IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

J. SCOTT MAGLIARI, Plaintiff, v. TOWER CONSTRUCTION CORP., HYON OK LEE, CHING EUN KEI, and JOHN OR JANE DOES NUMBER 1 THROUGH 10 Defendants.	)	Civil Action No. 97-1271 **ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

I. PROCEDURAL BACKGROUND

This matter came before the Court on November 18, 1998 , in Courtroom A on Plaintiff's motion for judgment on the pleadings. Timothy MB Farrell, Esq. appeared on behalf of Plaintiff. Pedro M. Atalig, Esq. and Yoon H. Chang, Esq. appeared on behalf of Defendants Tower Construction Corp. and Hyon Ok Lee. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

[p. 2]

II. FACTS

On September 16, 1998, Plaintiff J. Scott Magliari (hereinafter referred to as "Plaintiff") moved the Court to dismiss the counterclaim of Defendants Tower Construction and Hyon Ok Lee (hereinafter referred to as "Defendants") for tortious interference of contract. Included within the motion to dismiss,

Plaintiff moved for judgment on the pleadings. Since the pleadings were not closed at that time, the Court denied the motion for judgment on the pleadings after finding it was premature.[1]

On October 14, 1998, Plaintiff filed the instant motion for judgment on the pleadings, contending that Defendants have failed to show that they were unable to perform the contract or in the alternative, that Plaintiff has an affirmative defense.

III. ISSUES

1. Whether Plaintiff is entitled to judgment on the pleadings?

IV. ANALYSIS

A. Motion for Judgment on the Pleadings

In support of his motion, Plaintiff contends that the undisputed facts show that his actions did not prevent Defendants from performing its construction contract with Hwang Byun Gon. As such, judgment on the pleadings is appropriate under Com.R.Civ.P 12(c).[2]

Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. Hal Roach Studios v. Richard Feiner and Company, Inc., 896 F.2d 1542, 1550 (9th Cir.1990); see also Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., Inc., 50 F.3d 1486 (9th Cir.1995). For purposes of the motion, the allegations of the non-moving party must **[p. 3]** be accepted as true, while the allegations of the moving party which have been denied are accepted to be false. Id.

Since the CNMI has no written or customary law on the cause of action for intentional interference with contract, the Court looks to the common law as expressed in the restatements of the law. Pangelinan v. Itaman, 4 N.M.I. 114, 118 (1994); see also 7 CMC § 3401. As such, the elements of intentional interference with contract can be found at § 766A of the Restatement (Second) of Torts which provides, in pertinent part, as follows:

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[1] *See* Order After Hearing on Plaintiff's Motion to Dismiss, dated October 2, 1998, at 4-5.

[2] Rule 12(c) of the Commonwealth Rules of Civil Procedure provides, in pertinent part, that:
> After the pleadings are closed but within such time as not to delay trial, any party may move for judgment on the pleadings . . . .

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Restatement (Second) of Torts, § 766A (1979).

Plaintiff contends that Defendants have failed to allege in their counterclaim that Plaintiff was successful in preventing them from successfully performing under the contract. However, a claim of intentional interference with contractual relations may also lie where the party's performance is made more costly or burdensome. Pacific Gas & Electric v. Bear Stearns & Co., 791 P.2d 587, 592 (Cal.1990). In their counterclaim, Defendants allege that Plaintiff's counsel contacted CMS and requested that they not pour any concrete for Defendants at the San Vicente work site.[3] As a result, Defendants were unable to complete construction within the time limits of the contract.[4] Since their performance was untimely, Defendants allege that they are liable to Mr. Hwang for $300 per day in liquidated damages.[5] The Court finds that Defendants' allegations support the fact that performance was made more costly by Plaintiff's actions. As such, Defendants have properly alleged a cause of action for intentional interference with contractual relations.

[p. 4] As an alternative argument, Plaintiff contends that it has an affirmative defense to the counterclaim as case law has carved out certain privileges allowing for justifiable interference of contract in certain situations. See Plaintiff's Memorandum citing Mefford v. City of Dupontonia, 354 S.W.2d 283 (Tenn.1961)(city acted on behalf of health and general welfare of its citizens); Richette v. Solomon, 187 A.2d 910 (Pa.1963)(providing honest and friendly advice to another).

However, more recently, the Restatement (Second) of Torts has rejected the privilege concept in favor of a requirement that a defendant be subjected to liability for interference only if his acts were "improper": "one who intentionally and *improperly* interferes with the performance of a contract . . . ". Restatement (Second) of Torts, § 766, 766A (emphasis added). See Wagenseller v. Scottsdale Memorial

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[3] *See* Counterclaim, § 4; *see also* letter from Timothy MB Farrell to CMS, dated February 4, 1998, attached as Exhibit A to Opposition to Motion for Judgment on the Pleadings.

[4] Id. at §§ 5, 7.

[5] Id. at § 6.

Hospital, 710 P.2d 1025 (1985). Whether a particular action is improper is determined by a consideration of seven factors:

(1) the nature of the actor's conduct,
(2) the actor's motive,
(3) the interests of the other with which the actor's conduct interferes,
(4) the interests sought to be advanced by the actor,
(5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(6) the proximity or remoteness of the actor's conduct to the interference and
(7) the relations between the parties.

Restatement (Second) of Torts, § 767 (1979); Wagenseller, supra, at 1042.

Therefore, in addition to proving the elements of tortious interference, a plaintiff must show that the defendant acted improperly. Id. If the plaintiff is unable to show the impropriety of the defendant's conduct based on an examination of the factors, the conduct is not tortious. Id.

In the case at bar, the Court finds that a genuine factual dispute exists as to whether Plaintiff's alleged interference with the construction contract between Defendants and Mr. Hwang was improper. As Defendants point out, the letter sent by Plaintiff's counsel to CMS requests that CMS not pour *any* concrete on behalf of Defendants in light of the then existing preliminary injunction. However, the letter fails to notify CMS that the preliminary injunction only involved work within five feet of the retaining wall and not the entire project. In light of this factual dispute, the Court finds that the **[p. 5]** determination of impropriety is best left to the trier of fact after weighing Plaintiff's actions against the seven factors set forth above.

Because a factual issue remains as to whether Plaintiff's actions were improper, the Court finds that Plaintiff is not entitled to judgment on the pleadings. See Hal Roach Studios, supra.

V. CONCLUSION

For all the reasons stated above, Plaintiff's motion for judgment on the pleadings is **DENIED**.

So ORDERED this 22 day of March, 1999.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge