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NY Could Clarify Tortious Interference For Noncompetes

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Law360, New York (June 4, 2015, 4:14 PM ET) -- New York has long been recognized as one of the best venues for employers when it comes to enforcing employees' restrictive covenants, with the threat of a tortious interference claim being one of the primary tools in the employer's arsenal.

But is that acknowledgement made of whole cloth?

For over a decade, New York's courts have relied upon the court of appeals' trifecta of decisions in Carvel Corp. v. Noonan,[1] and its predecessors, Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., [2] and NBT Bancorp Inc. v. Fleet/Norstar Fin. Group Inc.,[3] to dismiss early on claims that a defendant wrongfully induced a third party, such as the plaintiff's existing customer or prospective client, to break their deal — or potential deal — with the plaintiff. Indeed, a cursory review of New York's case law on the subject reveals a vast wasteland of dismissed claims for tortious interference.[4]

The reason underlying these dismissals is, generally, predicated on one of two things:

- In the context of interference with an existing contract, the defendants are typically competing with the plaintiff for this customer's business, and therefore, acting in their own economic self-interest in trying to induce the breach of contract. Unfortunately for most plaintiffs, the economic self-interest defense can defeat its interference claim, unless the plaintiff can show that the defendant acted out of malice or spite, rather than to benefit their own pockets. At the risk of stating the obvious, this scenario — and the proof to support this contention — is highly unlikely to ever materialize.

- Likewise, albeit along a slightly different vein, in the interference with prospective economic relations context, the plaintiff is required to demonstrate, as part of his prima facie case, that the defendants used "wrongful means" (i.e., coercion or other conduct bordering on illegality) to induce a prospective customer to shun the plaintiff. Again, the odds of that happening — and the plaintiff's ability to prove it even if it did occur — are infinitesimal at best.

So where does that leave businesses whose customers have been poached?

On the surface of things, it certainly looks like tortious interference is, for most intents and purposes (with the possible exception of antitrust-oriented conduct), dead in New York, because, again, the proof and facts needed to satisfy this claim is very uncommon.

There appears to be one crucial exception to this rule: The realm of employee noncompetes and the rationale behind these rules — and their exception — goes to the heart of the public policy underlying both.

First, the rule:

Section 768 of the Restatement of Torts (Second), "Competition as Proper or Improper Interference," states:

> (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if:
>
> (a) the relation concerns a matter involved in the competition between the actor and the other; and
> (b) the actor does not employ wrongful means; and
> (c) his action does not create or continue an unlawful restraint of trade; and
> (d) his purpose is at least in part to advance his interest in competing with the other.
>
> (2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

The commentary to this section is most revealing, as it notes:

> One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. In order not to hamper competition unduly, the rule stated in this section entitles one not only to seek to divert business from his competitors generally but also from a particular competitor. And he may seek to do so directly by express inducement as well as indirectly by attractive offers of his own goods or services.

In other words, public policy favors free-market economics, and enticing vendors to compete for business by producing better products, with better service, at lower prices, and yes, by diverting prospective business from existing clients.

Leaving aside the situations where the defendants employ "wrongful means" to induce the third party to leave plaintiff (which, as set forth above, is exceedingly rare), Comment one also highlights the situation where one of the defendants remains bound by a restrictive covenant, stating:

> An employment contract, however, may be only partially terminable at will. Thus it may leave the employment at the employee's option but provide that he is under a continuing obligation not to engage in competition with his former employer. **Under these circumstances a defendant engaged in the same business might induce the employee to quit his job, but he would not be justified in engaging the employee to work for him in an activity that would mean violation of the contract not to compete.** (Emphasis supplied)

In sum, it appears that tortious interference may remain viable, at least in ambit of noncompete agreements. However, it would certainly benefit practitioners statewide if New

York's courts would make that clearer.

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[1] 3 N.Y.3d 182, 818 N.E.2d 1100, 785 N.Y.S.2d 359 (2004).

[2] 50 N.Y.2d 183, 406 N.E.2d 445, 428 N.Y.S.2d 628 (1980).

[3] 215 A.D.2d 990, 990, 628 N.Y.S.2d 408 [3d Dept.1995], affd. 87 N.Y.2d 614, 641 N.Y.S.2d 581, 664 N.E.2d 492 [1996]).

[4] See, e.g., White Plains Coat & Apron Co. Inc. v. Cintas Corp., 8 NY3d 422, 835 NYS2d 530, 867 NE2d 381; Lama Holding Co. v. Smith Barney Inc., 88 NY2d 413, 646 NYS2d 76, 668 NE2d 1370; Foster v. Churchill, 87 NY2d 744, 642 NYS2d 583, 665 NE2d 153; A.S. Rampell Inc. v. Hyster Co., 3 NY2d 369, 165 NYS2d 475, 144 NE2d 371; Israel v. Wood Dolson Co., 1 NY2d 116, 151 NYS2d 1, 134 NE2d 97; Hornstein v. Podwitz, 254 NY 443, 173 NE 674; Campbell v. Gates, 236 NY 457, 141 NE 914; Lamb v. S. Cheney & Son, 227 NY 418, 125 NE 817; Burrowes v. Combs, 25 AD3d 370, 808 NYS2d 50; Cantor Fitzgerald Associates LP v. Tradition North America Inc., 299 AD2d 204, 749 NYS2d 249; Gold Medal Farms Inc. v. Rutland County Co-operative Creamery Inc., 9 AD2d 473, 195 NYS2d 179.