

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: : Chapter 11 Case No. 94 B 43517 (BRL)
: :
WEST PAN, INC., d/b/a PIZZA PIAZZA, : :
: :
Debtor, : :
: :
----- : :
WEST PAN, INC., : :
: :
Plaintiff, : Adv. Pro.: 95-1415 (AJG)
: :
-vs.- : :
: :
MARTHA PERRY, ALVIN TRENK, PIZZA : **ORDER DISMISSING WEST PAN,**
PIAZZA, INC., PIZZA PIAZZA OF NEW : **INC.'S TORTIOUS INTERFERENCE**
JERSEY, INC., PIAZZA MIA, INC., : **COMPLAINT AND DENYING AWARD**
TECHTRON, INC., and PIZZA PIAZZA OF : **OF COMPENSATORY OR PUNITIVE**
NEW YORK, INC., : **DAMAGES**
: :
Defendants. : :
----- : :

Upon consideration of Amended Cross Motion to Dismiss Complaint filed by defendants, Martha Perry, Pizza Piazza, Inc., and Alvin S. Trenk, in the above-captioned matter, and the Court being satisfied as set forth by the Court on the record on December 14, 2005, a copy of the transcript attached hereto as Exhibit A, that the plaintiff has failed to prove the elements of a claim for tortious interference with contract; it is hereby

ORDERED, that the Motion be and hereby is **GRANTED**; and it is further

ORDERED, that West Pan Inc.'s complaint against Martha Perry Feldman and Alvin S. Trenk be and hereby is dismissed with prejudice; and it is further

ORDERED, that a true copy of this order be served upon all Counsel within 10 days of the date hereof.

Dated: January 31, 2006

s/Arthur J. Gonzalez
Arthur J. Gonzalez, USBJ

Exhibit A

1 (Proceedings commenced at 10:59 a.m.)

2 THE COURT: All right. With respect to West Pan,
3 are the parties on the phone?

4 MR. WEISS: Yes, Your Honor. Mr. Weiss.

5 THE COURT: Anyone else on the phone?

6 (No response.)

7 THE COURT: All right. Mr. Weiss, I'll take a
8 brief recess. Would you contact counsel for Martha Perry,
9 as well as counsel for Mr. Trenk, and see if there's any
10 confusion about the scheduling, because I would prefer to
11 read this decision into the record with them appearing
12 either by phone or in person.

13 MR. WEISS: Sure. I'll do that, Your Honor.

14 THE COURT: And if necessary, I can put this off
15 until sometime tomorrow and read it into the record.

16 MR. WEISS: Okay. I will call them and I'll get
17 back to you at this same number.

18 THE COURT: All right. Yes.

19 MR. WEISS: I'll get right back to you.

20 (Pause.)

21 THE COURT: Please be seated. Who is on the
22 phone?

23 MR. WEISS: Hello.

24 THE COURT: Yes, Mr. Weiss. Who else is on the
25 phone?

1 MR. ROSENBAUCH: Phil Rosenbach, Your Honor.

2 THE COURT: All right. I can't hear you.

3 MR. BALSAMO: Your Honor, Stephen Balsamo from
4 Garrity Graham.

5 MR. ROSENBAUCH: Judge, this is one of these
6 instances where we have a connection hooked to a
7 connection.

8 THE COURT: All right. I don't know if there was
9 some confusion from my chambers. I know I think we advised
10 Mr. Weiss -- and we may have assumed that Mr. Weiss was
11 going to tell the other parties. I don't particularly think
12 that we may have actually asked them to do so, so maybe
13 that explains why Mr. Trenk's counsel and Ms. Perry's
14 counsel were not on the phone earlier.

15 MR. ROSENBAUCH: I think that's what happened.

16 THE COURT: All right.

17 "Upon motion by defendant, Martha Perry
18 Feldman and subsequently joined by defendant,
19 Alvin Trenk, this court has been asked to dismiss
20 its award of punitive damages, subject to
21 subsequent hearing to determine those damages
22 arising from the court's Memorandum Decision
23 issued on August 22nd, 2003 in the West Pan, Inc.
24 vs. Martha Perry, Alvin Trenk, Pizza Piazza, et
25 al.

1 In that decision, this court awarded \$1.00
2 as nominal damages under West Pan, Inc.'s
3 tortious interference with contract theory,
4 finding that plaintiff West Pan had failed to
5 establish that it is entitled to any actual
6 damages under its complaint.

7 Subject to a subsequent hearing, this court
8 also awarded punitive damages to plaintiff West
9 Pan for defendant's tortious conduct."

10 It is prior to that hearing that this motion was made.

11 "As a procedural matter, pursuant to Rule
12 7052, 9014, 9023 of Federal Rules of Bankruptcy
13 Procedure and pursuant to Southern District of
14 New York Local Bankruptcy Rules, this court will
15 reconsider its findings contained in its August
16 22nd, 2003 decision. This reconsideration is
17 based on the substantial need to correct the
18 Court's findings regarding New Jersey law in it's
19 August 22nd, 2003 decision.

20 In their motions to dismiss punitive
21 damages, the defendants argued, that as a matter
22 of New Jersey law, actual damages are required --
23 are a required element of tortious interference
24 with contract complaints.

25 The defendants argue that because this court

1 did not find any actual damage to plaintiff West
2 Pan based on its tortious interference complaint,
3 as a matter of law, the tortious interference
4 complaint must fail and, therefore, cannot
5 support any award for punitive damages. This
6 particular argument was not included in the
7 briefs submitted by either party in the original
8 complaint, nor was it included in defendant
9 Trenk's original brief in opposition to punitive
10 damages.

11 Under New Jersey case law applicable to the
12 instant issue, 'one who unjustifiably interferes
13 with the contract of another is guilty of a
14 wrong.'

15 I will not read the citations into the record,
16 but before this is transcribed, I will give a copy to the
17 transcriber what I've read from that contains the citations
18 and I will review this decision for its accuracy, et
19 cetera, before it is ultimately issued as a certified
20 transcript of this morning's proceeding.

21 "As the case law indicates, New Jersey has
22 adopted the *Restatement (Second) of Torts*
23 definition of tortious interference with an
24 existing contract, which requires the complaint
25 to allege actual damage suffered by the

1 plaintiff.

2 As the parties to the current controversy
3 have previously pointed out, in certain specific
4 situations where there is an aggravated
5 intentional tort accompanied by wanton and
6 willful disregard of the rights of another, the
7 New Jersey Supreme Court has been willing to
8 aware punitive damages even without a finding of
9 actual damages. For example, *In re Nappe v.*
10 *Anchelewitz, Barr, Ansell & Bonello*, 97 N.J.37,
11 477 A.2d 1224(1984) and *Smith v. Whitaker*, 160
12 N.J. 221, 734 A.2d 243,252(1999), the New Jersey
13 Supreme Court explained that it has been their
14 policy to allow punitive damages to punish the
15 offender for clearly egregious, tortious conduct.
16

17 This Court notes that in 1995, the New
18 Jersey State Legislature amended the Punitive
19 Damages Act to require an award of compensatory
20 damages as a statutory predicate for an award of
21 punitive damages and disallows nominal damages as
22 a basis for a punitive damages claim. NJSA
23 2A:15-5.13(c). That provision did not take
24 effect until October 27th, 1995 and thus does not
25 govern the instant matter.

1 In *Nappe*, the New Jersey Supreme Court held
2 that actual damages are not a required element of
3 an egregious intentional fraud where the
4 plaintiff 'suffers some loss, detriment, or
5 injury' in connection with the tort. 97 N.J. at
6 47-48, 477 A.2d at 1229. In *Smith v. Whittaker*,
7 160 N.J. 221, 734 A.2d243,252(1999), the New
8 Jersey Supreme Court, further explaining their
9 reasoning in *Nappe*, held that where there is a
10 substantial legal injury due to a defendant's
11 aggravated and egregious tortious conduct,
12 'nominal damages supporting a claim of punitive
13 damages, may be awarded to vindicate the invasion
14 of plaintiff's rights.' *Id.* At 252. The *Smith*
15 court explained that in a case of intentional
16 tort, 'the true loss, injury and detriment'
17 suffered by plaintiff is not necessarily
18 coextensive with the compensatory damages
19 awarded, which is merely a monetary amount
20 awarded in court to compensate or indemnify a
21 plaintiff.' *Id.* at 252 citing *Nappe v.*
22 *Anchelewitz, Barr, Ansell & Bonello*, 97 N.J. 41
23 n. 1,477 A.2d 1224 (1984).

24 While the New Jersey Supreme Court allowed
25 for punitive damage awards without the finding of

1 actual damages in both *Smith* and *Nappe*, it has
2 greatly limited the extension of this policy to
3 only certain types of egregious intentional
4 torts. Both *Nappe* and *Smith* are clearly
5 distinguished from the current case. In *Nappe*,
6 the New Jersey Supreme Court had to decide
7 whether actual damage is a required element for
8 the tort of *legal fraud* and if not, 'whether
9 punitive damages may be awarded in the absence of
10 a compensatory damage award in an action for
11 *legal fraud*' (emphasis added). *Nappe* at 1226.
12 The *Nappe* court did not extend its holding on
13 legal fraud to all other intentional torts. In
14 *Smith*, the New Jersey Supreme Court was dealing
15 with the special circumstances under New Jersey's
16 Survival Act. In that case, motorist Helen
17 Robbins had died instantly when hit by
18 defendant's negligently maintained truck. *Smith*
19 at 246. Because Robbins died instantly and had
20 not experienced conscious pain and suffering, the
21 jury had not been able to award compensatory
22 damages under New Jersey's Survival Act. The
23 question for the New Jersey Supreme Court in
24 *Smith* was 'whether a plaintiff's inability to
25 establish conscientious pain and suffering in a

1 survival action involving instantaneous death
2 bars a claim for punitive damages.' *Smith* at
3 251. The court decided that the specific factual
4 details of Robbins' death and the legal limit on
5 compensatory damages to victims without conscious
6 pain and suffering should not bar plaintiff from
7 recovering punitive damages. *Id.*

8 The New Jersey Supreme Court has also
9 specifically treated tortious interference with
10 contract complaints differently than the
11 intentional fraud (*Nappe*) and the Survival Act
12 complaints (*Smith*), holding that actual
13 compensatory damages are a required element of
14 the tortious interference complaint. See
15 *Printing Mart vs. Sharp Electronics*, 563 A.2d 31,
16 37 (N.J. 1989). In *Printing Mart* ,
17 decided after both *Nappe* and *Smith*, the New
18 Jersey Supreme Court implicitly distinguished
19 that plaintiff's tortious interference complaint
20 from intentional fraud complaint in *Nappe*. In
21 *Printing Mart*, the Court specifically held that
22 tortious interference complaints *did* require
23 actual damage as an essential element, while in
24 *Nappe*, the New Jersey Supreme Court had treated
25 intentional fraud differently, finding that

1 actual damage was not a required element of the
2 tort. *Printing Mart v. Sharp Electronics*, 563
3 A.2d 31, 37 (N.J. 1989).

4 This distinction for tortious interference
5 complaints has previously been examined and
6 reinforced by other courts. In *Norwood Easthill*
7 *Associates v. Norwood Easthill Watch*, 222 N.J.
8 Super. 385,536 A.2d 1320 (N.J. Super A.D. 1988),
9 the plaintiff sought an award of punitive damages
10 on top of nominal damages in its tortious
11 interference complaint, but could not demonstrate
12 that it had incurred any actual damage because of
13 the defendant's interference with a contract.

14 Just as West Pan argues before this court,
15 the plaintiff in *Norwood* argued that, despite" --
16 there it was their inability to prove, whereas
17 here the (Court's finding of no actual damages, I
18 realized that West Pan disagrees with the Court's
19 finding of no actual damages) -- "it should still
20 could be able to obtain punitive damages under
21 the authority of *Nappe, Id.* At 1321. Citing New
22 Jersey case law, as well as the 2nd Restatement,
23 the *Norwood* court explained that due to the fact
24 that 'plaintiff cannot show any injury, loss or
25 detriment reasonably attributable to defendant's

1 alleged malicious interference,' it must reject
2 plaintiff's position on the issue of punitive
3 damages. *Id.*

4 Other courts have followed the same logic
5 when interpreting New Jersey law. In *Lighting*
6 *Tube, Inc. vs. Witco Corp.*, 4F.3d 1153 (3d Cir.
7 1993) the Third Circuit Court of Appeals
8 reinforced the distinction between the *Nappe* line
9 of cases and the complaints based on tortious
10 interference, finding that the *Nappe* line of
11 cases purely address the tort of intentional
12 fraud. As the Third Circuit decision indicated,
13 'the New Jersey Supreme Court does not appear to
14 have extended [*Nappe*] to the cause of action of
15 tortious interference.' *Lighting Tube* at 1168
16 n.7.

17 In another case focused on this issue,
18 *Matrix Essential, Inc. V. Cosmetic Gallery, Inc.*,
19 the plaintiff (Matrix), citing *Nappe*, argued that
20 it need not establish any actual damages as an
21 element of its tortious interference with
22 contract claim. *Matrix* at 1249.

23 Arguing that tortious interference is an
24 'intentional tort,' Matrix argued that it
25 therefore fell under *Nappe* line of cases and did

1 not require proof of compensatory damages. *Id.* As
2 was in the case of *Lighting Lube*, in *Matrix*, the
3 U.S. District Court found the *Nappe* line of cases
4 did not govern its inquiry because *Nappe* has
5 specifically addressed the intentional -- the
6 tort of intentional fraud. The *Matrix* court
7 concluded 'thus, we hold that damages are an
8 essential element of *Matrix's* tortious
9 interference claim and *Matrix* has utterly failed
10 to prove any damages.' *Id.*

11 Upon reconsideration, this court concludes
12 that actual damage is a required element of
13 tortious interference with the contract
14 complaints under New Jersey law. In this court's
15 Memorandum Decision dated August 22nd, 2003, the
16 Court found that the plaintiff West Pan, Inc. had
17 failed to establish that it suffered any actual
18 damages under its tortious interference with
19 contract complaint. After reconsideration, the
20 Court reiterates that West Pan has failed to
21 prove actual damages arising from the defendant's
22 interference with the contract. Therefore, this
23 Court finds that plaintiff, West Pan, has failed
24 to meet this required element of tortious
25 interference with the contract complaint under

1 New Jersey law. Based on this finding, this Court
2 dismisses West Pan's tortious interference
3 complaint and will not award plaintiff either
4 compensatory or punitive damages.

5 Furthermore, based on the court's ruling,
6 there is no reason to address the argument raised
7 in Mr. Trenk's original brief in opposition to
8 punitive damages.'

9 Ms. Perry's counsel is directed to -- following
10 receipt of the transcript, to settle an order consistent
11 with this court's decision. It is my understanding that
12 that order will be the final order in the West Pan
13 adversary proceeding, that then will be subject to appeal
14 by the parties to the district court, because this ruling
15 today closes out, from my perspective, the punitive damages
16 issue that was left open in the court's decision in August
17 of 2003. Thank you.

18 MR. ROSENBAUCH: Thank you, Your Honor.

19 MR. WEISS: Thank you, Your Honor.

20 (Proceedings concluded at 11:22 p.m.)

21 I, CHRISTINE FIORE, certify that the foregoing
22 transcript is a true and accurate record of the
23 proceedings.

24 s/Christine Fiore

25 Christine Fiore

1 Fiore Transcription Service, Inc.

2 67 Elaine Drive

3 Shelton, CT 06484

4 January 4, 2006

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