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CORPORATIONS—OFFICERS AND DIRECTORS—LIABILITY FOR INDUCING A CORPORATION TO BREACH ITS CONTRACTS—Plaintiff real estate company brought suit against the directors of a corporation and other third persons for an alleged conspiracy to induce the corporation to breach its contract with plaintiff. The complaint alleged that the corporation had entered into an agreement whereby plaintiff was to procure a purchaser for certain premises owned by the corporation and that plaintiff had found a purchaser; that before a written offer could be obtained, the corporation contracted to sell to another broker who was to be used as a conduit to transfer title to the purchaser found by the plaintiff, and who was to receive the usual commission. In the supreme court the defendant's motion to dismiss the complaint was denied and defendants appealed. *Held,* order reversed. Absent an allegation that the defendants had induced the corporation to breach its contract with the plaintiff, the allegation that the defendants agreed to "conceal" the making of the contract by the corporation was insufficient to impose liability upon the directors. *Potter v. Minskoff,* 2 App. Div. (2d) 513, 156 N.Y.S. (2d) 872 (1956).

The apparent lack of uniformity among courts in regard to a corporate director's or officer's liability in tort for inducing the breach of a contract between the corporation and a third party is probably attributable to the relatively short history of this cause of action.[1] The crucial question in these cases involves a determination of whether or not interference by one occupying the position of agent is privileged or, as some courts say, justi-

[1] For a discussion of the tort in general, see Carpenter, "Interference with Contract Relations," 41 HARV. L. REV. 728 (1928); Sayre, "Inducing Breach of Contract," 36 HARV. L. REV. 663 (1923).

fied.[2] The case most often cited as granting a privilege reached this result by treating the corporate agent as the alter ego of his principal, thereby making inducement of one by the other a theoretical impossibility.[3] Early New York cases indicated the agent would not be liable, but only when the plaintiff's breach of contract action against the principal was adequate.[4] Other cases, however, have held the directors liable without mentioning the possibility of a privilege.[5] It has been held that the agency relationship per se does not preclude liability, where the acts of the agent were not in protection of some interest recognized by the law.[6]

Most of the decided cases have conceded that, as a matter of policy, directors and officers should be free to exercise their business judgment without fear of such liability.[7] The existence or non-existence of a privilege should be determined by an evaluation of the interests of the respective parties,[8] i.e., if the policy favoring freedom of action by the corporate agent outweighs the policy of protecting the plaintiff's individual interest, there is a privilege.[9] A review of the authorities establishes that few jurisdictions can be categorized as either denying the privilege altogether or granting an absolute privilege of action. The decisions indicate that the activities of directors will be privileged if the inducement to breach occurs while they are acting bona fide in the best interests of the corporation. This conclusion is strengthened by later decisions from jurisdictions formerly thought to have denied any privilege.[10] The New York courts once upheld a seemingly absolute privilege,[11] but subsequent decisions, without overruling prior cases, have indicated that the privilege can exist only when the director is acting in good faith in his capacity as a director.[12] In the principal case, the court was clearly correct in dismissing the complaint for want of any allegation that the defendants induced the corporation to breach its contract with the plaintiffs,[13] and the court's observation that

[2] Although some courts still use the term "malice," it is now generally regarded to mean an intentional inducement without justification. Kurtz v. Oremland, 33 N.J. Super. 443, 111 A. (2d) 100 (1955).

[3] Said v. Butt, [1920] 3 K.B. 497 (dictum). See also Greyhound Corp. v. Commercial Casualty Ins. Co., 259 App. Div. 317, 19 N.Y.S. (2d) 239 (1940).

[4] Hicks v. Haight, 171 Misc. 151, 11 N.Y.S. (2d) 912 (1939).

[5] Morgan v. Andrews, 107 Mich. 33, 64 N.W. 869 (1895); Jones v. Stanly, 76 N.C. 355 (1877). These cases, however, based liability on malicious inducement or fraud.

[6] Sidney Blumenthal & Co. v. United States, (2d Cir. 1929) 30 F. (2d) 247.

[7] E.g., Buckley v. 112 Central Park South, Inc., 285 App. Div. 331, 136 N.Y.S. (2d) 233 (1954).

[8] 41 HARV. L. REV. 728; PROSSER, TORTS, 2d ed., § 106 (1955).

[9] Zoby v. American Fidelity Co., (E.D. Va. 1956) 143 F. Supp. 763.

[10] Imperial Ice Co. v. Rossier, 18 Cal. (2d) 33, 112 P. (2d) 631 (1941); Lee v. Fisk, 222 Mass. 418, 109 N.E. 833 (1915).

[11] Greyhound Corp. v. Commercial Casualty Ins. Co., note 3 supra.

[12] Matter of Brookside Mills, 276 App. Div. 357, 94 N.Y.S. (2d) 509 (1950); Buckley v. 112 Central Park South, Inc., note 7 supra.

[13] The elements of the cause of action are given in Israel v. Wood Dolson Co., 1 N.Y. (2d) 116, 134 N.E. (2d) 97 (1956).

the pleading contained no allegation that the acts of the corporate officers were done with the motive of personal gain indicates only that such a motive can normally be found where privilege is lost.[14] The overriding consideration at this time seems to be the thought that since the relationship between the director and the corporation is such that the corporation cannot act at all except through the agency of its directors, the directors should be relatively free when acting in the interests of the corporation. The latest cases confirm this policy as a sound basis upon which a court may rest a decision that the actions of directors and officers are justified.[15]

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[14] Sayre acknowledges such motive as the distinction between an "incidentally caused" and "intentionally procured" breach. 36 HARV. L. REV. 663 at 683.

[15] Terry v. Zachry, (Tex. Civ. App. 1954) 272 S.W. (2d) 157; Allison v. American Airlines, (N.D. Okla. 1953) 112 F. Supp. 37; Pennington Trap Rock Co. v. Pennington Quarry Co., 22 N.J. Misc. 318, 38 A. (2d) 869 (1944).