SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

PELICAN BAY ON THE WATER, LTD.,

Plaintiff,

INDEX No. 005132/08

MOTION DATE: Jan. 14, 2009
Motion Sequence #001, 003

-against-

GIACOMO BIONDO a/k/a JACK BIONDO, individually and as successor in interest to MICHAEL BIONDO d/b/a PLAZA REALTY, MERRICK PLAZA REALTY LLC as successor in interest to PLAZA REALTY, BRUCE J. LEUZZI and LEUZZI & LEUZZI, LLP,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Opposition..... XX
Reply Affirmation XX
Memorandum of Law.....XXX

This motion, by defendants Giacomo Biondo, Michael Biondo, Plaza Realty, Merrick Plaza Realty LLC (hereinafter "Biondo defendants"), for an order pursuant to CPLR §3211 (a)(7) dismissing plaintiff's complaint in its entirety, and for such other and further relief as may be deemed just, proper and equitable; motion (improperly named cross-motion), by

Bruce J. Leuzzi and Leuzzi & Leuzzi, LLP (hereinafter Leuzzi defendants), for an order pursuant to CPLR §3211 (a)(7) dismissing plaintiff's complaint in its entirety, and for such other and further relief as may be deemed just, proper and equitable, are **both** determined as hereinafter set forth.

The defendant Merrick Plaza LLC is the owner and landlord, which leased the premises to Umberto's of Merrick in September 1999 for 15 years; and Umberto's sublet the premises to the plaintiff. In March 2007 the plaintiff contracted to sell its business, and part of that contract required the consent of Merrick Plaza LLC to modify the extant lease, i.e., granting the contract vendee the exclusive right to operate the restaurant, a 5 year extension and that the contract-vendee obtain a liquor license. The landlord then required $400,000 to agree to the modifications to the lease for the contract-vendees, and the plaintiff would not agree, and the contract was cancelled.

The Biondo defendants assert that plaintiff refused to negotiate the $400,000 payment and permitted the contract to be cancelled and initiated this action to recover damages. Counsel for the movants asserts that no cause of action exists in New York law for extortion. With respect to the plaintiff's attempt to assert a cause of action for tortious interference with contractual relations, counsel argues that no specific act is alleged in the complaint that the defendants' conduct was designed to or did breach a contract. He also argues that no breach is alleged, only that the contract was cancelled. The second cause of action, the attorney for the movants contends, purports to allege a cause of action for punitive damages which is not recognized in New York.

The attorney for the Leuzzi defendants, in the other motion, points out that there is no first cause of action, only a second cause of action, and argues that, in any event, there is no civil cause of action for extortion. He further argues that even were the court to determine that the allegations do elucidate a cause of action for tortious interference with contractual relations, the plaintiff does not allege any conduct by the Leuzzi defendants that induced or attempted to induce a breach of that contract to sell the plaintiff's restaurant. He contends that the complaint does not allege that these defendants, the attorney(s) for the co-defendants Biondo and Merrick Plaza, had any contact with the plaintiff or the contract-vendee or that they did anything to interfere with the contract between the plaintiff and the contract-vendee, or that the contract itself was breached, only that it was cancelled.

The plaintiff's attorney asserts that, for approximately three months, the plaintiff had sought the landlord's consent to the assignment and modifications to the lease; and upon the

finally-agreed-to conference on June 8, 2007 with the plaintiff, the contract-vendee and the defendant Leuzzi and the defendant Biondo, the latter two defendants were informed that the contract would not close without the landlord's consent. At that conference, these defendants demanded a non-negotiable $400,000 payment in exchange for consent, and upon that demand the plaintiff and the contract-vendee terminated the contract. Counsel argues that the first cause of action seeks damages for tortious interference with contract, not for extortion. He further argues that the complaint fully and properly states all the elements of tortious interference with contract, and that the use of the term "extortionate" properly describes the unreasonable and unjustified refusal of the defendants to consent to the lease modifications. He argues that a breach need not be alleged, only that the contract be terminated by the interference with the contractual process. He contends that the defendants' demand was not an attempt to negotiate but a "take-it-or-leave-it" demand. He further asserts that an amendment of the complaint is conceded.

With respect to the cross-motion, the plaintiff's attorney repeats the arguments previously recited. He avers that Mr. Leuzzi was an integral part of the decision-making process to formulate the demand for the $400,000 payment. He argues that the Leuzzi's assertion that Leuzzi never had any contact with the contract-vendee is patently false and such clear allegations are present in the complaint.

Counsel for the Biondo defendants asserts that it is significant to note that the plaintiff was seeking a modification of the lease with the plaintiff's sub-landlord and that the plaintiff is a sub-tenant of Umberto's, the landlord's tenant. He argues that, because of the plaintiff's lack of privity with the defendant landlord, the lease could not be modified without the consent of the tenant Umberto's and no claim of tortious interference can be made as against these defendants. He further argues that case law holds that a subtenant has no cause of action against a landlord for unreasonable refusal to consent to a further sublease and that the proposed 5 year extension to the lease would have increased the potential liability to Umberto's, the prime tenant, and that this set of facts requires dismissal. He contends that, without the express consent of Umberto's, the plaintiff could not have a viable contract with the prospective purchaser. He further contends that the contingent nature of the contract could not bear the fruit of a viable contract until and unless there was consent of Umberto's and the defendant landlord, and without a viable contract, there can be no tortious interference. Counsel avers that a breach of a contract must occur as a necessary component to a viable cause of action in tortious interference with contract. He further avers that the landlord's refusal to consent to the modification of the lease without remuneration does not give rise to a claim for intentional interference with contract, and disputes the applicability

of the case law cited by plaintiff's attorney.

The attorney for the Leuzzi defendants joins in the legal and factual bases and arguments set forth by the Biondo defendants. Counsel disputes the applicability of the plaintiff's case law arguments and repeats his assertions previously made; and that an attorney could only convey that which is his client's position and demand. Counsel seeks to convert this motion to dismiss to one for summary judgment.

DECISION

"Upon a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleadings must be liberally construed (see CPLR 3026). "The question presented for review is not whether [the plaintiff] should ultimately prevail in this litigation, but rather, more narrowly, whether [its complaint] state[s] cognizable causes of action" (**Becker v Schwartz**, 46 NY2d 401, 408; cf. **Sotomayor v Kaufman, Malchman, Kirby & Squire**, 252 AD2d 554). For the purposes of review, the court must assume the allegations in the complaint to be true, "accord plaintiff[] 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; see **Rovello v Orofino Realty Co.**, 40 NY2d 633, 634)".

(**Natural Organics Inc. v Smith**, 38 AD3d 628, 832 NYS2d 76, 2nd Dept., 2007).

A concomitant determination, therefore, is whether the causes of action set forth in the complaint are recognized in New York. Initially, an examination reveals that, while the complaint makes general allegations that set forth the "factual" background, there is no formal assertion of a "first cause of action"; however, that language elucidates "extortionate" conduct so as to make a contract impossible. A liberal reading of that language appears to purport a cause of action sounding in tortious interference with contract, and it is in that context that this Court will address its viability.

> "In order to succeed on such a cause of action, the plaintiff must establish: (1) the existence of a valid contract between it and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of the third party's breach of that contract without justification; and (4) damages (see **Lama Holding Co. v Smith Barney**, 88 NY2d 413, 424; **Foster v Churchill**, 87 NY2d 744, 749-750)".

(**R.U.M.C. Realty Corp. v JCF Associates, LLC**, 51 AD3d 993, 859 NYS2d 465, 2nd Dept., 2008).

In the case at bar, the plaintiff specifically alleges that the contract-vendee would cancel the contract if the Biondo defendants did not consent; in essence, it was a contingency contract which never was consummated. Therefore, no final contract existed and such cause of action is not enunciated in the complaint.

Alternatively, were this cause of action to be termed as tortious interference with business relations, it

> "'applied to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant' (**WFB Telecommunications v NYNEX Corp.**, 188 AD2d 257; see, **Guard-Life Corp. v Parker Hardare Mfg. Corp.**, **supra**, at 196; **Datlow v Paleta Intl. Corp.**, 199 AD2d 362, 363). "In such an action '[t]he motive for the interference must be solely malicious, and the plaintiff has the burden of proving this fact" (72 NY Jur 2d, Interference, §44, at 240)" (**John R. Loftus, Inc. v White**, 150 AD2d 857, 860)".

(**M.J. & K. Co., Inc. v Matthew Bender & Company, Inc.**, 220 AD2d 488, 490, 631 NYS2d 938, 2nd Dept., 1995). Herein, the allegations do not limit the defendants' motivation to an intention to commit an unlawful act without an excuse, and the applicable case law requires that malice be the sole motivation.

As to the second cause of action, wherein the plaintiff alleges attempted extortion, the complaint fails to enunciate a tort cognizable under New York law (see, **Nigro v Pickett**, 39 AD3d 720, 833 NYS2d 655, 2nd Dept., 2007; **Niagara Mohawk Power Corp. v Testone**, 272 AD2d 910, 708 NYS2d 527, 4th Dept., 2000).

Accordingly, the motions to dismiss are both **granted**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated MAR 2 0 2009

ENTERED
MAR 23 2009 XXX
NASSAU COUNTY
COUNTY CLERK'S OFFICE

J.S.C.