

Hellman v Village of Upper Nyack
2019 NY Slip Op 34250(U)
January 2, 2019
Supreme Court, Rockland County
Docket Number: Index No. 034121/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
HOWARD N. HELLMAN,

DECISION AND ORDER

Plaintiffs,

-against-

Index No. 034121/2018

THE VILLAGE OF UPPER NYACK,

(Motion #1)

Defendants.

-----X
Sherri L. Eisenpress, J.

The following papers, numbered 1 to 4, were considered in connection with the Defendant's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3211(A)(7), dismissing Plaintiff's Second and Third Causes of Action on the ground that he has failed to state a cause of action:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-C"	1-2
AFFIRMATION IN OPPOSITION	3
AFFIRMATION IN REPLY	4

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiffs filed a Summons and Complaint through the NYSCEF system on July 16, 2018. The Complaint alleges that on or about May 15, 2017, Plaintiff entered into a contract with James Cason for the purchase of the premises located at 626 North Broadway, Upper Nyack, New York ("property") for a purchase price of \$2,470,000.00 and a closing date of September 15, 2017. On July 20, 2017, Plaintiff appeared before the Village Board to discuss his development plans, during which meeting the Defendant Village did not indicate the plans were unacceptable. The closing did not occur on September 15, 2017.

On October 5, 2017, it is alleged that a special meeting was held by the Village's

Board of Trustees wherein there was a discussion regarding the purchase of the Property from Cason by the Village, and a Resolution was passed whereby "if James O. Cason can show proof that the Contract of Sale between [Cason] and [Hellman] for the purchase of [the Property] has been terminated" then the Defendant authorizes the Mayor "to negotiate the purchase of 626 North Broadway, Upper Nyack, New York on behalf of the Village of Upper Nyack." Additionally, the mayor was authorized to proceed to offer up to \$2.5 Million for the purchase.

On or about October 17, 2017, Plaintiff was notified by Cason's attorney that Cason wanted to cancel the deal and return Plaintiff's repayment. On October 18, 2017, Plaintiff met with the Village to further discuss development plans, when he was advised for the first time that nothing could be built until a comprehensive review of the plans was undertaken which would take one to two years. Plaintiff asserts he was unaware of the Resolution at this point in time. On October 19, 2017, Plaintiff sent a Time is of the Essence letter to Cason's attorney to close on the property on October 31, 2017. The closing did not take place and on or about November 2, 2017, Plaintiff brought an action against Cason seeking to enforce the terms of the Contract of Sale. On January 18, 2018, Plaintiff first learned of the written October 5, 2017 Resolution. On February 28, 2018, the action by Plaintiff against Cason was settled and a Stipulation of Discontinuance with Prejudice was filed.

On March 8, 2018, the Defendant published a Notice of Adoption of Resolution Subject to Permissive Referendum in the Rockland County Journal News of its intent to purchase the property for 2.5 million dollars. The notice indicated that the Village intended to purchase the property "for public use, including but not limited to a new Village Hall, park land, and open space." On April 16, 2018, the Village mailed a "Message to Upper Nyack residents" which stated that past Mayors had tried unsuccessfully to buy the property but that at the end of last year, the owner came to the Village stating that he wanted to sell the land to the Village. The letter further stated that the land "is being bought for municipal purposes, primarily as a park for Village residents." The park could include bike and walking paths, areas for picnics and

perhaps a community garden. Both the Journal News Notice and the Letter were attached to the Complaint in this action. On June 28, 2018, the property was sold to the Village for the total sum of \$2,500,000, more than the contract price with Plaintiff.

Defendant alleges three causes of action, to wit: "Tortious Interference with Contractual Relations", "Tortious Interference with Business Relations or Prospective Advantage" and "Prima facie Tort." Defendant brings the instant pre-answer motion dismiss the Second and Third Causes of Action pursuant to CPLR Sec. 3211(a)(7) for failure to state a cause of action. The Village argues that the tortious interference with business relations cause of action must be dismissed since there are insufficient allegations that the Village acted with the sole purpose of harming the Plaintiff using wrongful means. Defendant notes that simple economic persuasion does not qualify as wrongful means and that a purchase price of \$2.5 million, as opposed to that of Plaintiff's original contract with Cason of \$2.47 million, does not constitute extreme and unfair behavior so as to be construed as wrongful. Additionally, Defendant argues that the Village's message to Upper Nyack residents with respect to why it wanted to acquire the property demonstrates that it was also motivated by "legitimate self-interest municipal purposes." In opposition thereto, the Plaintiff alleges that the letter sent to the residents omitted the fact that the Village knew there was an existing Contract in place when Cason approached the Village. Plaintiff also contends that at no time during the July 2017 meeting, or at any time before October 2017, did the Village advise Plaintiff that his development plans were unsatisfactory. Plaintiff further argues that the cases cited by Defendant are distinguishable because Plaintiff and Defendant were not competitors.

With respect to the cause of action for prima facie tort, Defendant contends it must also be dismissed because Plaintiff does not allege facts from which it can be inferred that Defendant acted solely from "disinterested malevolence" or that the Village intentionally inflicted harm on the Plaintiff. Defendant further contends that Plaintiff failed to plead, with the requisite specificity, how it arrived at the figure of \$7 million in special damages. In opposition

to Defendant's motion, Plaintiff asserts that because the Village knew of the contractual relationship between Plaintiff and Cason, and they offered more money if he could show the contract was terminated, a prima facie tort has been established.

On a motion to dismiss for failure to state a cause of action [§ 3211(a)(7)], the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348, 465 N.Y.S.2d 502 (1983); Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98, 675 N.Y.S.2d 143 (3d Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821, 478 N.Y.S.2d 55 (2d Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable reading of same. Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 431 N.Y.S.2d 60 (2d Dept. 1980); Penato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900 (2d Dept. 1976).

Under New York Law, the required elements for a party to make out a claim for tortious interference with business opportunities and advantages are as follows: (i) a prospective business relationship with a third party; (ii) the defendant's interference with that relationship; (iii) undertaken with the sole purpose of harming the plaintiff or by wrongful means; (iv) causing injury to the plaintiff. Guard-Life Corporation v. S. Parker Hardware Manufacturing Corp., 50 N.Y.2d 183, 428 N.Y.S.2d 629 (1980); Carvel Corp. v. Noonan, 3 N.Y.3d 182, 785 N.Y.S.2d 359 (2014); NBT Bancorp. v. Fleet/Norstar Financial Group, Inc., 87 N.Y.2d 614, 641 N.Y.S.2d 582 (1996).

In such an action "the motive for the interference must be solely malicious, and the plaintiff has the burden of proving this fact." M.J. & K. Co., Inc. v. Matthew Bender and Co.,

Inc., 220 A.D.2d 488, 490, 631 N.Y.S.2d 938 (2d Dept. 1995). "Wrongful means," which one may not use in order to interfere with prospective business relationship, include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure, although they do not include persuasion alone even though knowingly directed at interference with contract. NBT Bankcorp., 87 N.Y.2d at 624. Wrongful "economic pressure" must rise to the level of "extreme and unfair." Carvel, 3 N.Y.3d at 193.

In the instant matter, Plaintiff fails to plead facts sufficient to support a cause of action premised upon tortious interference with business opportunities. By virtue of the Journal News notice and the letter sent to all Upper Nyack residents which were annexed to the Complaint, it cannot be said that Plaintiff was solely motivated by malice to inflict injury upon Plaintiff, where there are other municipal considerations such as the desire for public space. Additionally, it cannot be said that the purchase price offered for the property by the Village, which was \$30,000 more or a little over 1% of the purchase price, was so extreme or unfair as to be considered malicious. Accordingly, this cause of action must be dismissed.

The requisite elements of a cause of action sounding in prima facie tort are: (i) the intentional infliction of harm, (ii) which results in special damages, (iii) without any excuse or justification, (iv) by an act or series of acts which would otherwise be lawful. Smith v. Meridian Tech, Inc., 86 A.D.3d 557, 558-559, 927 N.Y.S.2d 141 (2d Dept. 2011). "There is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act, that is 'unless defendant acts from 'disinterested malevolence.'" Id. at 559. Thus, "[a] claim of prima facie tort does not lie where the defendant's action has any motive other than a desire to injure the plaintiff." Id. For the same reasons that the tortious interference with business opportunities was dismissed, so too must the cause of action for prima facie tort. Based upon the facts alleged by Plaintiff, he cannot show that the sole motive in acquiring the property was to injure Plaintiff, particularly given the Village's long standing desire to purchase the property to be used as public space. Thus, the prima facie tort cause of action is also

dismissed for failure to state a cause of action.

Accordingly, it is hereby

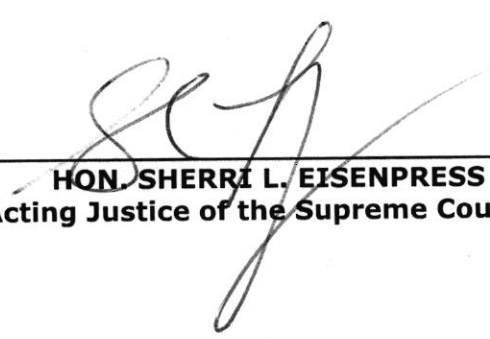
ORDERED that Defendant's Notice of Motion to dismiss Plaintiff's Second and Third Cause of Action is GRANTED; and it is further

ORDERED that Defendant is directed to file an Answer to the Complaint by January 13, 2019; and it is further

ORDERED that all parties are ordered to appear for a Preliminary Conference on **MONDAY, JANUARY 14, 2019** at 9:45 a.m.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
January 2, 2019



HON. SHERRIL EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties (via- NYSCEF)