

E-FILE

SHORT FORM ORDER

INDEX NO. 14/69855

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

RONCALLI FREIGHT COMPANY, INC.,

Plaintiff,

-against-

FIRE ISLAND PINES PROPERTY OWNERS'
ASSOCIATION, INC. (FIPPOA), FIPPOA
CHARITABLE FOUNDATION, JAY PAGANO,
MICHAEL HARTSTEIN, and ALAN
BRODHERSON;

Defendants.

**ORIG. RETURN DATE: 5/27/15
FINAL SUBMISSION DATE: 5/18/16
MOTION SEQ#002
MOTION: 002-MotD**

**PLAINTIFFS' ATTORNEY:
PATRICIA BYRNE BLAIR
9-B MONTAUK HIGHWAY
BLUE POINT, NY 11715**

**DEFENDANT'S ATTORNEY:
BRAVERMAN/GREENSPUN
110 EAST 42ND STREEN, 17TH FL
NEW YORK, NY 10017**

Upon the following e-filed papers numbered 36 to 63 read on this motion to dismiss the complaint; Notice of Motion/Order to Show Cause and supporting papers 36 - 46; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 49 - 61; Replying Affidavits and supporting papers 63; Other _____; and upon due deliberation; it is,

In this breach of contract action, plaintiff alleges that defendants improperly allowed third parties to deliver and store items on the freight dock at Fire Island Pines, and interfered with deliveries to homeowners on Fire Island. The record reveals that on January 8, 2008, plaintiff's predecessor, Coastline Freight and Charter, Inc. ("Coastline"), and the Fire Island Pines Property Owners' Association, Inc. ("the Association") entered into a Freight Service Contract ("the Contract") whereby Coastline would pay a fee for use of a freight dock in the harbor of Fire Island Pines, for a five-year term. The Contract provided that Coastline was responsible for the maintenance and repair of the dock and was required to procure insurance naming the Association

and the Fire Island Pines Property Owners Association Charitable Foundation (“the Foundation”) as named insureds. The Contract further provided that plaintiff would enforce the freight dock rules and regulations and that the Fire Island Pines Property Owners’ Association could change the rules at any time without the necessity of negotiating with plaintiff.

The record further reveals that on May 9, 2014, the Contract was extended and reflected that plaintiff bought Coastline and was operating the freight dock. The extension would expire automatically on December 31, 2014. On or about July 1, 2012, plaintiff refused to carry propane tanks and other goods and materials owned by non-party Walter Boss (“Boss”) due to his failures to pay outstanding shipping invoices due and owing to plaintiff. This action caused defendants to find alternative transportation for Boss’s goods and services to its homeowners.. Plaintiff claims that defendants breached the Contract on multiple occasions, by promoting the services of another ferry company, and failing to support plaintiff’s efforts in maintaining the dock. By letter dated October 16, 2014, defendants unilaterally terminated the Contract. The instant action was commenced on November 20, 2014.

The amended complaint contains eighteen causes of action: 1) unilateral breach of the Contract on October 16, 2014, prior to its natural termination; 2) breach of the Contract by promoting the use of an alternative freight services other than plaintiff’s; 3) breach of the Contract by securing alternative freight ferry service by defendant Jay Pagano, President of the Association; 4) tortious interference with plaintiff’s business relations against defendant Jay Pagano; 5) breach of the Contract against defendant Jay Pagano by allowing non-party Walter Boss to have a forklift at the freight dock, and permitting individuals other than plaintiff to carry freight from the dock to individual homes; 6) breached of the Contract by defendant Michael Hartstein, as an officer and director of the Association, by promoting alternative freight services; 7) violation of the Contract by defendant Michael Hartstein who permitted Walter Boss to have a forklift at the freight dock in and allowed individuals other than plaintiff to carry freight from the dock to individual homes; 8) defendant Michael Hartstein tortiously interfered with plaintiff’s business relations with third parties by promoting alternative freight services; 9) breach of the Contract by Michael Hartstein, who permitted Walter Boss to have a forklift at the freight dock in violation of freight service agreement; 10) tortious interference by Alan S. Broderson, as an officer and director of the Association breached the Agreement by promoting alternative freight services; 11) Alan S. Broderson, tortiously interfered with plaintiff’s business relations with third parties arriving or departing from Fire Island Pines by promoting alternative freight services; 12) Alan S. Broderson breached the Contract by allowing Walter Boss to have a forklift on the dock, and permitting individuals other than plaintiff

to carry freight from the freight dock to individual homes in Fire Island Pines in violation of the Agreement; 13) the corporate defendant and individual defendants breached the Contract by failing to collect fines or enforce the Fright Dock Rules and Regulations; 14) breach of fiduciary duty by the officers and directors of the Association; 15) defendants intentionally interfered with plaintiff’s business by failing to enforce the freight dock rules and regulations, and caused damage to plaintiff;

16) tortious interference with plaintiff's business by stepping above and beyond their capacities as directors and officers of the Association; 17) defendants breached the Contract by failing to publicize plaintiff as the primary freight carrier to Fire Island Pines, causing damage to plaintiff; 18) judgment declaring that this dispute is no longer controlled by the Contract and that the matter is not subject to arbitration.

Defendants now move to dismiss the complaint pursuant to CPLR (a) (1), (7) and 3016 (b), on the grounds that the individual defendants are not parties to the agreement, there is no fiduciary duty, and the Foundation is not a party to the Contract. In support of the motion, defendants submit the amended complaint, a copy of the Freight Service Contract dated January 8, 2008, a copy of the freight service agreement dated May 9, 2014, and an affidavit of Eric Von Kuersteiner.

Defendants contend that the complaint should be dismissed as asserted against the individual defendants and the Foundation inasmuch as they were not parties to the Contract. In any event, plaintiff has failed to adequately state a cause of action for tortious interference with business since it failed to specify the contracts with which defendants interfered. In addition, since the Agreement was an arms' length transaction, and the parties hold no special relationship to each other, there was no breach of fiduciary duty. Moreover, the Contract provided that plaintiff was responsible for maintenance and control of the freight dock thereby releasing defendants of liability for the 13th cause of action.

In opposition, plaintiff claims that the affidavit of Eric Von Kuersteiner, plaintiff's vice president should not be considered in defendants' submissions, inasmuch as that affidavit was submitted in opposition to an order to show cause in another action, and that an affidavit does not constitute documentary evidence. Plaintiff states that it generated income by collecting fees from charging entities to carry the goods, materials and other items across the Great South Bay. The amount of the charge was limited by the tariff issued by the Suffolk County Legislature. This was the only source of income for plaintiff. Defendant was to be paid a fixed sum under the Agreement. That fixed sum was paid no matter how much money plaintiff did or did not generate in freight charges. Plaintiff further states that the officers and directors failed to cede control over the freight dock to plaintiff and at the same time, would not enforce the Freight Dock Rules, and failed to collect fees from secondary carriers. However, the failure of the defendant to secure plaintiff's rights as the primary freight carrier to Fire Island Pines, including its admitted failure to publicize plaintiff as the primary carrier is a breach of the Agreement between the parties and warrants denial of the motion. Plaintiff further states that the Foundation and the Association are essentially one entity, inasmuch they share the same Board of Directors and meetings were held concurrently. In addition, the Foundation is an additional insured on the liability insurance policy that plaintiff was required to obtain.

Eric Von Kuersteiner states in his personal affidavit that he is an officer of plaintiff. Plaintiff corporation was formed in 2007. Plaintiff purchased Coastline Freight in or about 2010. Almost immediately thereafter, an individual named Walter Boss violated all the Freight Dock Rules that

were put in place by the Association. Although Von Kuersteiner made frequent complaints to the individual defendants, no change in policy occurred. By 2012, Boss owed plaintiff the sum of \$70,000, and plaintiff suspended services to Boss. Although Boss sued plaintiff in court, its application for a temporary restraining order was denied.¹ In depositions, the individual defendants conceded that they secured alternative freight services for Boss, interfering with the contract that plaintiff had with Boss, diminishing plaintiff's ability to collect its fees. As a result of the failure to enforce the Freight Dock Rules and Marina Rules, plaintiff's ability to charge for and generate income by delivering goods and freight from the dock at Fire Island Pines to individual houses, plaintiff sustained damages. Such conduct went on for years.

Von Kuersteiner further states that the Contract provided that plaintiff would publish the freight tariff and would pay the Association a set sum of money. Inferred in the contract is the fact that the Association would not tortiously interfere with plaintiff's ability to make money. However, plaintiff lost revenues when defendants retained secondary carriers for Boss.

In reply, defendants state that plaintiff's refusal to do business with Boss over July 4th weekend in 2012 was a major impact on the residents of Fire Island Pines and the Association was entitled to protect its constituency by finding an alternative means of propane delivery. Defendants also cite a provision in the Agreement which allows them to retain secondary carriers.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). The court accepts the facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*id.*). In assessing a motion under CPLR 3211(a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 389 NYS2d 314 [1976]) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

Pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437, 736 NYS2d 605 [2d Dept 2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 756 NYS2d 94 [2d Dept 2003]). An affidavit is not considered "documentary" evidence (See *Norment v Interfaith Center of N.Y.*, 98 AD3d 955, 951 NYS2d 531 (2nd Dept 2012)).

A complaint adequately states a cause of action for breach of contract when it alleges (1) the

¹ The prior action is captioned *Walter Boss, Inc. v Roncalli Freight Company, Inc.*, Index No. 20146/2012.

existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) damages as a result of the breach (*JP Morgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). Accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the court finds that the plaintiff has adequately stated the first, second, thirteenth, and seventeenth causes of action.

Turning to the branch of the defendants' motion to dismiss the causes of action which allege a tortious interference with prospective business relations, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the court finds that the plaintiff has failed to adequately state a cause of action. To establish a such a claim, a plaintiff must demonstrate that (a) the plaintiff had business relations with a third party, (b) the defendants interfered with those business relations, (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means, and (d) there was resulting injury to the business relationship (*North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 20 - 21, 953 NYS2d 96, 108 [2d Dept 2012]). Initially, the personal affidavit of Eric Von Kuersteiner as submitted by defendants is rejected as non-documentary evidence. The court finds that the Contract clearly allows for secondary carriers to transport freight to Fire Island Pines, and does not give exclusive rights to plaintiff to carry freight across the bay or from the freight docks to individual homes. In addition, it cannot be said that the Association tortiously interfered with the contract between Boss and plaintiff inasmuch as the Association did not contract with Boss to carry the freight in place of plaintiff, nor did it profit from retaining alternate carriers. Therefore, the fourth, sixth, eighth, tenth, eleventh, and sixteenth causes of action are dismissed.

Turning to the branch of defendants' motion to dismiss the fifteenth cause of action, alleging an intentional interference with business, the court construes that plaintiff is alleging that the Association interfered with plaintiff's prospective business relations. To establish a defendant's liability for damages for tortious interference with prospective contractual relations, the plaintiff must show that (1) the defendant knew of the proposed contract between the plaintiff and third parties; (2) intentional interference with the same; (3) the proposed contract would have been entered into but for the interference; (4) the defendant's interference was accomplished by wrongful means or with malicious intent; and (5) resulting damages (*Carvel Corp. v Noonan*, 3 NY 3d 182, 785

NYS 2d 359 [2005]). Here, the complaint alleges, and Von Kuersteiner avers that defendants failed to cede control of the dock to plaintiff as provided in the Agreement, and instead failed to enforce the Freight Dock Rules and Regulations, thereby causing damage to plaintiff's ability to do business with the residents and persons entering and leaving Fire Island Pines, and frustrating plaintiff's efforts to maintain order on the dock. Thus, plaintiff has sufficiently stated the fifteenth cause of action.

Turning to the branch of defendants' motion to dismiss the allegations against the individual defendants, corporate directors ordinarily are not liable for inducing a breach of contract with the

Turning to the branch of defendants' motion to dismiss the allegations against the individual defendants, corporate directors ordinarily are not liable for inducing a breach of contract with the corporation by merely making decisions or taking actions that result in the corporation's breach or broken promise (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109, 744 NYS2d 384 [1st Dept 2001] [citation and quotation marks omitted]). However they may be rendered personally liable where their acts or conduct benefitted the officers' personal, rather than the corporations' interests (*Hoag v Chancellor, Inc.*, 246 AD2d 224, 230, 677 NYS2d 531 [1st Dept 1998]). Here, plaintiff fails to allege a personal benefit was obtained by the individual defendants, but rather, defendants sought to assist the constituents and residents of Fire Island Pines. Therefore, plaintiff has failed to state a cause of action against the individual defendants, and the third, fifth, seventh, ninth, twelfth, and fourteenth causes of action are dismissed.

Turning to the branch of the motion to dismiss the allegations asserted against the Foundation, accepting the factual allegations contained in the complaint as true, and giving them every favorable inference, the court finds that the plaintiff has failed to state any cause of action against it. Accordingly, the complaint is dismissed as asserted against the Foundation. Turning to the branch of the motion to dismiss the eighteenth cause of action, inasmuch as the parties stipulated to avoid arbitration and proceed to litigation, the cause of action is dismissed as academic.

Accordingly, it is

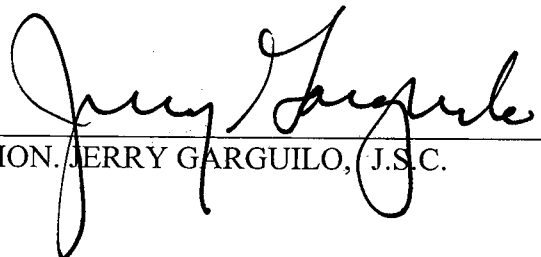
ORDERED that defendants' motion (002) to dismiss the complaint is granted to the extent that the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, fourteenth, and sixteenth causes of action are dismissed; and it is further

ORDERED that the remaining defendant is directed to serve and e-file its answer pursuant to CPLR 3211 (f); and it is further

ORDERED that the parties are directed to appear at a preliminary conference in Part 48 on September 7, 2016 at 9:30 a.m.

DATED

6/1/16


HON. JERRY GARGUILO, J.S.C.