

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

KALI DAVE, LTD. : **MAY TERM 2001**
:
v. : **NO. 819**
:
CVS CORP., and : **Commerce Program**
FRANK FACCIOLO :

ORDER

AND NOW, this 6th day of November, 2001, upon consideration of the defendants' preliminary objections to the complaint, the response of the plaintiff and the supplementary memoranda of the parties, and in accordance with the court's contemporaneously filed memorandum opinion, IT IS HEREBY ORDERED that the preliminary objections are SUSTAINED as follows:

1. The objection alleging legal insufficiency of plaintiff's tortious interference with contract claim is SUSTAINED;
2. The objection alleging legal insufficiency of plaintiff's punitive damages claim is SUSTAINED. References to punitive damages are hereby STRICKEN.

BY THE COURT:

John W. Herron, J.

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MEMORANDUM OPINION

The dispute before the court involves two pieces of property that share a common boundary. At issue are the defendants' preliminary objections to the complaint. The court sustains the preliminary objections.

BACKGROUND

Plaintiff, Kali Dave, Ltd. is the owner of 4317 Spruce Street and defendant Frank Facciolo owns the property located on the southwest corner of 43rd Street and Locust Street in Philadelphia. Presently, Mr. Facciolo's property is a CVS retail store and adjacent to it is a parking area that abuts the rear of plaintiff's 4317 Spruce Street property. According to the plaintiff's complaint, for a period of more than twenty-five years, plaintiff and its predecessors in title, and the occupants of 4317 Spruce Street, and their guests and invitees, utilized the parking area portion of the CVS property for ingress and egress to 4317 Spruce Street.

On or about February 2001, defendants built a fence preventing plaintiff and the occupants from using the parking area of the CVS property to gain access to 4317 Spruce Street. Plaintiff states that defendants refuse to remove the fence, erect a gate in the fence, or take other steps to allow plaintiff and the occupants to utilize the CVS property parking area. Because the fence prevents access to the parking area, plaintiff and the occupants have to walk approximately one block to 43rd Street and then to Spruce Street to gain entry to 4317 Spruce Street.

On May 11, 2001, plaintiff filed a complaint against defendants raising three claims: (1) defendants have interfered with plaintiff's easement by prescription, (2) defendants have interfered with plaintiff's easement by implication, and (3) defendants have tortiously interfered with plaintiff's business relationships with its tenants. Plaintiff seeks compensatory and punitive damages. The defendants demur on two grounds: (1) plaintiff has not alleged in its complaint that defendants' conduct caused or induced a third party not to perform a contract with the plaintiff, and (2) the complaint failed to plead any facts which would support punitive damages where building a fence on defendants' own property does not rise to the level of egregious or outrageous conduct.

DISCUSSION

I. STANDARD FOR DEMURRER

A demurrer tests the legal sufficiency of a claim. Pa.R.C.P. 1028(a)(4). A "trial court consider[s] as true all well pleaded facts set forth in the complaint and all reasonable inferences drawn therefrom." Joseph G. Gaston, et al. v. Diocese of Allentown, et al., 712 A.2d 757, 758 (Pa.Super. 1998). "If the facts pleaded state a claim for which relief may be granted under any theory of law, then there is sufficient doubt to require rejection of the demurrer." Id. "When reviewing a decision granting

preliminary objections in the nature of a demurrer, any doubt should be resolved in favor of overruling the demurrer.” Id. And “[p]reliminary objections should be sustained only in cases that are clear and free from doubt.” Id.

II. THE PLAINTIFF’S TORTIOUS INTERFERENCE WITH CONTRACT CLAIM IS LEGALLY INSUFFICIENT

The plaintiff has not stated a legally sufficient claim for its tortious interference with contract claim. The four elements sustaining a cause of action for tortious interference are:

(1) there is an existing contractual relationship between the plaintiff and the third party; (2) the defendant interfered with the performance of that contract by inducing a breach or otherwise causing the third party not to perform; (3) the defendant was not privileged to act in this manner; and (4) the plaintiff suffered pecuniary loss as a result of the breach of contract. Al Hamilton Contracting Company v. Evelyn Cowder, et al., 434 Pa.Super. 491, 497, 644 A.2d 188, 191 (1994).

An essential component of the claim is that a current contractual relationship exists between the plaintiff and the third party, and the cause of action will not prevail unless the defendant has committed some act to deprive the plaintiff of some contractually entitled benefit. See Id.

A. Plaintiff Failed to Meet the Requirements of Restatement (Second) of Torts § 766 by Not Alleging Facts Averting How the Third Parties to the Contract Were Precluded from Performing Once the Fence was Raised

It is plaintiff’s contention that the raising of the fence prevented plaintiff from meeting its obligations to the tenants by making it more difficult for the tenants to gain access to 4317 Spruce Street and by interfering with plaintiff’s ability to provide trash removal and other necessary services to the tenants. However, nowhere in the complaint does the plaintiff explain how the building of the fence precluded the tenants (i.e., third parties) from performing their side of the agreements.

In the Commonwealth of Pennsylvania, it is well established that courts have adopted the Restatement (Second) of Torts § 766 when analyzing tortious interference cases. See Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 429, 393 A.2d 1175, 1182 (1978) (the court found that appellants maintained an action under Restatement (Second) of Torts § 766 against appellees for tortiously interfering with appellants' existing contractual relationships with its clients); see also Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 659 (3d Cir. 1993) (where the court stated that "...the parties have not cited nor have we discovered any Pennsylvania cases recognizing a separate cause of action for preventing or hindering plaintiff's performance of its own contract");

Pursuant to the Restatement (Second) of Torts § 766, once a defendant has interfered with a contractual relationship between the plaintiff and the third party, a breach committed by the third party is the focal point in determining whether the tortious interference occurred. Whereas, under the Restatement (Second) of Torts § 766A, which has not been adopted in Pennsylvania, the focal point is whether the defendant's action impedes the plaintiff's own performance. See GE Capital Mortg. Services, Inc. v. Pinnacle Mortg. Inv. Corp., 897 F.Supp. 854, 868 (E.D.Pa. 1995) (where the court found that "...in Pennsylvania, the viability of a Section 766A cause of action remains an open question.").

Plaintiff's only assertion is that the claim is viable pursuant to the Restatement (Second) of Torts § 766A and therefore, should prevail. The plaintiff incorrectly applied GE Capital Mortg. Services, Inc. to its case, by claiming that because the court described the distinction from § 766A to § 766, § 766A was somehow followed in this jurisdiction. See plaintiff's Memorandum at 2. "That is precisely

plaintiff's theory. Because CVS' wrongful conduct has made it more difficult *for plaintiff* to meet its obligations to its tenants, *recovery can be had* under a theory of tortious interference" (emphasis added). Id. However, as was stated earlier, the GE Capital Mortg. Services, Inc. court determined that § 766A was actually not adopted by Pennsylvania courts which led the federal district court to conclude that its viability remains an open question. See GE Capital Mortg. Services, Inc., 897, F.Supp. at 869.

Looking at the complaint in its entirety, plaintiff did not plead any facts to support its tortious interference with contract claim. It is simply not known to the court how the plaintiff's tenants, guests and invitees failed to perform their contract with plaintiff after the fence was erected. Plaintiff contends the tenants, guests and invitees will have more difficulty in gaining access to 4317 Spruce Street, and the plaintiff will have greater difficulty in providing trash removal and other necessary services as well, however, this explanation falls short of averring that the third parties breached their contract with plaintiff as a result of defendants' construction of the fence. If anything, it only serves to explain how the plaintiff's own performance was impeded.

III. THE PLAINTIFF'S PUNITIVE DAMAGES CLAIM IS LEGALLY INSUFFICIENT

The Restatement (Second) of Torts § 908(2) has been embraced by Pennsylvania courts in determining whether punitive damages are warranted: "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Samuel Feld, et al. v. John W. Merriam, et al., 506 Pa. 383, 395, 485 A.2d 742, 747 (1984) (quoting from: Joseph Chambers v. Charles Montgomery, 411 Pa. 339, 344, 192 A.2d 355, 358 (1963)).

A. Plaintiff's Complaint Failed to Allege Facts Averring How Defendants' Conduct Rose to the Level of Outrageous Behavior and Reckless Indifference

Plaintiff argues that because much of the issue is based on defendants' state of mind in constructing the fence, it is too early at the present time to preclude plaintiff from pursuing punitive damages. However, there is nothing in the complaint to show the court that defendants' conduct was outrageous or malicious and that it rose to the level of "reckless indifference to the rights of others." Id.

CONCLUSION

The court sustains the preliminary objections to the complaint and will enter a contemporaneous order in accordance with this memorandum opinion.

BY THE COURT:

John W. Herron, J.

DATE: November 6, 2001