

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

JAMES NATION)	
)	
Plaintiff,)	
)	No. 09 CV 6917
)	Hon. Judge Matthew F. Kennelly
AMERICAN CAPITAL, LTD., d/b/a)	
American Capital Strategies, Ltd., a)	
Delaware corporation)	
)	
Defendant.)	

**PLAINTIFF’S MOTION AND MEMORANDUM IN SUPPORT
OF HIS MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Plaintiff, James Nation, by and through his attorneys, Fritzshall & Pawlowski, and for his Memorandum in Support of his Motion for Summary Judgment states as follows:

I. Statement of Facts

James Nation (“Jim”) was formerly employed by The Spring Air Company (“Spring Air”). He was hired in May 1990 as Senior Vice President for national accounts. He was promoted to President and CEO in October 1995. (James Nations’ Local Rule 56.1 Statement of Undisputed Facts, ¶ 1). Spring Air manufactured and sold mattresses to the public. Spring Air was a co-op where the ownership of individual factories were individually held by families around the United States, but all participated in manufacturing the Spring Air brand. (Id. ¶ 20)

Spring Air operated like two entities. HIG owned Consolidated Bedding, which had five factories in the Spring Air group. There were eleven other individual licensees that formed the remainder of Spring Air. In the summer of 2007, HIG conducted a “roll-up” of the outstanding licensees, which was essentially to buy the individual licensees up and consolidate the business into one entity along with the corporate facility and intellectual property. (Id. ¶¶ 23-25).

On or about June 2007, Jim was informed by HIG people that since Spring Air had been sold to HIG, the new owners were placing someone else in his position. Bob Hellyer replaced Jim as President and CEO, but Jim remained on as an employee for about three months. In October 2007, Jim negotiated a severance agreement with Spring Air. Ron Lueptow, Spring Air's CFO at the time, signed the Agreement on Spring Air's behalf. Pursuant to the Agreement, Jim was to receive \$1,243,140.00 as severance payments over a period of months. He was paid \$836,153.28, until July 2008, when Spring Air stopped payments. (Id. ¶¶ 2, 25-26).

Jim learned Spring Air stopped paying him when he received an email from Greg Moore, the Vice President of human resources at Spring Air. The email was sent to Jim and three other executives also receiving severance payments under agreements with Spring Air, Eric Spitzer, Ron Lueptow and Vince Zupkus, saying that Spring Air has stopped making severance payments indefinitely. Jim called Steve Cumbow, Spring Air's Chief Financial Officer at the time, after receiving the email and Cumbow acknowledged that Spring Air was breaching his Agreement. (Id. ¶¶ 18, 27). Spring Air eventually resumed payments to Spitzer, Lueptow and Zupkus. (Id. ¶ 28). Jim fully performed his obligations under the Agreement and is still owed \$406,980.72 under the Agreement. (Id. ¶¶ 26, 31). Jim filed suit against Spring Air for breach of the Agreement, but Spring Air filed for Chapter 7 bankruptcy. (Id. ¶ 22).

Jim then filed the instant suit for tortious interference with his contract against American Capital. American Capital was originally a lender to HIG in its roll-up of the licensees and was putting capital into Spring Air, along with HIG in 2007, to enable Spring Air to move forward. (Id. ¶ 14-15). The relationship changed significantly into 2008 and 2009, however.

In March 2008, the Spring Air Board of Directors had one American Capital person on it. By May-June 2008, there was a change in capital structure that precipitated a change in the Board of Director's structure. American Capital invested about \$15,000,000.00 into Spring Air and

obtained a total of four of the seven seats on the Spring Air Board of Directors. Bowen Diehl, William Byers, Michael Michienzi and William Moore were American Capital people on the Spring Air Board of Directors and, at that point, American Capital had control of Spring Air. (Id. ¶¶ 14, 16, 21).

American Capital was ingrained into Spring Air. American Capital maintained an office inside Spring Air's Tampa offices in 2008. They had people with offices in various areas inside Spring Air's Tampa office and used a conference room in Spring Air's Tampa building that housed American Capital employees who were there every week. At times, there were five to six American Capital people in the conference room for a week at a time. American Capital was provided daily reports of Spring Air's bank information by way of a Spring Air generated cash flow spreadsheet and would ask questions about pending deals and sales analysis. Byers also received copies of these reports. (Id. ¶¶ 4, 34). The American Capital people also ingrained themselves into Spring Air's outside vendor relationships. Michienzi went with Cumbow and Hellyer and some others to meet a spring making vendor, Legget and Platt, in June 2008, in Atlanta and again on July 15, 2008, in Missouri. (Id. ¶¶ 8, 19).

William Byers was there every week and about 90% of the time. (Id. ¶ 31). Michienzi worked in the Spring Air Tampa office five to six days per month from March 2008 through May 2009. He came to the Spring Air Tampa office a few times in 2008 and 2009 to give the Spring Air personnel pep talks. (Oleg Dep. pp. 53-54). When he would work there, he would use the old Tampa Spring Air CEO's office. (Id. ¶ 9, 13).

Michienzi was so entrenched in Spring Air that he considered himself part of the company. Michienzi sent an email on July 25, 2008, wherein he said "Since June 1st when we took control, we had made tremendous progress. . ." Again, Michienzi sent an email on September 24, 2008, wherein

he stated “We are staged to execute a sizeable cost cutting plan to be complete by Oct. 6th,” and by “we,” Michienzi meant “Spring Air.” (Id. ¶¶ 10-12)

American Capital, through its power on the Board, ultimately replaced Hellyer with Steve Cumbow. Michienzi, the Chairman, approved Cumbow’s appointment. Cumbow worked for American Capital as a vice president of finance immediately before being hired as Spring Air’s Chief Financial Officer. Cumbow reported to the CEO Robert Hellyer until Hellyer left Spring Air. (Id. ¶¶ 6-7, 18-19, 40).

By way of its infusion into Spring Air, American Capital was well aware of Spring Air’s Agreement and severance payment obligations to Jim. Michienzi sent an email to Hellyer, Spring Air’s CEO, and other Spring Air people, on May 9, 2008, rejecting the idea of allowing Jim to renegotiate his non-compete agreement and take a lower sum of money in exchange for less non-compete time. Diehl also participated in those email discussions. (¶¶ 10, 17, 32). Ultimately, it was American Capital through Michael Michienzi that made the decision to stop Jim’s severance payments under Spring Air’s Agreement with Jim. At that point, in July 2008, Michienzi was making all of the financial decisions for Spring Air. Spring Air did not do anything without American Capital’s approval. (Id. ¶¶ 5, 38-39).

II. Argument

Jim is entitled to summary judgment on his tortious interference claim. He has a valid and enforceable severance Agreement with Spring Air. American Capital was well aware of Spring Air’s obligations under Jim’s severance Agreement. Nonetheless, in order to save itself money as the lender of a dying company, American Capital intentionally and unjustifiably induced Spring Air to breach Jim’s Agreement. Spring Air stopped paying Jim and Jim has been damaged in excess of \$406,980.72. There is no question of fact as to American Capital’s tortious conduct or liability.

A. Legal Standard

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A genuine issue for trial exists only when the evidence could allow a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The court must view all evidence in a light most favorable to the nonmoving party, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987), and draw all inferences in the nonmovant's favor. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir.1990). However, if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024, 1032 (7th Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 249 (1988). In determining whether a genuine issue exists, the court “must view the evidence presented through the prism of the substantive evidentiary burden.” Anderson, 477 U.S. at 254, 106 S.Ct. at 2513. In making its determination, the court's sole function is to determine whether sufficient evidence exists to support a verdict in the nonmovant's favor. Id. at 255, 106 S.Ct. at 2513-14.

B. American Capital Tortiously Interfered With Jim’s Agreement

There is no question of material fact surrounding American Capital’s tortious conduct. To prove intentional interference with a contract, Jim needs to show 1) the existence of a valid contract, 2) defendant’s awareness of this contractual relationship, 3) defendant’s intentional and unjustified inducement of a contractual breach, 4) a subsequent breach by the other as a result of defendant’s wrongful acts and, 5) damages. Regan v. Garfield Ridge Trust and Savings Bank, 220 Ill.App.3d 1078, 581 N.E.2d 759 (2nd Dist. 1991); Blivas and Page, Inc., v. Klein, 5 Ill.App.3d 280 (2nd Dist. 1972); Girsberger v. Kresz, 261 Ill.App.3d 398, 633 N.E.2d 781 (1st Dist. 1994); Cress v. Recreation

Services, Inc., 341 Ill.App.3d 149, 795 N.E.2d 817 (2nd Dist. 2003). There is no question of fact on any of the elements.

First, there is no question that Jim had a valid and enforceable severance Agreement with Spring Air. Spring Air paid him more than \$800,000.00 under the Agreement prior to American Capital interfering. Next, American Capital was well aware of Jim's Agreement. The American Capital people, including Michienzi, Diehl, Byers and Moore, all participated in email discussions concerning Jim's Agreement and his attempts to negotiate a shorter period and a buyout. They all concluded that they should not let Jim out of his non-compete obligations.

Ultimately, American Capital, without any justification, intentionally used its leverage as the primary creditor and controlling interest in the Spring Air Board of Directors to induce Spring Air to stop paying Jim under the Agreement. American Capital owned 4 of the 7 seats on the Board. They occupied office space in Spring Air's headquarters. They received daily cash flow reports on Spring Air's financial condition. They took Steve Cumbow, an American Capital employee, and placed him as CFO, only later to have him assume overall charge of Spring Air when they fired Bob Hellyer. American Capital controlled every financial decision Spring Air made, including refusing to allow Spring Air to honor its contract with Jim. There is also no question that Spring Air breached its Agreement as a result of American Capital's direct and intentional interference. Jim's payments stopped and he has been damaged in excess of \$400,000.00.

III. Conclusion

The facts and the law in this matter are not complicated or extensive. American Capital took over Spring Air's Board, took over Spring Air's offices and took over control of Spring Air's finances as a result of some enormous loans it made in a risky attempt to keep Spring Air alive. When American Capital discovered it had invested heavily in a dying company, it did everything it could to save whatever of its investment was left, which meant cutting spending everywhere,

including Jim's severance Agreement. Unfortunately for American Capital, they cannot take control of Spring Air with the hopes of reaping huge profits without also bearing the liability for its control decisions when it causes Spring Air to breach contracts. Jim is entitled to summary judgment.

Respectfully submitted,
James Nation

/s/ Steven N. Fritzshall
By: one of his attorneys

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NOTICE OF FILING

To: Alan W. Nicgorski
Scandaglia & Ryan
55 E. Monroe, Suite 3440
Chicago, Il 60603

PLEASE TAKE NOTICE THAT the undersigned caused to be filed with the United States District Court for the Norther District of Illinois, 219 S. Dearborn, Chicago, Illinois on, January 18, 2011 , the attached Plaintiff's Motion and Memorandum in Support of his Motion for Summary Judgment in the above captioned matter.

PROOF OF SERVICE

I, Steven N. Fritzshall, attorney, certify that I caused to be served upon same as above, the foregoing by facsimile, email and or mail from 6584 N. Northwest Hwy., Chicago, IL at or before the hour of 5:00 p.m. on 1/18/11 .

/s/ Steven N. Fritzshall

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