

COMMERCIAL DIVISION UPDATE

BY GEORGE BUNDY SMITH AND THOMAS J. HALL

When Tort Claims Duplicate Contract Claims

When a tort claim duplicates a contract claim, it must be dismissed. Despite this seemingly straightforward rule, New York courts have long struggled with deciding when to dismiss a tort claim that arises in the context of a contractual relationship.¹

Many New York courts appear to have simply looked to the broad standard of whether the tort claim “relates to” the breach of contract claim; if so, the tort claim will be dismissed. Other decisions, however, have held that tort claims should not be dismissed merely because they relate to a contractual relationship, so long as the tort claim adds “something extra” not found in the contract claim.

The tension between these two methods of analyzing this issue is brought into stark focus by the recent decision in *Gotham Boxing Inc. v. Finkel*.² The court in *Gotham Boxing* endorsed the “something extra” test and distanced itself from the “relates to” test by asserting that the historical use of that test can be viewed as mere dicta.

‘Gotham Boxing Inc. v. Finkel’

In *Gotham Boxing*, Justice Bernard Fried of the Manhattan Commercial Division attempted to tease a straightforward rule for determining when a party has independent fraud and contract claims out of seemingly contradictory New York jurisprudence. The parties’ dispute involved their failed efforts to arrange a heavyweight championship boxing match. Plaintiffs alleged that on June 16, the parties reached an oral agreement that the two boxers they respectively represented, Vladimir Klitschko and Shannon Briggs, would fight on Nov. 11. Plaintiffs further alleged that defendants subsequently insisted that Mr. Briggs turn down invitations to fight other boxers in July and August, while reassuring Mr. Briggs and his agent that the Nov. 11 fight would happen. The Nov. 11 fight failed to occur, and Mr. Klitschko fought a match against a different boxer that same evening. Plaintiffs brought six causes



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of action against defendants, including breach of contract and fraudulent misrepresentation, and defendants moved to dismiss.

Justice Fried concluded that to survive as an independent cause of action, a fraud claim arising from a contractual relationship “must be based on some additional representation, omission, or conduct, other than the contract itself, which was fraudulent when performed... [I]t does not... matter that the alleged fraudulent representation is virtually identical to the promise contained in the contract as long as it is made at a different time and place.”³ Justice Fried denied the motion to dismiss the fraudulent misrepresentation claim, reasoning that “the alleged fraudulent misrepresentations are not the same as those [representations] on which the alleged oral contract on June 16 was based.”⁴ Rather, plaintiffs’ fraud claim “is based on a series of assurance, omissions, and conduct by [defendants] after June 16 none of which are part of the oral agreements that plaintiffs claim the parties reached on June 16.”⁵

The ‘Something Extra’ Analysis

By requiring “some additional representation, omission, or conduct,” *Gotham Boxing* fits into the line of cases holding that a tort claim arising out of a breach of contract is sustainable as an independent cause of action only if the allegations contain something extraneous to the breach of contract claim. New York courts historically have identified four aspects of a tort claim that may distinguish it from a related breach of contract claim so as to allow its survival:

- **Breach of a Legal Duty Independent From the Contract.** The distinguishing factor most often cited by New York courts is the existence of a legal duty independent from the contract. The New York Court of Appeals has explained that “a simple breach of contract is not to be

considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.”⁶

“Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties.”⁷ The courts impose tort liability on them in part because “a special relationship of ‘trust and confidence’” exists between the parties to such contracts, and “born of this relation is a special duty, which, when betrayed, is made actionable in tort.”⁸ However, as Justice Alan Scheinkman of the Westchester Commercial Division rightly noted in his recent opinion in *Technical Support Servs. Inc. v. Int’l Business Machines Corp.*, there is generally no “special relationship” between “parties to an arm’s-length business relationship.”⁹

- **Unique Damages.** An action should proceed under a contract theory rather than in tort where the party is merely seeking enforcement of its bargain.¹⁰ Where the damages sought in tort are distinct from the damages sought in contract, however, some New York courts have permitted plaintiffs to bring a tort claim independent from the related contract claim.¹¹ For example, where the parties’ contract contains a provision limiting contractual damages, those otherwise unrecoverable contract damages may constitute “special damages” recoverable in tort.¹² Notably, punitive damages are not considered a type of “special damages” giving rise to an independent tort claim.¹³ In *Oppman v. IRMC Holdings Inc.*, another opinion by Justice Fried, the court observed that “[p]laintiffs cannot bootstrap what is essentially a contract claim into an action for fraud merely by tacking a request for punitive damages onto their claim.”¹⁴

- **Manner in Which the Injury Occurred.** The New York Court of Appeals has observed that the manner in which the plaintiff’s injury occurred is another factor that may distinguish a tort claim from a related contract claim.¹⁵ A tort claim is not duplicative of a contract claim if the “manner in which the injury arose” and “the resulting harm” are “typical of tort claims.”¹⁶ For example, the New York courts have found the manner in which the injury occurred to be “typical of tort claims” where the injury involved fires, explosions of electrical transformers, pipes bursting from the cold, and building collapses.¹⁷ An independent tort claim may not survive where “the injury was not personal injury or property damage; there was no abrupt, cataclysmic occurrence; and the harm was simply

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replacement cost of [a] product.”¹⁸

• **Public Interest.** Some New York courts have held that a tort claim may be distinguished from a contract claim on the grounds that the contract involves a matter of “significant public interest.”¹⁹ For instance, in *Trustees of Columbia Univ. v. Gwathmey Siegel & Assocs. Architects*, the First Department sustained tort claims against an architectural firm alleged to have negligently breached its contract to design and construct a building.²⁰ The court held that plaintiff’s separate tort claim survived because the contract involved “the construction of a façade for a tall building in a heavily trafficked public area of a college campus” and was “so affected with the public interest that the failure to perform competently could have had catastrophic consequences.”²¹ However, the “catastrophic consequences” that have served to justify an independent tort claim appear to have been limited to those that threaten life or limb.²²

The ‘Relates To’ Analysis

Recognizing that *Gotham Boxing* stands in contrast to the “relates to” standard recited in other New York cases, the court attempted to marginalize the “relates to” test by implying that relatively few cases now employ it and by asserting that such language has been, at any rate, merely dicta in those decisions.²³ As an initial matter, the “relates to” language has been employed by more than just a handful of courts. Dozens of decisions from the Appellate Division and the Commercial Division have dismissed tort claims, particularly fraud claims, on the grounds that they “relate to” breach of contract claims.²⁴ However, *Gotham Boxing*’s assertion that the “relates to” language has usually been mere dicta in these decisions finds significant support in the analysis of those cases. While many of those decisions began by addressing the “relates to” standard, the outcome of most of them ultimately turned on whether there was “something extra” to the fraud claim.²⁵

This is not universally true, however, as some such decisions clearly applied the broad “relates to” standard when analyzing whether the tort claim could survive. In *Appian Estates Inc. v. Mastroddi*, the Second Department affirmed the trial court’s determination that plaintiff’s “fraud cause of action cannot be independently sustained.”²⁶ Plaintiffs in *Appian* sued defendant insurance agents alleging that defendants falsely assured them that they would obtain total and complete liability insurance coverage on behalf of plaintiffs. Plaintiffs asserted causes of action for breach of contract, negligence and fraud. Despite the fact that defendants’ false assurances would constitute

breach of an independent legal duty under the analysis in *Gotham Boxing*, the court dismissed the fraud claim because it was “inextricably related” to the contract and negligence claims.

Though *Gotham Boxing* represents perhaps the clearest analysis of the standard applicable in determining when to sustain a tort claim arising out of a contractual relationship, it leaves significant questions unanswered. With its exclusive focus on the independent legal duty issue, *Gotham Boxing* leaves open the question of whether the other factors—most notably the manner of the injury and public interest—may play a role in the analysis of tort claims arising from contractual relationships. Other articulations of this analysis by commercial division justices, such as that of Justice Elizabeth Emerson of the Commercial Division of Suffolk County in *Kelly v. Vikse*, similarly leave open these issues.²⁷

The court in ‘Gotham Boxing Inc. v. Finkel’ endorsed the “something extra” test and distanced itself from the “relates to” test by asserting that the historical use of that test can be viewed as mere dicta.

Conclusion

The *Gotham Boxing* court’s effort to rationalize the sometimes contradictory case law regarding whether a tort claim is duplicative of a related contract claim is persuasive and assists in bringing much needed analytical clarity to this issue. Further refinement is needed at the appellate level, however, to bring closure to this vexing question.



1. *Sommer v. Federal Signal Corp.*, 79 NY2d 540, 550, 593 NE2d 1365, 1369, 583 NYS2d 957, 961 (1992).

2. *Gotham Boxing Inc. v. Finkel*, 18 Misc3d 1114(A), 856 N.Y.S.2d 498, 2008 WL 104155 (Sup. Ct. N.Y. Co. 2008) (Fried, J.).

3. *Id.* at *10.

4. *Id.* at *11.

5. *Id.*

6. *Clark-Fitzpatrick Inc. v. Long Island R. Co.*, 70 NY2d 382, 289-90, 516 NE2d 190, 193-94, 521 NYS2d 653, 656-57 (1987) (internal citations omitted); see also *Bd. of Managers of the Arches at Cobble Hill Condominium v. Hicks & Warren, LLC*, 14 Misc3d 1234(A), 836 N.Y.S.2d 497, 2007 WL 556897, at *5 (Sup. Ct. Kings. Co. Feb 20, 2007) (Demarest, J.).

7. *Sommer*, 79 NY2d at 551, 593 NE2d at 1369, 583 N.Y.S.2d at 961.

8. *Apple Records, Inc. v. Capitol Records Inc.*, 137 AD2d 50, 55, 529 NYS2d 279, 282 (1st Dept. 1988).

9. *Technical Support Servs. Inc. v. Int’l Business Machines Corp.*, 18 Misc3d 1106A, 856 NYS2d 26, 2007 WL 4500382, at *22-23 (Sup. Ct. Westchester Co. Dec. 3, 2007) (Scheinkman, J.).

10. See *Landgarten v. Noise Cancellation Technologies*, No. 92 Civ. 6871, 1993 U.S. Dist. LEXIS 11088, at *10 (S.D.N.Y. Aug. 11, 1993).

11. See *Deerfield Communications Corp. v. Chesebrough-Ponds Inc.*, 68 NY2d 954, 956, 502 NE2d 1003, 1004, 510 N.Y.S.2d 88, 89 (1986); *Bridgestone/Firestone Inc. v. Recovery Credit Services Inc.*, 98 F.3d 13, 20 (2d Cir. 1996) (applying New York law).

12. *VTech Holdings Ltd. v. Lucent Technologies Inc.*, 172 F.Supp.2d 435, 441 (S.D.N.Y. 2001).

13. See *Krantz v. Chateau Stores of Canada, Ltd.*, 256 AD2d 186, 187, 683 NYS2d 24, 25 (1st Dep’t 1998). But see *CSI Inv. Partners II, L.P. v. Cendant Corp.*, 507 E.Supp.2d 384, 427 (S.D.N.Y. 2007).

14. *Oppman v. IRMC Holdings Inc.*, 14 Misc. 3d 1219(A), 836 N.Y.S.2d 494, 2007 WL 151355, at *10 (Sup. Ct. N.Y. Co. Jan. 23, 2007) (Fried, J.).

15. *Sommer*, 79 N.Y.2d at 552, 593 N.E.2d at 1369, 583 N.Y.S.2d at 961.

16. *Id.* at 552-53, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962.

17. *LaBarre v. Mitchell*, 256 A.D.2d 850, 853, 681 N.Y.S.2d 653, 655 (3d Dept. 1998) (fire); *Duane Reade v. SL Green Operating P/ship*, 30 A.D.3d 189, 190-91, 817 N.Y.S.2d 230, 231-32 (1st Dept. 2006) (burst pipes); *Syracuse Cablesystems Inc. v. Niagara Mohawk Power Corp.*, 173 A.D.2d 138, 143, 578 N.Y.S.2d 770, 772 (4th Dept. 1991) (transformer explosion); *Trustees of Columbia Univ. v. Gwathmey Siegel & Assocs. Architects*, 192 A.D.2d 151, 155, 601 N.Y.S.2d 116, 118 (1st Dept. 1993) (building collapse).

18. *Sommer*, 79 N.Y.2d at 552, 593 N.E.2d at 1369, 583 N.Y.S.2d at 961; see also *Roizen v. Marder’s Nurseries Inc.*, 161 Misc. 2d 689, 690 (Sup. Ct. Suffolk Co. 1994).

19. *Sommer*, 79 N.Y.2d at 552, 593 N.E.2d at 1369, 583 N.Y.S.2d at 961.

20. *Trustees of Columbia Univ.*, 192 A.D.2d at 155, 601 N.Y.S.2d at 118.

21. *Id.*

22. See *Asian Vegetable Research and Dev. Ctr. v. Inst. of Int’l Educ.*, 944 F. Supp. 1169, 1181 (S.D.N.Y. 1996).

23. *Gotham Boxing Inc.*, 2008 WL 104155, at *11 n.6.

24. See, e.g., *Schenkman v. New York College of Health Professionals*, 29 A.D.3d 671, 672, 815 N.Y.S.2d 159, 161 (2d Dept. 2006); *Tsilogiannis v. 53-11 90th Street Assocs. Inc.*, 293 A.D.2d 468, 469, 739 N.Y.S.2d 633 (2d Dept. 2002); accord *Titan Capital Group II, LLC v. Raghavan*, 19 Misc. 3d 1115(A), 2008 WL 921026, at *4 (Sup. Ct. N.Y. Co. March 27, 2008) (Cahn, J.); *Bridge Street Homeowners Ass’n v. Brick Condominium Developers, LLC*, 18 Misc. 3d 1128(A), 2008 WL 344136, at *4 (Sup. Ct. N.Y. Co. Feb. 7, 2008) (Demarest, J.); *Henrietta Piping Inc. v. Antetomaso & Micca Group, LLC*, 11 Misc. 3d 909, 913-14, 816 N.Y.S.2d 663 (Sup. Ct. Monroe Co. 2006) (Fisher, J.).

25. See, e.g., *Tsilogiannis*, 293 A.D.2d at 469, 739 N.Y.S.2d 633; *Henrietta Piping*, 11 Misc. 3d at 913-14, 816 N.Y.S.2d 663.

26. *Appian Estates Inc. v. Mastroddi*, 274 A.D.2d 366, 367, 710 N.Y.S.2d 119, 120 (2d Dept. 2000).

27. See *Kelly v. Vikse*, 7 Misc. 3d(A), 801 N.Y.S.2d 235, 2004 WL 3272107, at *2 (Sup. Ct. Suffolk Co. 2004) (Emerson, J.).

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