New York Law Journal
Fashion Law
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 40
MONDAY, AUGUST 26, 2019

She's Gone: **Tortious Interference** In the Fashion Industry

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Fashion is always on the move and not just on the runways. Photographers, makeup artists, stylists, fashion models and their agents (bookers), to name a few, are seemingly in constant motion, switching agencies, and, usually, to a competing firm. Your best performing talent comes to you, her manager, one day and says: "Sorry Charlie for the imposition," and then she's gone (Daryl Hall and John Oates, "She's Gone," *Abandoned Luncheonette* (Atlantic Records 1973)), off to your biggest competitor. You "need a drink and a quick decision." Id.

Suing talent has never been favored by the industry as there is always the hope that he or she will see the error of their ways and come back (and they do, sometimes). Perhaps, you think to yourself (after that double martini), you can sue your competitor for poaching to teach them a lesson. In New York, this would be called a cause of action for "tortious interference with contract."

In order to establish a claim for tortious interference with contract, the plaintiff must prove: (1) the existence of a valid contract with a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional and improper procuring of a breach of that contract; and (4) damages. *Kickertz v. N.Y. University*, 110 A.D.3d 268, 275 (1st Dep't 2013); *Click Model Management v. Williams*, 167 A.D.2d 279, 280 (1st Dep't 1990). New York began to recognize this cause of action at the end of the 19th and beginning of the 20th century. See *Posner Co. v. Jackson*, 223 N.Y. 325, 333 (1918); *Lamb v. Cheney & Son*, 227 N.Y. 418 (1920). Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior (say, pursuing its own economic interest). *NBT Bancorp v. Fleet/Norstar Financial Group Inc.*, 87 N.Y.2d 614, 621 (1996). There must be an actual breach of the contract. *Id*. Where there has been no breach of an existing contract, but only "interference with prospective contract rights," however, the plaintiff must show culpable conduct on the part of the defendant bordering on criminality. See *Guard-Life v. Parker Hardware Mfg.*, 50 N.Y.2d 183, 193-194 (1980); *Carvel v. Noonan*, 3 N.Y.3d 182, 190 (2004) (plaintiff must plead and prove that the defendant's conduct amounts to a crime or an independent tort and that defendant engaged in its conduct for the sole purpose of inflicting intentional harm on the plaintiff).

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The fashion model industry, in particular, is a bee-hive of activity and movement. Fashion models frequently walk out on their contracts (called model management agreements or representation agreements) to pursue representation with some other model manager in the same territory. For a time, agencies were reluctant to sign a fashion model who had walked out on his or her prior agency for fear that anyone who signed the model would be sued for tortious interference for "enabling" or "aiding and abetting" the model in the breach of the contract. The model was considered "radioactive" until he or she could represent to the prospective new agency that they were "contractually free" or could present a written release signed by the prior agency. This placed a heavy burden on the model seeking better representation or management of the model's career and had a chilling effect on the new agencies seeking new talent to represent. This persisted until the Second Circuit decided *Michele Pommier Models v. Men Women NY Model Mgt.*, 173 F.3d 845 (2d Cir. 1999), effectively shooting down the theory that agencies signing a model who breached his or her contract were guilty of tortious interference with contract because they "enabled" the breach.

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In the *Pommier* case, the plaintiff claimed that the defendant had induced a model, with whom plaintiff had an exclusive five-year representation contract, to break the exclusive agency and restrictive covenant of that contract by working instead with the defendant. The district court had granted the defendant's motion for summary judgment and the plaintiff appealed. The Second Circuit affirmed (although on slightly different grounds), finding that the plaintiff failed to present evidence upon which a reasonable jury could find that the model, who was actively looking for another agency to represent her at the time she signed with the defendant, would not have breached her contract "but for" the defendant's actions. *Pommier*, 173 F.3d at 845. In order to prove the causation element of a tortious interference cause of action (i.e., the defendant's intentional inducement of a third party to breach the contract) a plaintiff must show that the third party would not have breached the contract "but for" the activities of the defendant. Id.; see also *Sun Gold v. Stillman*, 95 A.D.3d 668, 669 (1st Dep't 2012); *Washington Ave. Assocs. v. Euclid Equip.*, 229 A.D.2d 486, 487 (2d Dep't 1996). The Second Circuit found that the evidence "overwhelmingly demonstrated" that the model intended to break her contract with the plaintiff several months before her negotiations with the defendant. 173 F.3d at 845. The model had contacted another agency prior to reaching out to the defendant and had sought out defendant through her attorney, who told defendant that his client would sign with another agency if defendant did not sign her. Id. But of significance to the industry was the Second Circuit's rejection of the plaintiff's contention that the defendant "necessarily" induced the model to breach the restrictive covenant that forbade her from being represented by an agency other than plaintiff "because she was incapable of breaching that obligation without the cooperation of another agency." Id. The court emphatically stated:

> We reject that interpretation of the law of inducement to breach. If that were the law, a restrictive covenant would become not only a contract but a servitude. A party, although theoretically free to breach the contract by paying the damages, would be incapable of finding a substitute, as any new contractor would make itself liable merely by agreeing to serve.

173 F.3d at 845. This interpretation, the court stated, was consistent with New York policy disfavoring unreasonably burdensome restrictions on employment or livelihood in the context of covenants not to compete. Id. (citing *Columbia Ribbon & Carbon Mfg.*

Co. v. A-1-A, 42 N.Y.2d 496, 499 (1977) and *Murray v. Cooper*, 268 A.D. 411 (1st Dep't 1944)).

The Second Circuit's pronouncements in *Pommier* made it easier for models to obtain new representation if they were dissatisfied with their current managers. Like a Grand Master in chess seeing defeat in eight to 10 moves ahead and resigning, modeling agencies faced with a dissatisfied model moving to a competitor saw the difficulty in meeting the "but for" causation standard for tortious interference with contract and, rather than sue the competitor, attempted to work things out with the competitor for the model's early release from his or her contract. These arrangements usually took the form of an agreement among the prior agency, the model and the new agency in which the model was given a release in exchange for the prior agency receiving a portion of the commissions earned by the new agency for a specific time-period. All parties would release each other from all liability in consideration for this early termination and commission-splitting agreement.

But *Pommier* was not a panacea for the industry and lawsuits claiming tortious interference with contract were, and still are, brought from time-to-time, particularly where the agency losing the talent felt that it was the target of repeated poaching or a particularly high-earning model was suspected of having been poached by a competitor. See, e.g., *Ford Models v. Wilhelmina Models*, Index No. 653277/2016 (Sup. Ct., N.Y. County March 15, 2017); *Wilhelmina Models v. IMG Models*, Index No. 653401/2012 (Sup. Ct., N.Y. County Sept. 27, 2012); *Men Women NY Model Mgt. v. Ford Models*, Index No. 601144/2010, 2011 WL 3689360 (Sup. Ct., N.Y. County Aug. 15, 2011); *Next Mgt. v. Ford Models*, Index No. 114956/2010 (Sup. Ct., N.Y. County Feb. 22, 2011).

The case of *Ford Models v. Wilhelmina Models* is significant in that it denied the defendant's motion to dismiss despite rather vague and conclusory allegations of tortious interference. The model himself provided an affidavit in support of the defendant's motion, recounting his dissatisfaction with the plaintiff's management of his career and the events leading up to his signing a new contract with the defendant. According to the model's affidavit, the model met with the defendant to discuss new representation. A week later the model sent an email "terminating" his contract with the plaintiff [Note: Most model management agreements require notices to be sent by certified or registered mail unless this is modified through negotiations]. Five days later, the plaintiff responded to the model that the contract remained in full force and effect until it was due to expire some ten months later [Note: most model management agreements have an initial term of three years, with one-year automatic renewals unless terminated 90 days before the expiration of the initial term or subsequent anniversary, with no ability for early termination]. The model signed the new contract with the defendant the next day and, once learned, the plaintiff sent two "cease and desist" letters to defendant before commencing suit. In its motion to dismiss, the defendant argued that the bare allegation that defendant was aware of the model's contract with plaintiff at the time defendant agreed to represent the model does not amount to tortious interference with contract (citing the *Pommier* case, among others). In denying the motion, the trial court ruled that while the plaintiff did not allege any specific facts to prove the third element (defendant's intentional and improper procuring of a breach), the model's affidavit was not "conclusive to warrant dismissal" and "[d]iscovery may lead to facts that support a finding that the breach would not have happened but for [defendant's] actions." Id. at *3.

The Second Circuit's pronouncements in 'Pommier' made it easier for models to **obtain new representation** if they were dissatisfied with their current managers.

Thus, a defendant faced with the prospect of a tortious interference with contract lawsuit will find it hard to achieve a quick and inexpensive dismissal. Relief, if any, will have to await the making of a summary judgment motion after discovery. For the party considering whether to bring such a suit, they had better be ready for the long haul, which will pay off only if they can ultimately establish that "but for" the defendant's interference, the talent who walked out on his or her contract would not have done so.