SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CREWFACILITIES.COM, LLC,

Plaintiff,

- v -

THE CITY OF NEW YORK and sTHE NEW YORK CITY OFFICE OF EMERGENCY MANAGEMENT

Defendant.

INDEX NO. 650506/2022

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In motion sequence number 001, defendants the City of New York (City) and the New York City Office of Emergency Management (NYCEM) move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint wherein plaintiff Crewfacilities.com (Crew) asserts two claims: (1) tortious interference with contract and (2) tortious interference with business relations. (NYSCEF Doc. No. [NYSCEF] 6, Complaint at 71-86.)

Background

Crew is a "logistics and travel management company" providing services such as "booking temporary housing accommodations." (*Id.* ¶9.) In response to the Covid-19 pandemic, the City provided temporary housing to certain individuals in an effort to curb the spread of the virus (Program). (*Id.* ¶¶10, 12.) On April 2, 2020, Crew and NYCEM entered into a services agreement whereby Crew agreed to provide hotel management

services for the Program (Government Contract). (*Id.* ¶12; *see also* NYSCEF 7, Government Contract.) The Government Contract's term initially ran from March 21, 2020 (retroactively) through May 1, 2020, and was extended, upon NYCEM's request, through July 31, 2020. (*Id.* ¶¶12, 16; *see also* NYSCEF 8, Modification and Extension to Government Contract.) The Government Contract explicitly permitted nonparty HotelEngine to serve as a subcontractor to assist Crew with certain responsibilities; thus, NYCEM was aware that HotelEngine would operate as a subcontractor for Crew. (*Id.* ¶¶13, 21.)

On April 1, 2020, Crew and HotelEngine entered into a Confidential Services Agreement (Subcontract). (*Id.* ¶¶14-15; *see also* NYSCEF 9, Subcontract.) Pursuant to the Subcontract, HotelEngine agreed to source participating hotels, make and track bookings, manage invoices for bookings, and remit payment to the participating hotels. (*Id.* ¶18.) HotelEngine also collected and reconciled invoices issued by the hotels participating in the Program to ensure that the rates charged were accurate and consistent with rates NYCEM permitted and the amounts the hotels were paid. (*Id.* ¶19.) In July 2020, HotelEngine advised Crew and NYCEM that it believed there were billing irregularities resulting in overpayment to the participating hotels. (*Id.* ¶22.)

On July 1, 2020, Crew received NYCEM's payment for the period June 8-14 (July Payment). (*Id.* ¶ 23.) Upon receiving the July Payment, Crew, awaiting HotelEngine's vendor reconciliation for the period of April 10, 2020 to June 15, 2020, withheld the July Payment. (*Id.* ¶¶ 24-25.) On July 11, 2020, HotelEngine's vendor reconciliation confirmed the hotels' overbilling, and in turn, overbilling by HotelEngine. (*Id.* ¶ 26.) On that same day, HotelEngine agreed to withhold the hotel portion of the July Payment,

and thereafter, requested the portion of the July Payment attributable to HotelEngine's fee, which Crew remitted to HotelEngine. (*Id.* ¶30.)

Crew alleges that, around this time, NYCEM and HotelEngine took steps to exclude and circumvent Crew, including conducting secret meetings where NYCEM and HotelEngine came to an understanding as to the reconciliation process and "NYCEM laid the groundwork for the pretextual termination of the Government Contract." (*Id.* ¶¶31-33.)

On July 16, 2020, HotelEngine demanded that Crew wire the Vendor portion of the July Payment immediately, despite the parties' earlier agreement. (*Id.* ¶34.) Crew alleges that NYCEM induced HotelEngine to demand payment. (*Id.* ¶35.) HotelEngine and NYCEM met on July 17, 2020, to discuss a drafted letter to Crew's counsel claiming HotelEngine could not perform without the July Payment. (*Id.* ¶¶36-38.) On July 19, 2020, HotelEngine and NYCEM participated in a call with the City's Law Department to discuss their plans to circumvent Crew. (*Id.* ¶42.) On that same day, HotelEngine blocked Crew from its software portal at NYCEM's encouragement. (*Id.* ¶¶43-44.)

On July 20, 2020, NYCEM issued Crew a Notice to Cure & Opportunity to Be Heard (Notice to Cure), asserting that Crew breached the Government Contract by withholding the hotels' portion of the July Payment. (*Id.* ¶46.) The Notice of Cure did not refer to any Government Contract provision allegedly breached; instead, it cited to the Subcontract, claiming that withholding the hotels' funds would jeopardize the Program. (*Id.* ¶¶47-48.) Despite Crew's efforts to diligently perform under the Government Contract, NYCEM issued a Notice of Termination based on Crew's alleged default by withholding the July Payment and failing "to have a mechanism in place to

carry out the work that HotelEngine did after HotelEngine stopped providing services to Crew pursuant to the Subcontract on July 17, 2020." (*Id.* ¶¶49-52.)

HotelEngine continued to perform directly for NYCEM. (*Id.* ¶55.) On August 6, 2020, NYCEM and HotelEngine entered into an Emergency Buy-Against Agreement (Direct Contract). (*Id.* ¶58.) In the Direct Contract, HotelEngine assumed the remaining obligations under the Government Contract. (*Id.* ¶59.) The Direct Contract resulted in a large savings for NYCEM. (*Id.* ¶61.) In the summer of 2020, NYCEM and HotelEngine contracted for "Wave 2" of the Program, which was a renewal of the Program in anticipation of a second wave of the Covid-19 pandemic. (*Id.* ¶¶62-63.)

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994].) "Bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v. Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2022] [citation omitted].) "A cause of action must be dismissed under CPLR 3211(a)(1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a

defense as a matter of law." (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) "The documents submitted must be explicit and unambiguous." (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be "'essentially undeniable.'" (*VXI Lux Holdco S.A.R.L v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to "'support the ground on which the motion is based.'" (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

First Cause of Action: Tortious Interference with Contract

To state a claim for tortious interference with contract, plaintiff must allege "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [citations omitted].)

Defendants assert that this claim must be dismissed because NYCEM is not a stranger to the Subcontract as the express terms of the Subcontract establish that NYCEM is a third-party beneficiary of the Subcontract. Defendants direct the court to the following language in the Subcontract: (1) "[t]he Parties agree to jointly service the Government Contract pursuant to the terms of this Agreement" (NYSCEF 9, Subcontract, Recitals); the parties have the joint responsibility "[t]o work together in good faith to ensure that the Government Contract is properly serviced" (*id.* §4); and

"[s]pecifically, the Parties shall ensure that the terms contained in the Agreed Material Terms Between NYC Emergency Management and CrewFacilities.com, LLC attached hereto as Exhibit A are adhered to." (*Id.*) Defendants also assert that the indemnity clause in the Modification and Extension to Government Contract, whereby the City agreed to indemnify "Crew and its approved subcontractor, HotelEngine," further evidences NYCEM's third-party beneficiary status. (NYSCEF 8, Modification and Extension to Government Contract § D.)

"[O]nly a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." (*Ashby v ALM Media, LLC*, 110 AD3d 459, 459 [1st Dept 2013] [internal quotation marks and citations omitted].) "[A]n intention of the parties to a contract to benefit a third party, thereby conferring on the third party the right to enforce the contract, will be found (apart from situations where the third party is the only party that could recover for the breach) only when it is . . . clear from the language of the contract that there was an intent to permit enforcement by the third party. Thus, it is well established that a third party cannot be deemed an intended beneficiary of a contract unless the parties' intent to benefit the third party . . . [is] apparent from the face of the contract." (*Commr. of the Dept. of Social Servs. of the City of NY v NY-Presbyt. Hosp.*, 164 AD3d 93, 98 [1st Dept 2018] [internal quotation marks and citations omitted].)

Here, the Subcontract does not conclusively evidence that defendants are third-party beneficiaries. Defendants do not point to any language in the Subcontract that authorizes them to enforce any obligations thereunder. Further, as to the indemnification provision in the Modification to the Government Contract, putting aside

that this clause is not part of the Subcontract, it also does "not reflect a clear intention to confer upon [defendants] a right to enforce the terms of the subcontract." (*KTG Hospitality, LLC v Cobra Kitchen Ventilation, Inc.*, 201 AD3d 710, 712 [2d Dept 2022] [citation omitted] [holding an indemnity clause contained in a subcontract did reflect an intention to confer a right on a third-party to enforce that subcontract].) Thus, defendants' motion to dismiss this claim is denied.

Second Cause of Action: Tortious Interference with Business Relations

To state a claim for tortious interference with business relations, a plaintiff must allege "(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." (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009] [citations omitted].) "To support such a claim, it must be alleged that defendant's conduct was motivated solely by malice or to inflict injury by unlawful means going beyond mere self-interest or other economic considerations. Further, any conduct constituting 'wrongful means' must be directed at the third parties with whom plaintiff sought to have the relationship." (*Bradbury v Israel*, 204 AD3d 563, 564-565 [1st Dept 2022] [citations omitted].)

Crew fails to allege that defendants acted solely with malice with the purpose of harming Crew or that defendants conduct amounted to crime or independent tort. Crew's allegation that "NYCEM acted intentionally, using dishonest, unfair and improper means, to interfere with Crew's otherwise positive and fruitful relationship with

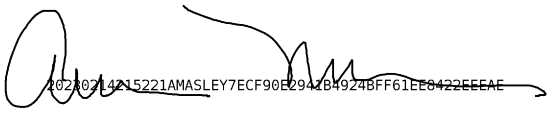
HotelEngine" is insufficient to support this claim. (NYSCEF 6, Complaint ¶ 82.) This claim is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted, in part, and the second cause of action of the complaint is dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit a jointly proposed Part 48 Preliminary Conference Order within 30 days after service of a copy of this order with notice of entry. If the parties cannot agree, they may submit competing proposed PC Orders.



2/14/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE