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Pleading the element of inducement for tortious interference with contract claims

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It is important to allege as many facts as possible to avoid dismissal of the claim as vague or conclusory.

In 1980, the New York Court of Appeals adopted §766 of the Restatement (Second) of Torts as the standard for a cause of action for tortious interference with contract in New York. *Guard-Life v. S. Parker Hardware Mfg.*, 50 N.Y.2d 183, 189-90 (1980); *see Alken Indus. v. Toxey Leonard & Assocs.*, 2013 N.Y. Slip Op. 31864(U), at *5 (Suffolk Co. Aug. 2, 2013). The Restatement defines tortious interference with contract as "intentionally and improperly interfer[ing] with the performance of a contract … between another and a third person by inducing or otherwise causing the third person not to perform the contract." Restatement (Second) of Torts §766 (Am. L. Inst. 1977). The requirement in this definition of "inducing or otherwise causing" the third person not to perform its contract has been extensively litigated in New York courts, which have required a somewhat heightened pleading standard for that element.

The standard

New York courts generally apply the following five elements to a claim for tortious interference with contract: (1) 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 procurement of the third party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996). The third element of intentional procurement of the breach has been found satisfied in either of two circumstances, first where the defendant has caused through inducement the third party to breach its contract with the plaintiff , known as "but for" causation, or second where the defendant has otherwise rendered the third party's performance of that contract impossible. *Alken Indus.*, 2013 N.Y. Slip Op. 31864(U), at *5 (*quoting Kronos v. AVX*, 81 N.Y.2d 90, 94 (1993)). This interpretation can be sourced to the definition of "inducing or otherwise causing" found in Comment h to Restatement §766:

> The word "inducing" refers to the situations in which A causes B to choose one course of conduct rather than another. Whether A causes the choice by persuasion or by intimidation, B is free to choose the other course if he is willing to suffer the consequences.
>
> The phrase "otherwise causing" refers to the situations in which A leaves B no choice, as, for example, when A imprisons or commits such a battery upon B that he cannot perform his contract with C, or when A destroys the goods that B is about to deliver to C.

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Commercial Division cases since the adoption of §766 have repeatedly held that pleading the third element of tortious interference with contract requires a plaintiff to plead facts that support either of these types of causation. Thus, as the case law discussed below demonstrates, to adhere to this standard, a plaintiff should aim to allege either: (1) but for the defendant's intentional inducement, the third party would not have breached the contract with the plaintiff; or (2) the defendant's actions rendered the third party's contractual performance impossible, thereby leaving the third party no choice but to breach the contract.

'But For' causation

To satisfy the third element by alleging inducement, as opposed to rendering performance impossible, "but for" causation should be specifically pleaded. Because the word "inducement" alone leaves the possibility open that the third party had a choice whether to be influenced by that inducement and breach the contract, courts generally do not infer "but for" causation from generalized allegations of inducement. *See Met FoodBasics v. Key Food Stores Co-Operative*, 2019 Slip Op. 32642(U), at *3-4 (Kings Co. Sept. 5, 2019); *see also* Restatement (Second) of Torts §766 cmt. o. When pleading but for causation, the plaintiff should avoid allegations that are vague, conclusory, or supported only by "mere speculation." *See Wiesen v. VerizonCommc'ns*, 2018 N.Y. Slip Op. 32464(U), at *4-5 (N.Y. Co. Oct. 1, 2018) (*quoting The Carlyle v. Quik Park 1633 Garage*, 160 A.D.3d 476, 477 (1st Dep't 2018)).

An example of an adequately pleaded claim for tortious interference with contract based on inducement can be found in *Creative Circle v. Norelle-Bortone*, 2019 N.Y. Slip Op. 34004(U) (N.Y. Co. Aug. 26, 2019). In that case, the plaintiff Creative Circle sued a competitor, 24 Seven, for interfering with an employment contract the plaintiff had and one of its employees, Bortone. The plaintiff alleged that defendant 24 Seven went after Bortone, and ultimately induced her to breach her non-complete contract with plaintiff, which prohibited her from working for a competitor within a defined geographic area for twelve months after leaving Creative Circle. Justice O. Peter Sherwood of the New York County Commercial Division held that the plaintiff adequately pleaded but for causation in that the plaintiff alleged that defendant 24 Seven not only assisted with and encouraged Bortone to breach her contract with Creative Circle, but also advised her that it would protect her from any actions taken by plaintiff to enforce the non-complete agreement.

In contrast, in *ProSight Specialty Ins. Grp. v. StarStone Ins. Holdings Ltd.*, plaintiff ProSight sued its competitor, defendant StarStone, for inducing its employees to resign en masse from ProSight to join StarStone's employ. 2017 WL 3086817, at *1 (N.Y. Co. July 20, 2017). Of the seven employees that resigned, only one of them, McAndrew, had an employment contract with ProSight. McAndrew's employment contract prohibited him from competing with plaintiff during the term of his employment and for a period of two years following termination of his employment. McAndrew was also subject to an employee and customernon-solicitation covenant and a confidentiality provision. Justice Saliann Scarpulla of the New York County Commercial Division dismissed ProSight's claim for tortious interference with contract, in part because ProSight failed to plead that, but for StarStone's actions, McAndrew would have honored his contract with ProSight. Notably, in a separate cause of action, ProSight alleged that it was McAndrew who solicited the other employees to leave ProSight, which the court found to be inconsistent with the allegations that the defendant was the but for cause of McAndrew's breach.

The render performance impossible approach

In contrast, specifically pleading but for inducement has been found to be unnecessary when alleging that the defendant induced the breach by rendering the breaching party's contractual performance impossible, leaving that party no choice but to breach. To meet this standard, the plaintiff should make it clear in the complaint that, on account of defendant's actions, the third party was unable to perform and had no alternative but to breach the contract.

For example, in *Woodlief v. Power Fasteners*, the plaintiff, owner and assignee of claims of a business called Screws & More, sued defendant, Power Fasteners, for interference with a contract Screws & More had with a third party named Irwin Seating. 2009 WL 6849517, at *1 (West. Co. Aug. 3, 2009). The plaintiff had contracted with Irwin to provide stainless steel anchors Irwin needed to install seats in the new Yankee and Citi field Stadiums. To fulfill its supply contract with Irwin, plaintiff contracted with defendant Power Fasteners to manufacture certain parts needed for those anchors. Instead of manufacturing and delivering conforming parts specified in that contract, the plaintiff alleged that defendant Power Fasteners delivered inferior parts, which it attempted to

conceal by packaging the inferior parts in boxes marked as the conforming parts. Plaintiff alleged that, after delivering those parts to Irwin, Irwin alerted plaintiff to this non-conformity, which Irwin discovered while inspecting and testing the goods and products delivered, and rejected the shipment. Plaintiff further alleged that, as a result of defendant's breach of its supply contract with plaintiff, Irwin discontinued its relationship with the plaintiff. Justice Alan Scheinkman of the Westchester County Commercial Division held that plaintiff adequately pleaded a cause of action for tortious interference with contract because plaintiff alleged that the defendant, by delivering non-conforming parts that were misrepresented as conforming, put plaintiff in a position where it could not possibly perform as agreed under its contract with Irwin, causing it to breach its contract with Irwin.

In contrast, in *KIND Operations v. AUA Private Equity Partners*, Justice Sherwood dismissed plaintiff KIND's tortious interference with contract claim for not adequately pleading that the defendant AUA's actions truly gave third party TruFood no alternative but to breach its contract with KIND. 2020 N.Y. Slip Op. 33059(U), at *9-10 (N.Y. Co. Sept. 16, 2020), *aff 'd*, 195 A.D.3d 446 (1st Dep't 2021). KIND sold energy bars and granola and contracted with TruFood for it to manufacture and supply those products. As part of that agreement, TruFood was required to give notice to and obtain KIND's consent to any "change of control" transaction, which included a transfer of substantively all of TruFood's assets. Thereafter, TruFood requested plaintiff's consent to a "major investment" in TruFood. The plaintiff refused, asking for more information. Later, defendant AUA announced that it had acquired TruFood's assets and henceforth would do business as TruFood. KIND then brought suit against AUA, alleging it tortiously interfered in KIND's contract with TruFood by forcing TruFood to breach by selling its assets without plaintiff's consent. In its complaint, KIND alleged that AUA procured TruFood's breach by "directing" TruFood to conceal information about the transactionfrom plaintiff, and that TruFood had no alternative to carrying out the deal in accordance with AUA's demands, as TruFood was struggling financially and had extensive debt. Justice Sherwood found, and the First Department agreed, that these allegations were in sufficient to plead the third element of the tortious interference with contract claim because the "allegations that TruFood's CEO was 'directed' by AUA to conceal the asset purchase from plaintiff [were not] sufficient to establish procurement since the CEO was free to reject that 'direction.'" Plaintiff then sought leave to amend based on documentary evidence allegedly showing that AUA exerted substantial control over TruFoods and directed it not to inform plaintiff of the details of that transaction. While Justice Margaret Chan, substituting for Justice Sherwood on that case, questioned whether those new allegations adequately established that TruFoods had no alternative but to carry out its deal with AUA in accordance with AUA's demands, the court denied the motion to amend on other grounds. *KIND Operations v. AUA Private Equity Partners*, 2022 N.Y. Slip Op. 3100(U), at *3 (N.Y. Co. March 22, 2022).

Conclusion

As the above discussion suggests, to survive a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), a plaintiff should not only plead the five elements of tortious interference with contract, but should specifically allege either that but for the defendant's intentional inducement, the third party would not have breached the contract, or that the defendant's actions rendered the third-party's performance impossible leaving it with no choice but to breach. In either scenario, it is important to allege as many facts as possible to avoid dismissal of the claim as vague or conclusory. The more detailed and specific the allegations, the more likely a claim for tortious interference with contract will survive the pleading stage.