

U.S. Bank N.A. v Kahn Prop. Owner, LLC
2020 NY Slip Op 30858(U)
February 11, 2020
Supreme Court, Suffolk County
Docket Number: 609493-16
Judge: Elizabeth Hazlitt Emerson
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SHORT FORM ORDER

INDEX
NO.: 609493-16

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 10-31-19
SUBMITTED: 12-5-19
MOTION NO.: 020-MG

x
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,
SUCCESSOR IN INTEREST TO BANK OF AMERICA,
NATIONAL ASSOCIATION, AS SUCCESSOR BY
MERGER TO LASALLE BANK FOR THE
REGISTERED HOLDERS OF J.P. MORGAN CHASE
COMMERCIAL MORTGAGE SECURITIES TRUST
2007-LDP12, COMMERCIAL MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2007-LDP12,
ACTING BY AND THROUGH ITS SPECIAL
SERVICER, LNR PARTNERS, LLC,

VENABLE LLP
Attorneys for Plaintiff and Third-Party Defendants
LNR Partners, LLC and Starwood Capital
Group, LLC
1270 Avenue of the Americas, 24th Floor
New York, New York 10020

Plaintiff,

LAW OFFICES OF JOSHUA L. DRATEL, P.C.
Attorneys for Defendants and Third-Party Plaintiffs
29 Broadway, Suite 1412
New York, New York 10006

-against-

KAHN PROPERTY OWNER, LLC; GARY MELIUS;
OHEKA CATERING I LLC; OHEKA MANAGEMENT
LLC; OHEKA CATERING, INC.; OHEKA
MANAGEMENT CORP.; PEOPLE OF THE STATE OF
NEW YORK; AND JOHN DOE #1-50, SAID JOHN DOE
DEFENDANTS BEING FICTITIOUS, IT BEING
INTENDED TO NAME ALL OTHER PARTIES WHO
MAY HAVE SOME INTEREST IN OR LIEN UPON THE
PREMISES SOUGHT TO BE FORECLOSED,

JUDGE LANG & KATERS, LLC
Attorneys for Defendants and Third-Party Plaintiffs
8112 W. Bluemound Avenue, Suite 101
Wauwatosa, WI 53213

Defendants.

x
KAHN PROPERTY OWNER, LLC; GARY MELIUS;
OHEKA CATERING 1 LLC; AND OHEKA
MANAGEMENT LLC,

Third Party Plaintiffs,

-against-

LNR PARTNERS, LLC; STAN GALE; GALE
INTERNATIONAL, LLC; AND STARWOOD CAPITAL
GROUP, LLC,

Third Party Defendants.

x
Upon the following papers read on this motion to reargue ; Notice of Motion and supporting papers 404-409 ; Notice of
Cross Motion and supporting papers____; Answering Affidavits and supporting papers 420-426 ; Replying Affidavits and supporting
papers____; it is,

Index No.: 609493-16

Page 2

ORDERED that this motion by the third-party plaintiffs for leave to reargue so much of an order of this court dated September 4, 2019, as granted the branches of the motion by the third-party defendants LNR Partners, LLC, and Starwood Capital Group, LLC, which were to dismiss the third-party causes of action for breach of the implied covenant of good faith and fair dealing, tortious interference with business relations, and tortious interference with contract insofar as asserted against them is granted; and it is further

ORDERED that, upon reargument, the court adheres to its prior determination.

Kahn Property Owners, LLC (“Kahn”) is the owner of real property located in Huntington, New York, known as “Oheka Castle.” Gary Melius is the principal of Kahn. The plaintiff (“U.S. Bank”) loaned Kahn approximately \$30 million and holds a mortgage on Oheka Castle as security for the debt (the “Kahn loan”). In order to pay off the loan, Gary Melius had a plan to build 200 condominiums on the land surrounding Oheka Castle, some of which was owned by Kahn and some of which was owned by the neighboring Cold Spring Country Club (“CSCC”). In 2014, Stan Gale approached Melius with a proposal that included a redesign of the CSCC golf course by Jack Nicklaus with Oheka Castle as the clubhouse (the “Nicklaus deal”) in addition to the condominium development.

The parties began serious negotiations in September 2015. On December 29, 2015, LNR Partners, LLC (“LNR”), the Kahn loan’s special servicer, notified Kahn that the loan was in default. On January 5, 2016, LNR notified Kahn that it had accelerated the maturity date of the loan. Melius advised Gale that the plaintiff had declared the Kahn loan in default and that LNR was threatening to foreclose. Gale told Melius that he knew the principals of Starwood Capital Group, LLC (“Starwood”), which purportedly owned LNR, and that he would have them intercede with LNR on Melius’s behalf. On February 5, 2016, Gale sent an e-mail to Melius reiterating his promise. Gale also included Melius on a telephone call with one of Starwood’s principals, who stated that everything would be taken care of regarding the Kahn loan and that there was nothing for Melius to be concerned about.

Between March 9 and 11, 2016, Gale and Melius negotiated the Nicklaus deal, the general terms of which were contained in an email dated March 23, 2016, that was signed by both Gale and Melius. The third-party plaintiffs allege that, after the email was signed, Stan Gale began to make demands to change the Nicklaus deal in ways that he knew would be unacceptable to Melius, such as insisting that Melius move out of his apartment in Oheka Castle. The third-party plaintiffs allege that Gale never intended to honor the Nicklaus deal and that his strategy was to delay the Nicklaus deal until LNR could commence a foreclosure action. The third-party plaintiffs allege that Gale, working with LNR and Starwood, sought to “seize” Oheka Castle at a discount and profit from the Nicklaus deal himself or simply obtain a valuable piece of real property at a substantial discount. Gale broke off negotiations with Melius shortly before this mortgage-foreclosure action was commenced on June 24, 2016.

Index No.: 609493-16

Page 3

The third-party plaintiffs seek reargument of the court's dismissal of their claims for breach of the implied covenant of good faith and fair dealing, tortious interference with business relations, and tortious interference with contract against LNR and Starwood. They contend that the court erroneously relied on its previous order dated March 25, 2019, which granted partial summary judgment to the plaintiff, as the law of the case. The third-party plaintiffs contend that, contrary to the court's determination, the March 25, 2019, order is not the law of the case.

The third-party plaintiffs' claim for breach of the implied covenant of good faith and fair dealing against LNR was dismissed for a few reasons, only one of which was the law of the case. First, LNR was not a party to the loan agreement between U.S. Bank and Kahn. Second, LNR was acting on behalf of a disclosed principal. An agent who acts on behalf of a disclosed principal will generally not be liable for a breach of contract (**Stonhard v Blue Ridge Farms, LLC**, 114 AD3d 757, 758). Third, U.S. Bank was exercising its express rights under the loan agreement. A claim for breach of the implied covenant of good faith and fair dealing is generally actionable only when wrongs independent of the express terms of the contract are asserted (**J. Kokolakis Contracting Corp. v Evolution Piping Corp.**, 46 Misc 3d 544, 547 [and cases cited therein]). In support of reargument, the third-party plaintiffs do not address any of these other reasons for dismissal. Accordingly, the court adheres to its prior determination dismissing the third-party claim for breach of the implied covenant of good faith and fair dealing against LNR.

The third-party plaintiffs allege that LNR and Starwood tortiously interfered with Kahn's contractual relationship with U.S. Bank by declaring the Kahn loan in default. It is well established that only a stranger to a contract may be liable for tortious interference with contract (**Ashby v ALM Media, LLC**, 110 AD3d 459). LNR, which is purportedly owned by Starwood, was not a stranger to the loan agreement between U.S. Bank and Kahn. As U.S. Bank's special servicer, LNR was acting on behalf of the bank and within the scope of its authority when it declared the loan to be in default on December 29, 2015, and accelerated the maturity date thereof (*see*, **Lutz v Caracappa**, 35 AD3d 673, 674). Moreover, the third-party plaintiffs do not specifically allege that U.S. Bank would not have declared the loan in default but for LNR's conduct (*see*, **White Knight of Flatbush, LLC v Deacons of the Dutch Congregation of Flatbush**, 159 AD3d 939, 940; **Pursuit Inv. LLC v Alpha Beta Capital Partners, L.P.**, 127 AD3d 580, 581). In fact, the record reflects that U.S. Bank's prior servicer, Wells Fargo Bank, had already declared the loan in default on November 3, 2015, before transferring it to LNR for servicing. Finally, the third-party plaintiffs' conclusory allegations that Gale, working with LNR and Starwood, induced the plaintiff to declare the Kahn loan in default and foreclose in order to take advantage of the Nicklaus deal are speculative and unsupported by relevant factual allegations (**Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC**, 82 AD3d 1035, 1036). Accordingly, the court adheres to its prior determination dismissing the third-party plaintiff's claim for tortious interference with contract against LNR and Starwood.

When there has been no breach of an existing contract, but only interference with prospective contract rights, the plaintiff must allege more culpable conduct on the part of the

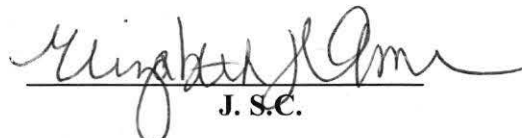
Index No.: 609493-16

Page 4

defendant (**NBT Bankcorp v Fleet/Norstar Fin. Group**, 87 NY2d 614, 621). Generally, the defendant's conduct must amount to a crime or an independent tort (**Carvel Corp v Noonan**, 3 NY3d 182, 190). If it does not, the plaintiff can still recover if the defendant engaged in conduct for the sole purpose of inflicting intentional harm on the plaintiff or if the defendant used wrongful means (**Id.** at 190-191). When the alleged interference is motivated, at least in part, by economic self interest, it cannot be characterized as solely malicious, and the plaintiff must demonstrate that the means employed by the defendant were wrongful (**Out of the Box Promotions v Koschitzki**, 55 AD3d 575, 577).

The third-party plaintiffs allege that LNR and Starwood tortiously interfered with Melius's business relationship with Gale, i.e., the Nicklaus deal. The third-party plaintiffs do not allege the LNR and Starwood committed any crimes, and all of the independent tort claims against them have been dismissed. The third-party plaintiffs do not dispute the court's determination that LNR and Starwood were motivated by economic self interest. Rather, they contend that the court erroneously relied on its previous order dated March 25, 2019, to determine that the means employed by LNR and Starwood was not wrongful. "Wrongful means" has been defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure (**Carvel Corp.**, *supra* at 191). Moreover, conduct constituting tortious interference with business relations is, by definition, not conduct directed at the plaintiff, but conduct directed at the third party with whom the plaintiff has or seeks to have a relationship (**Carvel Corp. v Noonan**, *supra* at). Gale was the party with whom Melius sought to have a business relationship. Thus, third-party plaintiffs must allege that LNR and/or Starwood directed some physical violence, fraud or misrepresentation, civil suits, criminal prosecutions, or economic pressure toward Gale. The third-party plaintiffs make no such allegations. Accordingly, the court adheres to its prior determination dismissing the third-party plaintiffs' claim for tortious interference with business relations against LNR and Starwood.

DATED: February 11, 2020



J. S.C.

HON. ELIZABETH HAZLITT EMERSON