STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

B[redacted], INC.,

Plaintiff

-vs- Index No. [redacted]

[redacted] R[redacted], 3[redacted], LLC,
and K[redacted], LLC

Defendants

Special Term
[redacted] 2019

APPEARANCES

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Attorneys for Plaintiff

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[redacted]

DECISION

Rosenbaum, J.

Defendant, K[redacted] LLC, moves for an order granting Defendant's motion to dismiss pursuant to CPLR 3211(a)(1) and (7). Likewise, Defendants, [redacted] R[redacted] and 3[redacted] LLC, also move for dismissal pursuant to CPLR 3211.

B[redacted] is a New York corporation located in Wayne County which sells legal fireworks in Wayne, Monroe and Ontario counties through temporary tent sites at commercial locations during the permitted selling season each summer. The permitted selling season is from June 20 through July 5. K[redacted] is a competitor of B[redacted]. Monroe County allowed for the sale of legal fireworks for the first time in 2018.

The Complaint in this action alleges as follows: Three contracts existed between 3[redacted] and B[redacted] regarding the rental of part of a parking lot located within each of the three subject properties. Complaint, ¶6. Each contract provided that B[redacted] was permitted the exclusive right to rent a portion of the parking lots on the properties from June 20 to July 6, 2018 for the purpose of erecting large tents to sell fireworks. Id. at ¶7. Each contract also stated that B[redacted] was granted the right of first refusal to rent to properties similarly on a year-to-year basis. Id. at ¶8.

Plaintiff alleges that [redacted] R[redacted] was a Member and Agent of 3[redacted] and acted on behalf of 3[redacted] as well as the owner of [redacted], the owner of [redacted], and the owner of [redacted], all in Rochester, New York, the subjectproperties. Id. at ¶¶3-4.

Dismissal is warranted under paragraph 1 of subdivision (a) of CPLR

§3211 "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324 (2007). See also, Goshen v. Mut. Life Ins. Co., 98 N.Y.2d 314,326 (2002)("motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144,152 (2002). "In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR §3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim." Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 (1st Dept. 1995)(citations omitted). See also, Zuckerwise v. Sorceron, Inc., 289 A.D.2d 114 (1st Dept. 2001). With respect to a motion made pursuant to CPLR 3211(a)(7), a claim can be dismissed "if the documentary proof disproves an essential allegation of the complaint . . . even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." Deutsche Bank Natl. Trust Co. v. Sinclair, 68 A.D.3d 914, 915 (2nd Dept. 2009). "It is well settled that . . . factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action." Olszewski v. Waters of Orchard Park, 303 A.D.2d 995 (4th Dept. 2003).

On a motion to dismiss pursuant to CPLR §3211(a)(7) the complaint must be given every favorable inference and the allegations in the complaint are deemed to be true. See Dannasch v. Bifulco, 184 A.D.2d 415, 417 (1st Dep't 1992). When considering such a motion, it is the task of the court to determine whether, "'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.'" Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995)(citations omitted). If the court determines "that plaintiffs are entitled to relief on any

reasonable view of the facts stated," the court's inquiry is complete, and the complaint is deemed legally sufficient. See id. "Modern pleading rules focus upon whether the pleader has a cause of action, not whether he has properly stated one, and in making that determination, accompanying affidavits may be referred to for the limited purpose of remedying any defects in the pleadings." Embee Advice Establishment v. Holtmann, Wise & Shepard, 191 A.D.2d 194 (1st Dept. 1993). See also, Jennings-Purnell v. Jennings, 107 A.D.3d 513 (1st Dept. 2013). A party moving to dismiss "must 'establish conclusively that plaintiff has no cause of action' . . . and that in light of the evidence presented 'no significant dispute exists.'" Kaufman v. International Bus. Machs. Corp., 97 A.D.2d 925, 926-27 (3d Dept. 1983), *aff'd* 61 N.Y.2d 930 (1984) (quotations and citation omitted).

First Cause of Action: Breach of Contract

The first cause of action against [redacted] and 3[redacted] alleges that R[redacted], 3[redacted] and the owners of the subject properties (represented by R[redacted] and 3[redacted]), repudiated the contract with B[redacted] on February 21, 2019, stating to President of B[redacted] that "they had decided not to honor the Contracts and instead would work with K[redacted]" and that "to go with K[redacted] and not Fireworks is in her best interest." Complaint, ¶10. B[redacted] did not consent to the repudiation and tendered full payment as full performance under the contracts and was ready, willing and able to perform. Id. at ¶11. The repudiation constituted a breach. Id. at ¶12.

As to the claim stated against the individual R[redacted] Plaintiff claims that the claims against R[redacted] must withstand the motion to dismiss due to R[redacted] deep involvement in the alleged tortious activity. Moreover, Plaintiff alleges that R[redacted] engaged in questionable activities upon which discovery is needed so the conduct can be clarified.

The first cause of action as stated against R[redacted]s dismissed because Plaintiff fails to allege any contractual obligations on the part of R[redacted] that has been breached by R[redacted] in her individual capacity. R[redacted] was not a party to any of the relevant contracts. Plaintiff's claims that R[redacted]'s statements indicate her ownership interest in some capacity are speculative and are contradicted by the documentary evidence. See Katz v. Essner, 136 A.D.3d 575 (1st Dept. 2016). See also Stoianoff v. Gahona, 248 A.D.2d 525 (2nd Dept. 1998) (stating that vague and conclusory allegations in support of a claim make the claim ripe for dismissal).

Defendants also seek dismissal premised upon the language in the contract for the 2018 rental, which states in relevant part:

> The lessor shall give B[redacted]Inc. first option of renting a lot at the location above on a year-to-year basis. B[redacted] shall let the Lessor know by April 1st of each year if they are going to rent the location.

Affirmation of K. Hashmi, Exhibit A.

"The Rule against Perpetuities evolved from judicial efforts during the 17th century to limit control of title to real property by the dead hand of landowners reaching into future generation." Symphony Space v. Pergola Prop., 88 N.Y.2d 466, 475 (1996). "Underlying both early and modern rules restricting future dispositions of property is the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time." Id. "In New York, the rules regarding suspension of the power of alienation and remoteness in vesting- the Rule against Perpetuities- have been statutory since 1830." Id.

"Under the common law, options to purchase land are subject to the rule against remote vesting." Id. at 476. However, "[t]he *Symphony Space* Court also recognized that certain options to purchase land, options appurtenant or appendant to a lease, are not invalid under the rule against perpetuities if the option 'originates in one of the lease provisions, is not exercisable after lease

expiration, and is incapable of separation from the lease.'" Bleecker Street Tenants Corp. v. Bleeker Jones LLC, 16 N.Y.3d 272, 276 (2011), *quoting* Symphony, 88 N.Y.2d at 480. "The Court reasoned that such options 'encourage the possessory holder to invest in maintaining and developing the property by guaranteeing the option holder the ultimate benefit of any such investment. Options appurtenant thus further the policy objective underlying the rule against remote vesting and are not contemplated by EPTL 9-1.1(b).'" Bleeker, 16 N.Y.3d at 276, *quoting* Symphony, 88 N.Y.2d at 480.

In *Bleecker*, the Court of Appeals observed that options to renew further "the policy goals of the rule against remote vesting." Bleecker, 16 N.Y.2d at 277. The Court of Appeals continued:

> At the same time, lease renewal options or covenants for perpetual lease renewals are wholly distinguishable from purchase options in two respects: an option to renew a lease (1) is exercisable pursuant to the lease agreement and, thus, inherently appurtenant to the lease and (2) lacks the power to divest title of that property to the option holder. It also has been noted that these "covenants" are often part of commercial leases, rendering the lease more attractive and readily alienable than less so. . . .

Id. at 277-78. The Court of Appeals determined that nine consecutive renewal options of the 14-year lease term were "not inconsistent with the purpose of the rule against perpetuities because they continue the tenant's possession fo the property without interruption, thus encouraging the efficient use of the property." Id.

EPTL Section 901(b) states: "No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved." Here, dismissal is warranted based on the documentary evidence: the contract between the parties violates the rule against perpetuities. Plaintiff's option to

renew did not have to be exercised during the lease term and, as the lease term was only for several days falling around the Fourth of July holiday, the scenario presented does not involve giving the tenant continuous use of the property without interruption. Moreover, the clause as written allows Plaintiff to alienate Defendants' ability to rent the space until it decides whether to re-rent for the coming year, with an outside notification date of April 1. As such, the contract prevents Defendants from renting the space, without giving Plaintiff the first option to rent, from July 6 until April 1 of the next year. This constitutes an invalid alienation of Defendants' ability to freely lease their space.

The motion to dismiss the breach of contract cause of action is granted pursuant to CPLR 3211(a)(1).

Second Cause of Action: Tortious Interference with Contractual Relations

The second cause of action against K[redacted] alleges tortious interference with contract, alleging that the contracts relative to the properties were valid, and that K[redacted] knew about the contracts and that B[redacted] had contracts with 3[redacted] and the property owners represented by 3[redacted]. Complaint, ¶¶15-16. Plaintiff alleges that K[redacted] deliberately interfered with B[redacted]'s contracts, causing R[redacted] and 3[redacted] to wrongfully abandon their duty of good faith and fair dealing and breach the contracts. Id. at ¶17. K[redacted]'s interference was intentional and done for the improper and unfair purpose of forcing B[redacted] L[redacted] out of business through interference rather than by competing fairly in the marketplace. Id. at ¶18. K[redacted] sought to control the territory surrounding the subject properties as a wrongful monopoly for its own sales free of competition from B[redacted]. Id.

"Tortious interference with contract requires the existence of a valid contract between the Plaintiff and a third party, Defendant's knowledge of that contract, Defendant's intentional procurement of the third-party's breach of the

contract without justification, actual breach of the contract, and damages resulting therefrom." Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996). "'Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a Plaintiff must support his claim with more than mere speculation.'" Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc., LLC, 82 A.D.3d 1035, 1036 (2nd Dept. 2011) (citation omitted). Vague and conclusory allegations cannot support a claim for tortious interference. See Black Car & Livery Ins., Inc. v. H&W Brokerage, Inc., 28 A.D.3d 595 (2nd Dept. 2006). "Mere contentions" offered without any factual support cannot state a cause of action for tortious interference with contractual relations. See M.J. & K. Co. v. Matthew Bender & Co., 220 A.D.2d 488, 490 (2nd Dept. 1995).

Here, the Complaint is factually devoid of specific allegations against K[redacted] on this claim. The conclusory allegations fail to give notice as to what actions K[redacted] allegedly wrongfully took. The speculative and conclusory allegations contained in the Affidavit of J[redacted] do not save this claim. The second cause of action is dismissed pursuant to CPLR 3211(a)(7). To the extent Plaintiff sought to plead tortious interference with prospective contractual relations, the motion to dismiss is granted without prejudice to replead for the same reasons.

Additionally, for the reasons stated *supra* in the discussion of the breach of contract cause of action, the second cause of action is also dismissed pursuant to CPLR 3211(a)(1).

Signed at Rochester, New York this [redacted] 2019.

Matthew A. Rosenbaum
Supreme Court Justice

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