



THE PATTERN JURY INSTRUCTIONS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ARE WRONG, THE INDEPENDENT CRIME OR TORT ELEMENT IS A FACTUAL QUESTION FOR THE JURY AND SHOULD NOT BE DECIDED AS A MATTER OF LAW BY THE COURT, MOTION TO SET ASIDE THE \$5 MILLION VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to set aside the verdict based upon flawed jury instructions should have been granted. Plaintiff was awarded a \$5 million verdict based upon complaints made by the defendant, who taught at the school, which led to plaintiff's firing from her position as superintendent of the NYS School for the Deaf. The Fourth Department determined the pattern jury instructions, which the trial court followed, do not state the correct way to instruct a jury on the elements of tortious interference with prospective economic advantage. One of the elements is the commission of an independent crime or tort. The pattern jury instructions indicate that whether an independent crime or tort has been committed should be determined by the court as a matter of law. The Fourth Department disagreed and held that whether defendant committed an independent crime or tort is a factual question for the jury:

To state a cause of action for tortious interference with prospective economic advantage, "a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff[]" The term "[w]rongful means" has been defined by the Court of Appeals as conduct amounting "to a crime or an independent tort" This definition was a refinement to the ... previous description of the standard, which required "more culpable conduct on the part of the defendant" for the interference when there is no breach of an existing contract. ..." [M]ore culpable' conduct" [has been defined] as including the "wrongful means" Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract

... [T]he determination whether particular facts constitute the independent tort is almost always a factual determination best left to the jury. Thus, while the court should evaluate the evidence to decide which independent tort(s) fits the fact pattern presented, the disputed underlying elements of the independent tort should still be charged to the jury. [Ray v Stockton, 2018 NY Slip Op 04861, Fourth Dept 6-29-18](#)

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Plaintiff Breached Contract By Not Being Ready on the Time-of-the-Essence Date and Was Therefore Not Entitled to a Return of the Downpayment/Plaintiff's "Tortious-Interference-with-Contract" Cause of Action Against Brokers Dismissed Because Sellers Did Not Breach the Contract

In finding plaintiff was not entitled to return of her downpayment because she was not ready to close on the "time-of-the-essence" date, the Second Department explained the relevant analytical criteria, as well as the elements of a tortious interference with contract cause of action:

The sellers established, prima facie, that they were ready, willing, and able to perform on the time-of-the-essence closing date, and that the plaintiff lacked a lawful excuse for her failure to close In opposition, the plaintiff failed to raise a triable issue of fact Accordingly, the sellers established that they did not breach the contract and that the plaintiff was not entitled to the return of her down payment

The plaintiff alleged that the brokers tortiously interfered with the contract between the plaintiff and the sellers. The elements of a



cause of action for tortious interference with contract are (1) 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 that contract; and (4) damages Here, the brokers established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the third-party, i.e., the sellers, did not breach the contract; rather, the plaintiff breached the contract when she did not appear on the time-of-the-essence closing date. In opposition, the plaintiff failed to raise a triable issue of fact. [Iacono v Pilavas, 2015 NY Slip Op 01418, 2nd Dept 2-18-15](#)