimate purpose because much of the information relevant to Albert's servicing of Merchant accounts was readily available to Defendants through their corporate portal. Plaintiff alleges that this was a pretext for Defendants ceasing to pay Plaintiff.

After receiving the March 2016 Letter, Albert devoted extensive time and attention to reviewing previous directives and instructions provided by Defendants with regard to servicing Merchant accounts. He gathered email correspondence that demonstrated his compliance with directives, addressed Merchant concerns and requests, volunteered his assistance to Merchants and Defendants, and reviewed past customer service requests from Merchants to verify that he had responded to requests diligently and promptly. Albert contacted Defendants, to ensure that he was meeting their expectations and that they were satisfied with the services he was providing. Albert sent the Merchants a survey titled "Merchant Satisfaction and Compliance Check" ("Survey") in which Albert asked the Merchants to confirm that they were satisfied with the training and customer service that Albert had been providing, and that they were processing payments in accordance with the rules of Defendants, the credit card companies and the government.

Shortly thereafter, Newtek sent a "cease and desist" letter to Albert (Comp. at ¶ 24) dated April 6, 2016 ("Cease and Desist Letter") in which Newtek asserted that Albert's distribution of the Survey violated Section 1.6 of the Agreement which requires Albert to submit all "marketing material" (*id.*) to Premier for its review, and states that Albert may not use Premier's name except as "expressly permitted" (*id.*) by Premier. Newtek asserted in the letter that the Survey was damaging Premier's' relationship with its merchants, and that Albert had breached the Agreement. Plaintiff alleges that the statements in the Cease and Desist Letter were false, and illogical, for several reasons: 1) the Survey could not reasonably be considered marketing materials; 2) the Survey did not use Premier's name, other than to identify the services to which the Survey was referring; and 3) a Survey sent by an independent contractor to determine whether he was providing satisfactory service to his merchants could not reasonably be expected to damage Premier's relationship with its merchants. Following the issuance of the Cease and Desist Letter, Defendants placed a block on Albert's company email account, rendering Albert

unable, as of April 9, 2016, to send or receive any email communications with his Merchants, or to receive or respond to any inquiries, concerns or complaints from Merchants or prospective merchants. Albert has been damaged as a result of the denial of his access to that information.

Following an unsuccessful attempt to reach Defendants by telephone, counsel for Albert wrote another letter dated April 20, 2016 ("April 2016 Letter") to address Defendants' breach and subsequent misconduct. The April 2016 Letter asserted that Albert was never in breach of the Agreement but requested that, to the extent that Defendants maintained otherwise, Defendants identify with specificity Albert's failure to perform any task or duty. Defendants never responded to the April 2016 Letter. In May 2016, Defendants ceased paying Albert all residual commissions on his Merchant accounts. At that time, Albert was averaging monthly commissions of approximately $10,000, or less because of misappropriated accounts.

The Complaint contains two (2) causes of action:

1) breach of the Agreement by Defendants; and

2) tortious interference with contract based on the allegation that, to the extent that Newtek proves to be an entity independent of, and not the successor to, Premier, Newtek tortiously interfered with the Agreement by engaging in unlawful and deceitful behavior to avoid Premier having to pay Albert his rightfully due commissions, including instructing Premier to move certain Merchant accounts away from Albert to reduce his commissions, and instructing Premier to cease paying Albert commissions in violation of the Agreement.

The first paragraph of the Agreement (Ex. B to motion) reads as follows:

> The agreement (the "Agreement") is made and entered into as of the date indicated below by and between: Premier Payments LLC, a company having its principal place of business at 40 Cutter Mill Rd., Suite 302 Great Neck, NY 11021 (the ISO") and the agent identified below ("Agent").

The Agreement contains the following information, at page 1:

> Agent Company Name (if any): JA Processing Incorporated
> Agent Name: Jonathan Albert
> Agent Address: 401 Park Avenue South 10th FL NY, NY 10016
> **
> Agent E-mail Address: jalbert@premierpayments.com
> Effective Date of this Agreement: June 1, 2015

The last page of the Agreement reads as follow:

The parties have signed this Agreement as to the Effective Date:

AGENT:	PREMIER PAYMENTS LLC
X_____	X_____
Name: Jonathan Albert Title: President Date: June 19, 2015 Business Name: JA Processing, Inc.	Name: Jeffrey Rubin Title: Managing Member Date: 6/22/15

In support of the motion, Stein, the President and Chief Operating Officer of Premier, affirms that 1) at all relevant times, Premier was and is a New York limited liability company; 2) at all times during the period of July 2015 through December 31, 2016, Premier maintained its own board of managers and officers; and 3) it is his understanding that Premier entered into an Independent Contractor Agreement with JA Processing, Inc. ("JA"), effective June 1, 2015.

In further support of the motion, Michael Adam Schwartz ("Schwartz") affirms that he is the Chief Legal Officer and Secretary of Newtek. Schwartz affirms that at all relevant times, Newtek was and is a publically traded Maryland corporation authorized to conduct business in New York. Newtek is an internally managed, non-diversified, closed-end management investment company that has elected to be regulated as a "business development company" ("BDC") (Schwartz Aff. in Supp. at ¶ 4) under the Investment Company Act of 1940, as amended (the "1940 Act") (*id.*). Schwartz affirms that BDCs are special investment vehicles designed to facilitate capital formation for small and middle-market companies. The 1940 Act defines a BDC as a domestic closed-end company that, *inter alia*, operates for the purpose of making investments in certain securities specified in Section 55(a) of the 1940 Act.

Schwartz affirms that Newtek is managed by its Board of Directors ("Board"). The Nasdaq listing standards and Section 2(a)(19) of the 1940 Act require that a majority of Newtek's Board be "independent" (Schwartz Aff. in Supp. at ¶ 6). He affirms that Newtek holds controlling equity interests, *i.e.* greater than 51%, either directly or through its business finance platform, in certain portfolio companies that, as of June 30, 2017, represented approximately 35% of Newtek's $392,276,000 total investment portfolio. Schwartz lists numerous companies in which Newtek holds a controlling equity interest (Schwartz Aff. in Supp. at ¶ 7).

Schwartz affirms that in July 2015, Newtek acquired 100% of the membership interests in Premier, a New York limited liability company. Since the Acquisition, Premier, an electronic payment processing independent sales organization, has continuously operated as an independent

distinct legal entity, managed by its board of managers and executive officers. Newtek's investment in Premier represents 5.3% of Newtek's total investment portfolio as of June 30, 2017. Schwartz affirms that 1) Premier has its own board of managers and officers; 2) Newtek is not, and has never been, a successor-in-interest to Premier; 3) Newtek and Premier are independent, distinct legal entities, and each has an independent board of directors, and board of managers, respectively; 4) Newtek has not exercised complete dominion and control of Premier; 5) Newtek was not, and is not, the alter ego of Premier; and 6) Newtek is not, and has never been, a party to any contract with Plaintiff and/or non-party JA.

In opposition to the motion, Albert affirms that he has been in the credit card processing business for many years. He was the first employee of Premier and, during his tenure with Premier, he solicited and referred merchants to Premier for credit and debit card processing services. He affirms that he was one of Premiers' highest-producing and most successful agents for many years.

Albert affirms that, in connection with the Acquisition in 2015, he was asked, for the first time to sign a contract. Albert affirms that he signed the Agreement in his individual capacity as an agent of Premier Payments. The contract form asked Albert to identify his corporate entity, JA Processing, Inc., which he did, but, he affirms, JA is not the contracting party. Albert submits that it is obvious that the agent, identified as Albert in the Agreement, is the individual undertaking the obligations set forth in the Agreement (Ex. A to Albert Aff. in Opp.).

Albert affirms that his relationship with Premier changed shortly after the Acquisition, and that Newtek's management team, and in particular Chief Executive Officer Barry Sloane ("Sloane"), began making the decisions for Premier. On July 29, 2015, Sloane held a conference call with all of the Premier agents in which he reassured them that the transition would be smooth. Albert affirms that, from his perspective, Newtek and Premier had merged and had begun to act as one company in many ways.

Shortly after the Acquisition, Albert began to notice that several of his Merchant accounts had been removed from his monthly residual, or commission, reports. Following conversations with senior executives, including Stein who advised Albert that "he had become afraid of putting anything in writing" (Albert Aff. in Opp. at ¶ 6), Albert realized that he was being deprived of commissions. Albert confirmed that the misappropriation of his customers was intentional, and not a bookkeeping error.

Defendants subsequently offered to buy Albert out, as contemplated by the Agreement, but Defendants attempted to exclude a large incoming customer from the buyout calculation. Without Albert's knowledge, Michael Campbell, Chief Credit and Risk Officer, traveled to see the incoming customer, and Defendants allegedly coerced Albert's sub-agent into signing a non-disclosure agreement to prevent the sub-agent from communicating with Albert about his customers, including the large incoming customer at issue, which Albert describes as "unheard of" (Albert Aff. in Opp. at ¶ 7). After the proposed buy-out could not be accomplished, Defendants accused Albert of breaching the Agreement. In support of his contention that Defendants had become one entity, Albert affirms that he received letters from both Newtek and Premier (Exs. B and C to Albert Aff. in Opp.), "interchangeably and without distinction" (Albert Aff. in Opp. at ¶ 8).

The April 6, 2016 letter (Ex. B to Albert Aff. in Opp.) is addressed to an attorney in New York City whom the letter identifies as the attorney representing JA. That letter is written on Newtek stationery and signed by Robert Fraley ("Fraley"), who is identified as "Senior Counsel, Newtek Business Services Corp. The April 6, 2017 letter includes the following:

> PREMIER HEREBY DEMANDS THAT YOUR CLIENT IMMEDIATELY CEASE DISTRIBUTING ANY UNAUTHORIZED MATERIALS AND IMMEDIATELY RETRACT ANY UNAUTHORIZED MATERIALS HE HAS ALREADY DISTRIBUTED.

The April 17, 2017 letter (Ex. C to Albert Aff. in Opp.), is addressed to a different attorney in New York City whom the letter identifies as the attorney representing Albert. That letter is also written on Newtek stationery and signed by Fraley who is identified as "Counsel to Premier Payments LLC." In that letter, Fraley asserts *inter alia* that "Premier denies any liability to Mr. Albert."

In reply, Adam Eddelson ("Eddelson") affirms that he is the Controller of Premier and a member of Premier's board of managers, and is familiar with the facts and circumstances of this action. Eddelson affirms that he is one of the custodians of the books, records and files of Premier and, in that capacity, has gained personal knowledge of the agreements between Premier and its customers, including the Agreement at issue in this action, which Eddelson describes as being "with" JA (Eddelson Reply Aff. at ¶ 3). Eddelson affirms that the Agreement was signed by Plaintiff, on page 14, as President of JA.

Eddelson provides a copy of the Form W-9 provided by Plaintiff on behalf of TAB Consulting Corp., 29 Wren Drive, Roslyn, New York 11576, to Premier. Eddelson affirms that

Premier requires that all contract "counterparties" (Eddelson Reply Aff. at ¶ 4) who are to receive payments from Premier provide a Form W-9 so that Premier can comply with Internal Revenue Service ("IRS") rules which require that Premier report these payments to the IRS on an information return called form 1099-MISC. Eddelson affirms that businesses use the name, address and tax identification number from Form W-9 to complete form 1099-MISC.

Eddelson also provides a copy of an August 27, 2015 email from Plaintiff to an employee of Premier, annexing the Form W-9 and a printout from the website of the New York State, Department of State, Division of Corporations reflecting that JA changed its name to TAB Consulting Corp. on November 1, 2013, and that the registered agent for both companies was Plaintiff, with an address of 29 Wren Drive, Roslyn, New York 11576. In that email, Plaintiff wrote:

> Please see attached. To avoid confusion. The company I currently have on file with Premier Payments is called JA Processing, TAB Consulting is the same company I just did a name change. The second attachment is documentation on the name change.

Eddelson affirms that all payments made pursuant to the Agreement were made to TAB Consulting Corp., formerly known as JA Processing, Inc, and no payments under the Agreement were made to Plaintiff personally. Eddelson affirms that, pursuant to IRS regulations and company policy, Premier only makes payments to the legal counterparties to Premier's contracts, citing Treasure Regulation § 301.6109-1(b)(1) which provides that "A U.S. person whose number must be included on a document filed by another person must give the taxpayer identifying number so required to the other person on request" (Eddelson Reply Aff. at ¶ 6). Eddelson affirms that the general instructions on Form W-9 state that it is mandatory to provide a taxpayer identification number to a business who properly requests it.

C. The Parties' Positions

Defendants submit that dismissal of the Complaint is warranted because 1) Plaintiff is not a party to the Agreement and, therefore, lacks standing to pursue the claims asserted in the Complaint; 2) a party who signs a contract in his capacity as a corporate officer, as Defendants contend Plaintiff has done, may not sue on the contract in his individual capacity; 3) the only parties to the Agreement are JA, a non-party corporation, and Premier, as evidenced by the fact that the Agreement was signed by Plaintiff as President of JA, and not in his individual capacity; 4) for the reasons outlined by Schwartz, prior to and following the Acquisition, Premier has operated as an entity that is independent and distinct from Newtek; 5) the Complaint fails to

allege facts supporting Plaintiff's allegation that Newtek is or could be a successor-in-interest to Premier; 6) Premier has demonstrated that JA breached the Agreement, and refused to cure that breach; and 7) as JA is the party to the Agreement, and Albert is not a party to the Agreement, Albert may only proceed derivatively on behalf of JA. Defendants also argue that the cause of action alleging tortious interference is legally insufficient because contracts terminable at will may not form the basis of a tortious interference with contract claim, citing *Discovery Group, Inc. v. Lexmark Int'l, Inc. ("Lexmark")*, 333 F. Supp. 2d 78, 85-6 (E.D.N.Y. 2004). Defendants submit, further, that Plaintiff does not have a viable tortious interference claim because the means employed were not wrongful, and because Plaintiff is not a party to the Agreement that was allegedly breached.

Plaintiff opposes the motion, submitting that Defendants are incorrect in asserting that JA was the party to the Agreement. Plaintiff submits that Albert was a party to the Agreement, as evidenced by the fact that 1) the Agreement states that it is between Premier and the "Agent," who is specifically identified as Albert; 2) JA is listed as the Agent's Company, but not as a party to the Agreement; and 3) the signature block of the Agreement identifies the "Agent" as the party to the Agreement. Plaintiff contends that it is "obvious" (P's Memo. of Law in Opp. at p. 4) from these facts that Albert signed the Agreement as the Agent in his individual capacity. Plaintiff submits that the fact that Premier's contract form requested a title and business name of the Agent in the signature block is of no legal consequence. At best, Plaintiff contends, the issue of whether Albert was a party to the Agreement is an issue of fact and, therefore, that the Court should deny the motion to dismiss.

Plaintiff submits, further, that dismissal of the Complaint against Newtek is also not warranted. Plaintiff contends that there are numerous factual assertions supporting Plaintiff's allegation that Newtek is the successor-in-interest to Premier, including that it was Newtek, not Premier that sent the Cease and Desist Letter; Newtek followed up with a letter dated April 17, 2017; and immediately after the Acquisition, Newtek's Chief Executive Officer conducted a conference call with all of Premier's agents to assure them that the transition would be smooth. Plaintiff submits that Defendants' motion to dismiss the Complaint against Newtek relies on self-serving, conclusory statements, including Schwartz's affirmation that Newtek is not and has never been a successor-in-interest to Premier (Schwartz Aff. at ¶ 12).

Plaintiff also contends that the cause of action alleging tortious interference with contract is viable. Plaintiff contends that the terminable at will contract provision has no significance,

submitting that the *Lexmark* case on which Plaintiff relies dedicated a single sentence to the proposition cited by Defendants, and did so in the context of a choice of law analysis. Moreover, Plaintiff submits, New York case law holds that an agreement terminable at will is a prospective contractual relation, that may be tortiously interfered with through malicious or wrongful conduct. Thus, at most, Plaintiff's tortious interference claim could be "reclassified" (P's Memo. of Law in Opp. at p. 8) as interference with business relations, rather than interference with contract, notwithstanding the existence and breach of an actual contract. Plaintiff contends, further, that it has alleged that Newtek used wrongful means by removing accounts from Albert's report, ceasing the payment of residuals to which Albert was entitled, and attempting to close the Deal without Albert's knowledge.

In reply, Defendants submit *inter alia* that 1) the submissions, including the Eddelson affidavit, demonstrate that Plaintiff was not a party to the Agreement; 2) Plaintiff has failed to allege facts supporting a claim of successor liability, and Albert's affirmation that from his perspective the two companies acted as one company is not evidence in support of that claim; and 3) Plaintiff has not alleged facts demonstrating that there was a breach of the Agreement or that, if there was such a breach, it was Newtek that procured that breach.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Breach of Contract

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *El-Nahal v. FA Management, Inc.*, 126 A.D.3d 667, 668 (2d Dept. 2015) citing, *inter alia*, *Dee v. Rakower*, 112 A.D.3d 204, 208-209 (2d Dept. 2013).

C. Contract Interpretation

A contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d 895, 897 (2d Dept. 2013), citing *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009), quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). A contract is ambiguous if the terms are reasonably susceptible of more than one interpretation. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d at 897. Whether a contract is ambiguous is a question of law to be resolved by the court. *Id.*, citing *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990); *JP Morgan Chase Bank, N.A. v. Cellpoint Inc.*, 54 A.D.3d 366 (2d Dept. 2008). Where a contract is ambiguous, extrinsic evidence may be considered to determine the parties' intent. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d at 897, citing *Greenfield v. Philles Records*, 98 N.Y.2d at 569.

In *Red-Kap Sales, Inc. v. Northern Lights Energy Products, Inc.*, 94 A.D.3d 1281 (3d Dept. 2012), the Third Department affirmed the trial court's order denying plaintiff's motion for summary judgment against the individual defendant on the guaranty agreement. *Id.* Noting that 1) the document at issue was not titled "Personal Guaranty" but, rather, "Guaranty of Payment of Loan Agreement;"2) there was no language in the body of the document reflecting that the signor was personally guaranteeing the related loan agreement; 3) the guaranty agreement referred to an obligation incurred by "the undersigned" but did not identify the individual defendant or anyone else as "the undersigned;" and 4) the words "Corporate Officers" appeared at the bottom of the document, under which the individual defendant signed his name, suggesting that he was signing in his corporate capacity, the Third Department concluded that it was unclear whether the individual defendant was guaranteeing the loan agreement in an individual or representative capacity and, therefore, extrinsic evidence was necessary to determine the intent of the parties.

Id. at 1282-1283.

D. Tortious Interference

A party claiming tortious interference with contractual relations must establish the following elements: 1) the existence of a valid contract with a third party, 2) defendants' knowledge of the contract, 3) defendants' intentional procurement of the third party's breach of the contract without justification, 4) actual breach of the contract, and 5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996).

To make out a claim for tortious interference with business relationships, a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper. *Nassau Diagnostic Imaging and Radiation Oncology Associates, P.C. v. Winthrop-University Hosp.*, 197 A.D.2d 563, 563-564 (2d Dept. 1993), *lv. app. den.*, 83 N.Y.2d 756 (1994).

To state a cause of action to recover damages for tortious interference with prospective contractual relations, the plaintiff must allege that the defendant engaged in culpable conduct that interfered with a prospective contractual relationship between the plaintiff and a third party. *Adler v. 20/20 Companies*, 82 A.D.3d 915, 918 (2d Dept. 2011), citing *Smith v. Meridian Techs., Inc.*, 52 A.D.3d 685 (2d Dept. 2008). As a general rule, such culpable conduct must amount to a crime or an independent tort, and may include wrongful means, defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. Mere knowing persuasion would be insufficient. *Adler v. 20/20 Companies*, 82 A.D.3d at 918, quoting *Lyons v. Menoudakos & Menoudakos, P.C.*, 63 A.D.3d 801, 802 (2d Dept. 2009) (internal citations omitted). An agreement terminable at will is a prospective contractual relation, and may be tortiously interfered with through malicious or wrongful conduct. *Smith v. Meridian Technologies, Inc.*, 52 A.D.3d 685, 687 (2d Dept. 2008) citing, *inter alia*, NBT Bancorp. v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614, 624 (1996)..

E. Application of these Principles to the Instant Action

The Court denies the motion. The Court cannot conclude, at this juncture, as a matter of law, that JA, rather than Albert, was a party to the Agreement. There is evidence supporting Plaintiff's allegation that Albert was a party to the Agreement, including the fact that 1) the Agreement states that it is between Premier and the "Agent," who is specifically identified as Albert; 2) JA is listed as the Agent's Company, but not as a party to the Agreement; and 3) the signature block of the Agreement identifies the "Agent" as the party to the Agreement. Thus,

Plaintiff has asserted a viable breach of contract by alleging that he was a party to the Agreement and that Defendants breached that Agreement by failing to pay him monies to which he was entitled. The Court also concludes that the Complaint adequately alleges that Newtek was a successor-in-interest, and that the documentary evidence does not clearly refute that allegation. Evidence supporting Plaintiff's claim for successor liability includes the fact that the 2016 and 2017 letters annexed to Plaintiff's affidavit in opposition are written on Newtek stationery but contain assertions by/on behalf of Premier, and the fact that Fraley is identified in one letter as Senior Counsel to Newtek, and in another letter as Counsel to Premier. The Court also concludes that Plaintiff has asserted a legally sufficient tortious interference claim and, if the at-will nature of the Agreement is fatal to a tortious interference with contract claim, Plaintiff has a viable cause of action for tortious interference with prospective contractual relations, and has sufficiently allegedly culpable conduct by alleging that Newtek removed accounts from Albert's report, ceased the payment of residuals to which Albert was entitled, and attempted to close the Deal without Albert's knowledge.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on November 30, 2017 at 9:30 a.m.

ENTER

DATED: Mineola, NY
November 1, 2017

ENTERED
NOV 08 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. TIMOTHY S. DRISCOLL
J.S.C.