| **Empire Gas Sta. Inc. v 115 Southside Dr. Owego Inc.** |
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| 2022 NY Slip Op 33250(U) |
| September 28, 2022 |
| Supreme Court, Tioga County |
| Docket Number: Index No. 2022-0006252 |
| Judge: Eugene D. Faughnan |
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At a Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 22nd day of July 2022, by Microsoft Teams argument.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF TIOGA

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EMPIRE GAS STATION INC.
d/b/a OWEGO MOBIL,
SALDRITA LLC and
DRITA RRACI,

Plaintiffs,

-vs.-

DECISION AND ORDER

Index No. 2022-00062529

115 SOUTHSIDE DRIVE OWEGO INC.
(a/k/a 105 Southside Rive Owego, LLC),
(a/k/a 115 Southside Drive Owego Inc.) and
BAHARUL ISLAM,

Defendants.

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APPEARANCES:

Counsel for Plaintiffs:

THE CROSSMORE LAW OFFICE
By: Marissa Johnson, Esq.
115 West Green Street
Ithaca, NY 14850

Counsel for Defendants:

COUGHLIN & GERHART LLP
By: Keith A. O'Hara, Esq.
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Binghamton, NY 13902

**EUGENE D. FAUGHNAN, J.S.C.**

This matter is before the Court to consider Defendants' motion to dismiss the Plaintiffs' Complaint pursuant to CPLR 3211 (a)(7). Counsel for the parties appeared for oral argument on July 22, 2022, conducted virtually by Microsoft Teams. After due deliberation, this Decision and Order constitutes the Court's determination with respect to the pending motion.

**BACKGROUND FACTS**

Plaintiffs and Defendants operate competing gas stations in Owego, NY. Drita Rraci is President of Empire Gas Station, Inc. d/b/a Owego Mobil and manages the day-to-day operations of the Owego Mobil gas station/convenience store. Baharul Islam is a member of Defendant business.

Plaintiff Empire Gas Station (d/b/a Owego Mobil) and Defendant, 115 Southside Drive, Inc., had a business partner in common, Mr. Salvatore Liga, Esq., who passed away in January 2022. Defendant Baharul Islam was involved in the formation and purchase of Plaintiff's gas station, and is also a director and officer of Empire Gas. The business relationship between these parties and entities is somewhat murky and opaque, but the facts giving rise to this action are a bit more straightforward.

Plaintiff Empire Gas Station has a contract with Mystic Oil Company which requires Plaintiff to purchase gasoline exclusively from ExxonMobil Gas ("Mobil") or pay a substantial penalty to purchase gasoline from an alternate supplier. Plaintiff contends that the relationship between Plaintiffs and Defendants deteriorated, and that Defendants contacted Mobil and "told the gasoline supplier about its ongoing soured relations with the [P]laintiffs." The Complaint further alleges that due to these conversations, Mobil began refusing to deliver gasoline to Plaintiffs' business, resulting in Plaintiff not being able to obtain or sell gasoline since then. The Complaint sets forth two causes of action- tortious interference with contract and "interference with contractual or business relations."

Defendants filed this motion to dismiss pursuant to CPLR 3211 (a)(7), contending that: 1) there is no allegation that a third party breached a contract between the third party and

Plaintiff, which is necessary in a tortious interference with contract claim, and 2) the Complaint fails to allege facts that would satisfy the requirements for a claim of intentional interference with business relations. In support, Defendants submitted an affidavit from Mr. Islam, an affirmation from Defendants' counsel, and a Memorandum of Law. Plaintiffs' attorney, Marissa A. Johnson, Esq., filed an affirmation in opposition to the motion with two Exhibits and Memorandum of Law. Defendants' counsel, Keith O'Hara filed an affirmation in reply.

**LEGAL DISCUSSION AND ANALYSIS**

Defendants seek dismissal pursuant to CPLR 3211 (a)(7)-failure to state a cause of action. "The grounds for dismissal under CPLR 3211 (a) (7) are ... strictly limited; the court is not allowed to render a determination upon a thorough review of the relevant facts adduced by both parties, but rather is substantially more constrained in its review, examining only the plaintiff's pleadings and affidavits." *Carr v. Wegmans Food Mkts., Inc.*, 182 AD3d 667, 668 (3rd Dept. 2020) *citing Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 (1976); *Sokol v. Leader*, 74 AD3d 1180, 1181 (2nd Dept. 2010). "Notwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss ...[and] '[d]ismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.'" *Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC* 155 AD3d 1218, 1219 (3rd Dept. 2017) [internal citations omitted] *quoting Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 (2017).

While the court is normally constrained to the facts as pleaded in the complaint, on a 3211 (a) (7) motion, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v Martinez*, 84 NY2d 83,88 (1994) [internal quotation marks and citations omitted]. Under this section, the court "must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true,

confer on the plaintiff(s) the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory." *Torok v. Moore's Flatwork & Founds., LLC*, 106 AD3d 1421, 1421 (3rd Dept. 2013) [internal quotation marks and citation omitted]; *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 141 AD3d 785, 788 (3rd Dept. 2016); *Lewis v. DiMaggio*, 115 AD3d 1042 (3rd Dept. 2014); *Lopes v. Bain,* 82 AD3d 1553 (3rd Dept. 2011); *see Tenney v. Hodgson Russ, LLP*, 97 AD3d 1089, 1090 (3rd Dept. 2012); *Leon v. Martinez,* 84 NY2d 83. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005); *see also AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582 (2005); *Jacobs v. Macy's East, Inc.*, 262 AD2d 607 (2nd Dept. 1999). The Court of Appeals has stated:

> Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (*see Foley v D'Agostino*, 21 AD2d 60, 64-65; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:24, p 31; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.36). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate (*see Rappaport v International Playtex Corp.*, 43 AD2d 393, 394-395; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.36; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:25, p 31).

*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977).

The Complaint's two causes of action are for tortious interference with contract and interference with business relations between Plaintiffs and a third-party gasoline supplier (Mobil). Plaintiffs do not specify how the second cause of action differs from the first cause of action. If the second cause of action is based on the Empire Gas/Mobil contract, then the second cause of action duplicates the first cause of action. If the second cause of action is based on some other prospective business opportunities, Plaintiffs have not identified those opportunities. Regardless, the Court will review both causes of action, and note the differences between them.

"While New York law recognizes the tort of interference with both prospective and existing contracts, greater protection is accorded an interest in an existing contract (as to which respect for individual contract rights outweighs the public benefit to be derived from unfettered competition) than to the less substantive, more speculative interest in a prospective relationship (as to which liability will be imposed only on proof of more culpable conduct on the part of the interferer).'" *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 NY3d 422, 425-426 (2007), *quoting Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 (1980); *accord Carvel Corp. v. Noonan*, 3 NY3d 182 (2004); *see NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 (1996); *106 N. Broadway, LLC v. Lawrence*, 189 AD3d 733 (2nd Dept. 2020). The elements for a claim of tortious interference with contract are "the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional and improper inducement of the third party to breach that contract, and (4) damages." *Schmidt & Schmidt, Inc. v. Town of Charlton*, 103 AD3d 1011, 1013 (3rd Dept. 2013) [internal brackets omitted], *quoting Rosario-Suarz v. Wormuth Bros. Foundry*, 233 AD2d 575, 577 (3rd Dept. 1996); *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 NY3d 422; *see, Bradbury v. Cope-Schwarz*, 20 AD3d 657, 659 (3rd Dept. 2005). Breach of contract is an essential element in a claim for tortious interference with contract and must be pleaded. *See, Barry's Auto Body of NY, LLC v. Allstate Fire & Cas. Ins. Co.*, 190 AD3d 807 (2nd Dept. 2021); *Empire State Bldg. Assocs. v. Trump*, 247 AD2d 214 (1st Dept. 1998); *J&L Am. Enters., Ltd. v. DSA Direct, LLC*, 10 Misc3d 1076(A) (Sup. Ct., New York County 2006).

Plaintiffs' Complaint simply states that Mobil stopped selling gas to Plaintiffs, but it does not allege that Mobil's actions constitute a breach of the Mobil/Empire Gas Station contract. There are several circumstances noted in the contract which would permit Mobil to stop selling gas to Plaintiffs, and not be a breach by Mobil. The contract enumerates a number of factors which are be deemed an "Event of Default" by Plaintiffs including things such as non-payment, failure to comply with applicable laws and regulations, assignment of the interests under the contract to another party, etc. If Mobil discontinued selling to Plaintiffs due to one of those conditions (i.e. Plaintiff's breach), then Mobil's actions would not be a breach of the contract. The claim for tortious interference with contract requires a

showing that a third party breached a contract with plaintiff. Manifestly, an allegation of the third party's breach is a *sine qua non* to a claim for tortious interference of contract. *See, NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 NY2d 614; *Empire State Bldg. Assocs. v. Trump*, 247 AD2d 214; *Fluhr v. Goldscheider*, 264 AD2d 570 (1st Dept. 1999); *Martian Entertainment, LLC v. Harris*, 12 Misc3d 1190(A) (Sup. Ct., New York County 2006). The Complaint alleges that: Defendants informed Mobil of the soured relations between Plaintiffs and Defendants in an attempt to convince Mobil to terminate its business relationship with Plaintiffs; the Defendants had no legitimate business reason for making the statements; that Mobil refused to deliver gasoline to Plaintiffs due to those statements; and, that the contractual relationship between Plaintiffs and Mobil would have continued without Defendants' interference. While a complaint that uses the terms "discontinue" and "terminate" the contract may be sufficient for an allegation of breach (*Ullmannglass v. Oneida, Ltd.*, 86 AD3d 827 [3rd Dept 2011]), the Complaint in this case cannot be read as alleging Mobil's breach. Plaintiffs failed to allege that Mobil breached the contract, and also failed to address any of the other conditions which could have been a valid reason for Mobil to discontinue gas delivery to Plaintiffs.

Further, even though the Court can consider affidavits in opposition to a motion to dismiss, the affidavits still have to be from a person with knowledge-not just an attorney affirmation. Here, Plaintiffs' opposition to the motion consists only of an affirmation from an attorney. While an attorney affirmation may serve as a vehicle for the submission of admissible documents and evidence, an affirmation which is not based on first-hand knowledge is not a substitute for an allegation to support the elements of a cause of action. Here, the affirmation included submission of two Shareholder agreements, but those agreements do not have bearing on an *allegation* of breach. Regardless of what the Shareholder agreements say, there must be an allegation a third party's breach of contract with Plaintiff, made by someone with first-hand knowledge. As the Court already observed above, the Complaint does not adequately allege Mobil's breach, and the opposition affirmation does not remedy that defect. Even though Defendants were aware of a contract between Mobil and Plaintiffs, it still does not necessarily mean that Mobil's discontinuance of gasoline sales to Plaintiffs constitutes a breach. Therefore, the Court concludes that the cause

of action for tortious interference with contract must be dismissed. *See, e.g. Empire State Bldg. Assocs. v. Trump*, 247 AD2d 214; *Fluhr v. Goldscheider*, 264 AD2d 570; *cf. Ullmannglass v. Oneida, Ltd.*, 86 AD3d 827 (language of the complaint sufficiently alleged that the contract was breached).

Plaintiffs' second cause of action is for tortious interference with business relations. To establish a claim for tortious interference with business relations, "'a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party.'" *Jackie's Enters., Inc. v. Belleville*, 165 AD3d 1567, 1571 (3rd Dept. 2018), *quoting Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept. 2009); *see Carvel Corp. v. Noonan*, 3 NY3d 182; *NBT Bancorp Inc. v. Fleet/Norstar Financial Group*, 87 NY2d 614. To state a cause of action under this theory, Plaintiffs must establish either that the Defendants acted with malice or used wrongful means for the sole purpose of inflicting harm. *Carvel Corp. v. Noonan, supra; NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., supra.*; *Ullmannglass v. Oneida, Ltd.*, 86 AD3d 827 The type of "wrongful means" contemplated for this cause of action are those that "amount to a crime or an independent tort" (*Carvel Corp. v. Noonan*, 3 NY3d 182; *Ullmann Glass v Oneida Ltd.*, 86 AD3d 827) or that represent "physical violence, fraud or misrepresentation, civil suits and criminal prosecution, and some degrees of economic pressure." *Guard-Life Corp. v. Parker Hardware Mfg.*, 50 NY2d at 191. The only conduct alleged by Plaintiffs is that Defendants told Mobil about the soured relations with Plaintiffs. That allegation is not nearly sufficient to meet the threshold for "wrongful means".

Since Plaintiffs have not set forth facts for "wrongful means", they cannot recover unless they show that Defendants' conduct was motivated solely by malice. The burden is on the Plaintiffs to show that Defendants' conduct was solely motivated by malice. *See, John R. Loftus, Inc. v. White*, 150 AD2d 857 (3rd Dept. 1989). Plaintiffs' Complaint does not even allege malice, or contain any information from which Defendants' conduct could be deemed malicious. The only allegation is that Defendants engaged in conversations with Plaintiffs'

gasoline supplier about the poor relations with Plaintiffs in an effort to undermine Plaintiffs' business relationship with Mobil. Even if Defendants did make those statements and could have foreseen the refusal by Mobil to continue delivering gas to the Plaintiffs, such conduct does not rise to the level of culpability required under this cause of action. Nor does it in any way suggest that Defendants' conduct was motivated solely by malice. There might be other reasons, not borne of malice, that could explain the comments, but the Complaint does not even give any indication of the nature of the comments. Some degree of background or context, and details regarding the comments would be necessary to ascertain Defendants' motivation in making the statements. Without that, any characterization of the comments would be speculation. The Complaint does not allege who was involved in the conversations, what was said, when it was said, and whether the person to whom it was said had any power or authority to make any determination to discontinue the contract with Plaintiffs. If the person to whom it was said was a truck driver delivering fuel, it would likely not be anticipated to result in an interference with Plaintiffs' business relations. If the comments were limited to matter-of-fact descriptions of a soured relationship, that also would not be suggestive of any malice. The Complaint only contains conclusory allegations that are insufficient to avoid dismissal of this cause of action. *Id.*; *see also Ullmannglass v. Oneida, Ltd.*, 86 AD3d 827.

**CONCLUSION**

Based on the foregoing discussion, it is hereby

ORDERED, that Defendants' motion to dismiss the Complaint is GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: September 28, 2022
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice