32 Misc.3d 1234(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Supreme Court, New York County, New York.

2626 BWAY LLC, Plaintiff,
v.
BROADWAY METRO ASSOCIATES, LP, Albert Bialek, Howard W. Segal, P.C ., and Howard W. Segal, Esq., Defendants.

No. 105586/2010.
|
Aug. 11, 2011.

Attorneys and Law Firms

D. Paul Martin of Claude Castro & Associates PLLC, for Plaintiff BWAY LLC.

Alice K. Jump of Reavis Parent Lehrer LLP and Howard W. Segal of Howard W. Segal, P.C., for Defendants.

Opinion

EILEEN BRANSTEN, J.

***1** Defendants Broadway Metro Associates, LP and Albert Bialek move to dismiss plaintiff 2626 BWAY LLC's claims against them. For the reasons set forth below, the defendants' motion is granted.

PROCEDURAL HISTORY

On April 27, 2010, plaintiff 2626 BWAY LLC ("Plaintiff") filed a verified complaint against defendants Broadway Metro Associates, LP ("Broadway Metro"), Albert Bialek ("Bialek"), Howard W. Segal, P.C. ("HWS P.C.") and Howard W. Segal, Esq. ("Segal"). On February 17, 2011, Plaintiff and defendants HWS P.C. and Segal signed a stipulation of discontinuance without prejudice. Thereafter, Plaintiff continued the matter only against defendants Broadway Metro and Bialek (together, "Defendants").

Plaintiff alleges six causes of action: 1) breach of contract against Broadway Metro; 2) breach of contract against Bialek; 3) breach of the covenant of good faith and fair dealing against both Defendants; 4) tortious interference with business relations against both Defendants; 5) tortious interference with contract against both Defendants; and 6) tortious interference with prospective economic advantage against both Defendants. Complaint, ¶¶ 15–65.

On February 16, 2011, Defendants moved to dismiss the complaint pursuant to CPLR 3211. Defendants filed a memorandum of law in support ("Defendants' Memo") and an affirmation in support by **Alice K. Jump** ("Defendants' Affirm"). On March 9, 2011, Plaintiff opposed, and filed a memorandum of law in opposition ("Plaintiff's Opp.") and an affidavit in opposition by John Souto ("Plaintiff's Opp. Aff."). On March 10, 2011, Defendants filed a memorandum of law in reply ("Defendants' Reply").

Oral argument was held on March 15, 2011, and the matter was fully submitted on March 22, 2011.

FACTUAL BACKGROUND

Plaintiff is a New York limited liability company with its principal place of business in New York, New York. Complaint, ¶ 1.

Broadway Metro is a New York limited partnership with its principal place of business in New York, New York. *Id.,* ¶ 2. Bialek is the president of Seavest Management Corp. ("Seavest"). *Id.,* ¶ 4. Seavest is the general partner of Broadway Metro. *Id.,* ¶ 4. Broadway Metro owns a property at 2624–2626 Broadway, New York, New York (the "property"). *Id.,* ¶ 3.

In 2006, Plaintiff sought to lease Broadway Metro's property for commercial retail use. Complaint, ¶ 7. During their negotiations, Plaintiff told Bialek that Plaintiff intended to sublet the property to a major retailer. *Id.,* ¶¶ 8–9. On September 1, 2006, Plaintiff signed a lease ("Plaintiff's lease") with Broadway Metro for the property. *Id.,* ¶ 14. Plaintiff had difficulty finding a sub-tenant. *Id.,* ¶ 20. On December 23, 2008, Urban Outfitters, Inc. ("Urban Outfitters") agreed to sublet the property from Plaintiff, pursuant to a proposed sublease

agreement between Plaintiff and Urban Outfitters (the "sublease"). Complaint, ¶¶ 22–24; Defendants' Affirm., Ex. A., Sublease, p. 1.

***2** On May 28, 2009, Plaintiff submitted a written request to Broadway Metro for consent to sublet the property to Urban Outfitters. Complaint., ¶ 27; Plaintiff's Opp. Aff., Ex. E. On June 5, 2009, Broadway Metro rejected Plaintiff's request. Complaint, ¶¶ 28–29; Plaintiff's Opp. Aff., Ex. H. Plaintiff alleges that Broadway Metro did so on the grounds that Plaintiff and Urban Outfitters executed the sublease before Broadway Metro gave written consent, an action that violated Plaintiff's lease. Complaint, ¶¶ 28–29; Plaintiff's Opp. Aff., Ex. H. Broadway Metro sent a copy of the letter rejecting permission for the sublease to Urban Outfitters. Complaint, ¶¶ 28–38.

Plaintiff contends that the sublease did not violate Plaintiff's lease. *Id.,* ¶¶ 30–31. Plaintiff argues that Broadway Metro and its principal, Bialek, unreasonably withheld consent for the sublease in order to secure Urban Outfitters for Defendants' own account. *Id.,* ¶ 38.

STANDARD OF LAW

Motion to Dismiss under CPLR 3211

CPLR 3211(a)(7) states that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action."

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.... We accept the facts as alleged in the complaint as true, accord 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 N.Y.2d 83, 87–88 (1994); *see also Yan Ping Xu v. New York City Dep't of Health,* 77 AD3d 40, 43 (1st Dep't 2010). "It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency, and that when the moving party offers matter extrinsic to the pleadings, the court need not assume the truthfulness of the pleaded allegations, but rather is required to determine whether the opposing party actually has a cause of action or defense, not whether he has properly stated one." *O'Donnell, Fox & Gartner, P.C. v. R–2000 Corp,* 198 A.D.2d 154, 154 (1st Dep't 1993) (internal citations and quotations omitted); *see also JFK Holding Co., LLC v. City of New York,* 68 AD3d 477, 477 (1st Dep't 2009).

ANALYSIS

1. *Plaintiff's Causes of Action as Against Defendant Bialek*

Defendants' motion to dismiss Plaintiff's second, third, fourth, fifth and sixth causes of action as against Bialek is granted.

Defendants argue that Plaintiff's causes of action against Bialek are bare legal conclusions that should be dismissed for failure to state a claim. Defendants' Memo, pp. 14–15. Plaintiff, in opposition, contends that its allegations against Bialek are pled properly, and Bialek is personally responsible for the torts allegedly committed by Broadway Metro against Plaintiff. Plaintiff's Opp., pp. 32–33. Plaintiff alleges that Bialek was the principal of Broadway Metro, "exercised complete domination and control over Broadway Metro, and directed all of the actions set forth in" the Complaint. Complaint, ¶ 43.

***3** In seeking to hold Bialek responsible for Broadway Metro's actions, Plaintiff asks to pierce the veil of Broadway Metro in order to bring the second, third, fourth, fifth and sixth causes of action against him. Plaintiff's Opp., pp. 32–33. The doctrine of piercing the corporate veil applies to limited liability companies as well as to corporations. *Retropolis, Inc. v. 14th St. Development,* 17 AD3d 209, 210 (1st Dep't 2005). To pierce a corporate veil, a plaintiff must allege: 1) that the owners exercised complete domination of the corporation in respect to the transaction attacked; 2) that the owners used such domination to commit a fraud, wrong or unjust act against the plaintiff; and 3) damages. *Morris v. State Dep't of Taxation & Finance,* 82 N.Y.2d 135, 141–142 (1993); *Stewart Title Insurance v. Liberty Title Agency,* 83 AD3d 532, 533 (1st Dep't 2011) (citing *Morris v. State Dep't of Taxation & Finance,* 82 N.Y.2d at 141). Conclusory allegations that a corporation's owners completely dominated the corporation will not support a claim for piercing the corporate veil. *Andejo Corp. v. South*

St. Seaport Ltd. Partnership, 40 AD3d 407, 407 (1st Dep't 2007).

Plaintiff argues that Bialek exercised complete domination and control over Broadway Metro, and therefore caused all of Broadway Metro's actions that injured Plaintiff. Complaint, ¶ 43. However, Plaintiff fails to allege how or in what manner Bialek exercised such domination or control. Plaintiff's conclusory language, without more, is insufficient to pierce the corporate veil. *Andejo Corp. v. South St. Seaport Ltd. Partnership,* 40 AD3d at 407 (affirming dismissal of a claim for piercing the corporate veil when plaintiff made only conclusory statements regarding the defendants' alleged domination and control of the corporation at issue). Therefore, Plaintiff's second, third, fourth, fifth and sixth causes of action as against Defendant Bialek are dismissed for failure to state a claim.

2. Plaintiff's First Cause of Action for *Breach of Contract as Against Defendant Broadway Metro*

Defendants' motion to dismiss Plaintiff's first cause of action for breach of contract against Broadway Metro is granted.

Plaintiff alleges that Broadway Metro breached the lease by unreasonably refusing to give consent to the sublease. Complaint, ¶¶ 39–40. Defendants contend that Plaintiff violated its lease with Broadway Metro by subleasing to Urban Outfitters before obtaining Broadway Metro's written consent. Defendants' Memo, pp. 8–11. Defendants contend that, because of this lease violation, Broadway Metro's refusal to consent to the sublease was not unreasonable and cannot be used as the basis for a breach of contract claim. *Id.* Plaintiff argues that it did not breach the lease with Broadway Metro. Plaintiff's Opp., pp. 13–25.

When a lease requires a tenant to obtain a landlord's written consent prior to a sublease, and the tenant subsequently subleases without having first received the landlord's written consent, the tenant breaches the lease. *752 Pacific v. Pacific Carlton Development,* 62 AD3d 685, 688 (2nd Dep't 2009). It is not unreasonable for a landlord to withhold consent to assignment or subletting when a tenant is in default or has otherwise breached the lease. *See NNA Restuarant Management v. Eshaghian,* 29 AD3d 384, 384–385 (1st Dep't 2006) (finding that a landlord's withholding of consent to an assignment of a lease was not unreasonable when the tenant was in "default of its lease obligations" and failed to provide appropriate information about the potential subtenant); *Forty Four Eighteen Joint Venture v. Rare Medium,* 18 AD3d 237, 237–238 (1st Dep't 2005) (finding that a landlord's withholding of consent to assignment of a lease was not unreasonable when tenant's rent was in arrears); *752 Pacific v. Pacific Carlton Development,* 62 AD3d at 688 (finding that the tenant's assignment of a lease in violation of a lease's terms breached the lease).

***4** Plaintiff breached its lease with Broadway Metro in two separate ways: 1) by failing to obtain Broadway Metro's permission before subleasing to Urban Outfitters; and 2) by being in arrears on the money it owed to Broadway Metro.

First, Plaintiff breached its lease with Broadway Metro by subletting the property without Broadway Metro's prior written consent. Plaintiff's lease with Broadway Metro states that Plaintiff must receive prior written consent before subletting the property:

> Except as specifically provided herein, [Plaintiff] expressly covenants that [Plaintiff] shall not voluntarily or involuntarily assign, sublease, encumber, mortgage or otherwise transfer this Lease, or sublet [the property] or any part thereof, or suffer or permit [the property] or any part thereof to be used or occupied by others, by operation of law or otherwise, without the prior written consent of [Broadway Metro] in each instance, which consent [Broadway Metro] agrees not to unreasonably withhold or delay. Absent such consent, any act or instrument purporting to do any of the foregoing shall be null and void.

Defendants' Affirm., Ex. A, Plaintiff's lease, p. 22, § 29.1.

Plaintiff and Urban Outfitters signed the sublease on December 23, 2008. Defendants' Affirm., Ex. A, Sublease, p. 1. However, Plaintiff alleges that it did not ask

Broadway Metro for written permission for the sublease until May 28, 2009, five months later. Complaint, ¶ 27.

Plaintiff contends that although the sublease was signed five months before it sought Broadway Metro's written permission, it did not violate the lease. Plaintiff's Opp., pp. 16–19. Plaintiff alleges that the sublease was subject to Broadway Metro's approval, and therefore was not in effect until after Broadway Metro approved. *Id.*

Plaintiff's sublease contains the following provision:

> If [Plaintiff] has not obtained the Approvals [including Broadway Metro's written permission] on or prior to March 1, 2009, then each party shall have the right, but not the obligation, in its sole discretion to terminate this [sublease].

Defendants' Affirm., Ex. A., Sublease, p. 2, § 2(b)(ii). The sublease thus was in effect even if Plaintiff fails to obtain Broadway Metro's approval. Broadway Metro's failure to approve the sublease grants the parties the "right, but not the obligation" to terminate the sublease. *Id.* The sublease's execution was not contingent on Broadway Metro's written consent, and thus the sublease was in full force and effect before Plaintiff sought Broadway Metro's permission. Plaintiff thus breached its lease with Broadway Metro by not obtaining Broadway Metro's permission prior to the sublease becoming effective. *752 Pacific v. Pacific Carlton Development,* 62 AD3d at 688 (finding that when a lease requires prior written consent to an assignment, and the tenant assigns without the prior written consent, there is a breach of the lease).

Second, Plaintiff was in breach of its lease with Broadway Metro when Plaintiff became in arrears on the money it owed under the lease. On May 28, 2009, when Plaintiff asked Broadway Metro for written consent to the sublease, Plaintiff had not paid its rent in several months. Plaintiff's Opp., p. 19. Plaintiff contends that although it had not paid its rent, Broadway Metro had drawn down all rent arrears from Plaintiff's security deposit, and that because of this drawing down, Plaintiff was not in arrears on its rent nor in default on Plaintiff's lease. *Id.*

***5** Plaintiff's lease states that Broadway Metro may use Plaintiff's security deposit to pay rent when Plaintiff is in default. Plaintiff's Opp. Aff., Ex. B, p. 32, § 40.1. The lease does not specify that such use cures any rent default by Plaintiff. *Id.* However, even if the court accepted Plaintiff's contention that any rent default was cured, on April 24, 2009, Broadway Metro demanded that Plaintiff replenish the security deposit to the full amount required under the lease. Defendants' Affirm., Ex. H. Under the terms of the lease, Broadway Metro's demand for Plaintiff to restore the security deposit required Plaintiff immediately to do so. Plaintiff's Opp. Aff., Ex. B, p. 32, § 40.1. When Plaintiff requested Broadway Metro's written consent to the lease, Plaintiff had not replenished the security deposit, and therefore Plaintiff was in breach of the lease for failure to replenish the security deposit on Broadway Metro's demand. Plaintiff's Opp. Aff., Ex. B, p. 32, § 40.1; Defendant's Reply, p. 4. Thus, Plaintiff remained in default on the lease for not replenishing the security deposit.

In conclusion, Plaintiff was in default on its lease with Broadway Metro for two reasons: 1) because Plaintiff subleased the property without prior written consent from Broadway Metro; and 2) because Plaintiff was in arrears on its rent and/or its security deposit. Therefore, it was not unreasonable for Broadway Metro to withhold consent to Plaintiff's sublease. *See NNA Rest. Mgt. LLC v. Eshaghian,* 29 AD3d at 384–385 (finding that the landlord's withholding consent to assignment not unreasonable when the tenant was in "default of its lease obligations" and tenant failed to provide appropriate information about potential subtenant); *see also Forty Four Eighteen Joint Venture v. Rare Medium,* 18 AD3d at 237–238; *752 Pacific v. Pacific Carlton Development,* 62 AD3d at 688. Because it is indisputable that Broadway Metro's withholding consent is not unreasonable, Broadway Metro did not breach the lease with Plaintiff. Defendants' motion to dismiss Plaintiff's first claim for breach of contract against Broadway Metro is granted. CPLR 3211(a)(7).

3. Plaintiff's Third Cause of Action for Breach *of the Covenant of Good Faith and Fair Dealing as Against Broadway Metro*

Defendants' motion to dismiss Plaintiff's third cause of action for breach of the covenant of good faith and fair dealing against Broadway Metro is granted.

Defendants argue that Plaintiff fails to state a claim for a breach of the covenant of good faith and fair dealing. Defendants' Memo, p. 11. Plaintiff does not contest Defendants' argument. A claim for breach of the covenant of good faith and fair dealing should be dismissed if it is duplicative of a breach of contract claim. *Business Networks of New York v. Complete Network Solutions,* 265 A.D.2d 194, 195 (1st Dep't 1999).

Here, Plaintiff's claim for breach of the covenant of good faith and fair dealing is based upon Broadway Metro's "unreasonable" refusal to grant consent to the sublease. Complaint, ¶¶ 45–48. This is the exact same basis as Plaintiff's breach of contract claim, and is otherwise indistinguishable from that claim. *Id.,* ¶¶ 15–41. Plaintiff's claim for breach of the covenant of good faith and fair dealing as against Broadway Metro is thus duplicative of the beach of contract claim. Defendants' motion to dismiss Plaintiff's claim for breach of the covenant of good faith and fair dealing is therefore granted. *Business Networks of New York v. Complete Network Solutions,* 265 A.D.2d at 195; CPLR 3211(a)(7).

4. Plaintiff's Fifth Cause of Action for Tortious *Interference with Contractual Relations as Against Broadway Metro*

***6** Defendants' motion to dismiss Plaintiff's fifth cause of action for tortious interference with contractual relations as against Broadway Metro is granted.

Plaintiff alleges that Defendants' tortiously interfered with the sublease in two ways: 1) by sending a letter to Urban Outfitters; and 2) by denying consent to the sublease. Plaintiff's Opp., pp. 25–29. Defendants argue that Plaintiff fails to state a claim for tortious interference with contract because: 1) the letter cannot form the basis of a tortious interference with contract; and 2) the sublease was in full force and effect even if Broadway Metro did not consent to it. Defendants' Memo, pp. 11–12.

To state a claim for tortious interference with contract, a plaintiff must allege: 1) the existence of a valid contract between the plaintiff and a third party; 2) defendant's knowledge of that contract; 3) defendant's intentional procurement of the third-party's breach of the contract; 4) the procurement was without justification; 5) actual breach of the contract; and 6) damages. *Lama Holding Co. v. Smith Barney Inc.,* 88 N.Y.2d 413, 424 (1996).

Plaintiff's fails to state a claim for tortious interference with contract. First, Plaintiff contends that Broadway Metro attempted to procure a breach of the sublease by sending a letter to Urban Outfitters that detailed Broadway Metro's reasons for refusing consent to the sublease. Complaint, ¶¶ 56–60. However, Plaintiff's fails to allege the third prong of the test for a claim for tortious interference with contract: Plaintiff never alleges that Urban Outfitters breached the sublease as a result of the letter. *Lama Holding Co. v. Smith Barney Inc.,* 88 N.Y.2d at 424. Plaintiff's pleadings specifically state that Plaintiff "was prevented from subleasing" to Urban Outfitters, not that Urban Outfitters breached. Complaint, ¶ 39. In addition, Broadway Metro's letter to Urban Outfitters was merely a copy of its letter to Plaintiff. Complaint, ¶¶ 28–36. Plaintiff does not explain how sending a copy of the letter to Urban Outfitters was unjustified, thus failing to allege the fourth prong of the test for a claim for tortious interference with contract. Even if sending the letter procured a breach of the sublease by Urban Outfitters, Broadway Metro had a valid justification for sending the letter to Urban Outfitters: the letter alerted a potential subtenant that it could not sublease from the landlord, thus potentially preventing any misunderstandings between a subtenant and landlord. Because Broadway Metro's sending of the letter was justified, it cannot form the basis of a claim for tortious interference with contract. *See Lama Holding Co. v. Smith Barney Inc.,* 88 N.Y.2d at 424 (finding that a claim for tortious interference with contract requires that a defendant's action in procuring a breach of contract be without justification). Therefore, Plaintiff fails to allege the third and fourth prong of the test for a claim for tortious interference with contract. *Id.*

***7** Second, Plaintiff contends that Broadway Metro tortiously interfered with the sublease by refusing consent. A tenant cannot sue a landlord for tortious interference with contract when a tenant attempts to sublease, landlord refuses to grant consent to the sublease and the sublease specifically contemplates such a refusal. *See Duane Reade v. I.G. Second Generation Partners,* 280 A.D.2d 410, 412 (1st Dep't 2001) (finding that a claim for tortious interference against landlord must be dismissed when landlord refused to consent to a sublease and the sublease was conditioned thereon); *see also Levine v. Yokell,* 245 A.D.2d 138, 139 (1st Dep't 1997) (finding that a tortious interference with contract claim against landlord was properly dismissed when landlord's refusal to consent

to plaintiff's application was "a contingency specifically contemplated in the contract").

Here, in at least two places, the sublease contemplates the landlord failing to grant consent. In the first instance, the contract states:

> If [Plaintiff] has not obtained [Broadway Metro's written permission] on or prior to March 1, 2009, then each party shall have the right, but not the obligation, in its sole discretion to terminate this [sublease].
>
> Defendants' Affirm., Ex. A., Sublease, p. 2, § 2(b)(ii).

The sublease echoes this language when it contemplates the landlord refusing to consent to an Agreement of Non–Disturbance:

> If [Plaintiff] has not obtained the Agreement of Non–Disturbance as aforesaid from [Broadway Metro] on or before such date, [Urban Outfitters] shall have the option, but not the obligation to terminate this [sublease] within thirty (30) days ... If [Urban Outfitters] does not exercise such right of termination within such thirty-day period, then such right of termination shall be deemed waived and of no further force and effect.

Defendants' Affirm., Ex. A., Sublease, pp. 27–28, § 24(a). The sublease thus specifically considers contingencies where Broadway Metro might not consent to the sublease or the sublease's conditions. Broadway Metro's refusal to consent to the lease thus cannot be the basis for a claim for tortious interference with contract. *Levine v. Yokell,* 245 A.D.2d at 139 (upholding the dismissal of a claim for tortious interference with a contract against a landlord who refused to consent to a sublease because the sublease contemplated an outcome where the landlord might not consent).

In conclusion, Plaintiff fails to state a claim for intentional interference with contract because: 1) Plaintiff fails to allege the requisite prongs of a claim for intentional interference with contract; and 2) Broadway Metro's refusal of consent cannot form the basis of such a claim. Thus, Defendants' motion to dismiss Plaintiff's fifth cause of action for intentional interference with contractual relations as against Broadway Metro is granted. CPLR 3211(a)(7).

5. Plaintiff's Fourth Cause of Action for Tortious Interference with Business Relations and Sixth Cause of Action for *Tortious Interference with Economic Advantage as Against Broadway Metro*

***8** Finally, Defendants' motion to dismiss Plaintiff's fourth cause of action for tortious interference with business relations and sixth cause of action for tortious interference with economic advantage as against Broadway Metro is granted.

Plaintiff argues that Broadway Metro tortiously interfered with business relations and economic advantage in two ways: 1) by wrongfully contacting Urban Outfitters via letter to alert Urban Outfitters that Broadway Metro would not approve the sublease; and 2) by withholding consent to the sublease. Plaintiff's Opp., pp. 30–32. Defendants argue that Plaintiff's contentions are merely conclusory and do not properly allege the elements of claims for tortious interference with business relations and economic advantage. Defendants' Memo, pp. 12–13.

To state a claim for tortious interference with business relations or with economic advantage, a plaintiff must allege that: 1) the plaintiff had business relations with a third party; 2) the defendant interfered with those business relations; 3) the defendant acted either with the sole purpose of harming the plaintiff or interfered by using means amounting either to a crime or an independent tort; and 4) damages. *Amaranth LLC v. J.P. Morgan Chase,* 71 AD3d 40, 47 (1st Dep't 2009) (stating the elements for tortious interference with business relations); *Thome v. Alexander & Louisa Calder Foundation,* 70 AD3d 88, 108 (1st Dep't 2009) (stating the elements for tortious interference with economic advantage). Defendant must direct its wrongful conduct at the third party with whom a plaintiff has or has sought a business relationship, and not against the plaintiff itself. *Carvel Corp. v. Noonan,* 3 NY3d 182, 192 (2004) (finding that a claim for tortious interference with business relations requires conduct directed at the third party and not against the plaintiff); *Havana Central NY2 v. Lunney's Pub, Inc.,* 49 AD3d 70, 74 (1st Dep't 2007) (finding that a claim for tortious interference with economic advantage requires conduct directed at the third party and not against the plaintiff).

Here, Plaintiff fails to allege the third prong: that Broadway Metro acted with the sole purpose of harming Plaintiff or interfered using means that were criminal or tortious. *Amaranth LLC v. J.P. Morgan Chase,* 71 AD3d at 47 (stating the elements for tortious interference with

business relations); *Thome v. Alexander & Louisa Calder Foundation,* 70 AD3d at 108 (stating the elements for tortious interference with economic advantage).

First, Plaintiff fails to allege that Broadway Metro acted with the sole purpose of harming Plaintiff. Plaintiff admits in its own pleadings that it believes that Broadway Metro refused to consent to the sublease because, in part, Broadway Metro sought "to secure Urban Outfitters for [Broadway Metro's] own account." Complaint, ¶ 38; *see also* Plaintiff's Opp., p. 8. Thus, by Plaintiff's own theory of the case, Broadway Metro's alleged interference with the sublease was not solely to cause Plaintiff harm, but was also for Broadway Metro's economic enrichment. Plaintiff therefore fails to show that Broadway Metro acted solely to injure Plaintiff. *See Thome v. Alexander & Louisa Calder Foundation,* 70 AD3d at 108 (affirming lower court's dismissal of a claim for tortious interference with economic advantage in part because "by plaintiff's own theory of the case, defendants acted with the intent of benefitting themselves").

***9** Second, Plaintiff does not allege that Broadway Metro used criminal or tortious means to interfere with Plaintiff's business relations and economic advantage. Plaintiff alleges that Defendant's interference consisted of: 1) Defendant contacting Urban Outfitters via letter to alert Urban Outfitters that Broadway Metro would not approve the sublease; and 2) Defendant withholding consent to the sublease. Plaintiff's Opp., pp. 30–32. These actions plainly are not criminal, and, as per the analysis above, neither are these actions tortious. Thus, Plaintiff fails to allege that Broadway Metro's actions were either criminal or constituted an independent tort. *See Thome v. Alexander & Louisa Calder Foundation,* 70 AD3d at 108 (affirming lower court's dismissal of a claim for tortious interference with economic advantage in part because plaintiff "failed to allege any facts suggesting that defendants' actions were criminal or independently tortious").

Plaintiff has not plead the third prong for stating a claim for tortious interference with business relations and economic advantage. *Amaranth LLC v. J.P. Morgan Chase,* 71 AD3d at 47 (stating the elements for tortious interference with business relations); *Thome v. Alexander & Louisa Calder Foundation,* 70 AD3d at 108 (stating the elements for tortious interference with economic advantage). Defendants' motion to dismiss Plaintiff's fourth cause of action for tortious interference with business relations and sixth cause of action for tortious interference with economic advantage as against Broadway Metro is therefore granted. CPLR 3211(a)(7).

Accordingly, it is

ORDERED that Defendants Broadway Metro Associates, LP and Albert Bialek's motion to dismiss Plaintiff 2626 BWAY LLC's claims is GRANTED. The Clerk is directed to enter judgment in favor of Defendants Broadway Metro Associates, LP and Albert Bialek's, dismissing this action, together with costs and disbursements to Defendants, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the Decision and Order of the Court.

All Citations

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