

17-869

Conte v. Emmons

1 In the
2 United States Court of Appeals
3 For the Second Circuit
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6 AUGUST TERM, 2017

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8 ARGUED: MARCH 26, 2018

9 DECIDED: JULY 10, 2018

10
11 No. 17-869-cv

12
13 ANTHONY CONTE,
14 *Plaintiff-Appellee,*

15
16 *v.*

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18 BOB EMMONS, Individually and as Assistant District Attorney of
19 Nassau County, New York, WILLIAM WALLACE, Individually and as
20 Assistant District Attorney of Nassau County, New York, MIKE
21 FALZARNO, Individually and as Special Investigator for the Office of
22 the District Attorney of Nassau County, New York,
23 *Defendants-Appellants,*
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25 Larry Guerra, City of New York, Rhoda Zwicker, Individually and
26 as a Clerk in the Nassau County District Attorney's Office, Nassau
27 County, New York, Nassau County District Attorney's Office,
28 Katherine Rice, Individually and as District Attorney of Nassau
29 County, New York, Christina Sardo, Individually and as Assistant
30 District Attorney of Nassau County, New York, Nassau County,
31 New York, Denis E. Dillon, Individually and as Former District
32 Attorney of Nassau County, New York, Lisa Bland, Individually and
33 as Attorney for the Police Department of the City of New York, Tefta
34 Shaska, Individually and as a Detective for the Police Department of
35 the City of New York, New York City Police Department, Robert

1 Vinal, Individually and as Deputy Commissioner of the Police
2 Department of the City of New York, John and Jane Does, 1-20,
3 Unknown Individuals and Employees of the Nassau County District
4 Attorney's Office, Phillip Wasilausky, Individually and as Assistant
5 District Attorney of Nassau County, New York,

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7 *Defendants.*
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10 Appeal from the United States District Court
11 for the Eastern District of New York.
12 No. 06-cv-04746 – Joseph F. Bianco, *Judge.*
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15 Before: WALKER AND POOLER, *Circuit Judges*, COTE, *District Judge*.^{*}
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17 Robert Emmons and William Wallace, prosecutors in the
18 Nassau County District Attorney's Office, and Michael Falzarno, an
19 investigator in the Office, appeal from the denial of their post-trial
20 motion for judgment as a matter of law, and the corresponding entry
21 of judgment following a jury verdict in favor of Plaintiff Anthony
22 Conte, on Conte's claims against them for tortious interference with
23 contract under New York law. Because we conclude that there was
24 insufficient evidence for a reasonable juror to have found at least two
25 elements of Conte's claims—intent and causation—we REVERSE.

26 Judge POOLER dissents in a separate opinion.
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^{*} Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

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ELIZA MAE SCHEIBEL, Wilson Elser Moskowitz
Edelman & Dicker LLP (Peter Meisels, *on the brief*),
White Plains, NY, *for Defendants-Appellants*.

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MICHAEL H. ZHU, New York, NY, *for Plaintiff-Appellee*.

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10 JOHN M. WALKER, JR., *Circuit Judge*:

11 Robert Emmons and William Wallace, prosecutors in the
12 Nassau County District Attorney's Office, and Michael Falzarno, an
13 investigator in the office, appeal from the denial of their post-trial
14 motion for judgment as a matter of law, and the corresponding entry
15 of judgment following a jury verdict in favor of Plaintiff Anthony
16 Conte, on Conte's claims against them for tortious interference with
17 contract under New York law. Because we conclude that there was
18 insufficient evidence for a reasonable juror to have found at least two
19 elements of Conte's claims—intent and causation—we reverse.

20 Conte alleged in relevant part that appellants tortiously
21 interfered with his contracts when appellants investigated the
22 activities of I Media, a company Conte founded to produce and
23 distribute *TV Time*, a television magazine. The investigation focused
24 principally on Conte's possible defrauding of "route distributors,"
25 individuals who paid I Media upfront for the exclusive right to
26 distribute *TV Time* in a given area, and were to receive in return a sum

1 for each magazine they delivered. To state it briefly, I Media faced
2 serious difficulties in its early stages, and certain route distributors—
3 who had paid upfront for their routes but had not received any
4 magazines to distribute—became suspicious. Two distributors made
5 complaints to the District Attorney’s Office, which assigned the
6 investigation to appellants at the Office’s Criminal Bureau.
7 Ultimately, nearly fifty individuals reported their suspicions to the
8 District Attorney’s Office, which assigned the investigation to
9 appellants at the Office’s Criminal Frauds Bureau. Appellants
10 investigated the complaints, which included the issuance of grand
11 jury document subpoenas and significant inquiries to route
12 distributors, printers, and potential advertisers. No charges were
13 ultimately filed, and, when I Media subsequently failed, Conte sued
14 appellants and others for, *inter alia*, tortious interference with contract.

15 Following the close of evidence at a jury trial, appellants moved
16 pursuant to Fed. R. Civ. P. 50(a) for judgment as a matter of law. The
17 district court denied the motion and submitted the claims to the jury
18 which ultimately found in favor of Conte on his tortious interference
19 with contract claims against appellants and subsequently awarded
20 Conte \$1,381,500, which included \$678,000 in punitive damages.¹

¹ Following thorough rulings at the motion to dismiss stage, 2008 WL 905879 (E.D.N.Y. Mar. 31, 2008), and the summary judgment stage, 2010 WL 3924677 (E.D.N.Y. Sept. 30, 2010), trial was narrowed to the following

1 Appellants renewed their motion for judgment as a matter of law
2 pursuant to Fed. R. Civ. P. 50(b), and, following developments not
3 relevant here, *see Conte v. County of Nassau*, 596 F. App'x 1 (2d Cir.
4 2014); *Conte v. Emmons*, 647 F. App'x 13 (2d Cir. 2016), the district
5 court denied the motion and directed entry of judgment in favor of
6 Conte on the relevant claims. This appeal followed.

7 DISCUSSION

8 To warrant post-verdict judgment as a matter of law, the
9 movant must show that the evidence, when viewed most favorably to
10 the non-movant, was insufficient to permit a reasonable juror to have
11 found in the non-movant's favor. *See S.E.C. v. Warde*, 151 F.3d 42, 46
12 (2d Cir. 1998). The standard is a high one, met only in "rare

claims: (i) unlawful arrest under New York law and 42 U.S.C. § 1983 against Assistant District Attorney Philip Wasilausky; (ii) abuse of process under New York law and § 1983 against appellants and Wasilausky; (iii) a *Monell* claim against Nassau County; and (iv) tortious interference with contract under New York law against appellants and Wasilausky. In resolving defendants' motion for judgment as a matter of law under Fed. R. Civ. P. 50(a), the district court dismissed the *Monell* claims against Nassau County but submitted the remaining claims to the jury. As discussed, the jury found against appellants on Conte's tortious interference with contract claims, but it ruled in their favor on Conte's claims against them for abuse of process. The jury separately found Wasilausky liable on Conte's unlawful arrest claims, but not on Conte's claims for abuse of process and tortious interference with contract. The district court granted Wasilausky judgment as a matter of law on Conte's unlawful arrest claims in its first post-trial opinion. *See Conte v. County of Nassau*, 2013 WL 3878738, at *18 (E.D.N.Y. July 26, 2013). We affirmed. *See Conte v. County of Nassau*, 596 F. App'x 1, 3 (2d Cir. 2014).

occasions.” *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1536 (2d Cir. 1992). The movant, generally, must be able to show a “complete absence of evidence supporting the verdict [such] that the jury’s findings could only have been the result of sheer surmise and conjecture.” *Luciano v. Olsten Corp.*, 110 F.3d 210, 214 (2d Cir. 1997) (internal quotation marks omitted).² For the reasons that follow, appellants met that strict burden here.

The unchallenged jury instructions correctly listed the elements of a tortious interference with contract claim under New York law: (i) the existence of a contract; (ii) defendants’ knowledge of that contract; (iii) defendants’ intentional inducement of a breach of that contract; (iv) a breach; (v) but for the defendants’ actions, that contract would not have been breached; and (vi) damages. App’x 611. After

² Conte argues that appellants relied on contentions in their renewed Rule 50(b) motion that they did not raise in their initial pre-verdict Rule 50(a) motion. Generally, this would require appellants to make an additional showing to obtain their requested relief, specifically, that entry of judgment as a matter of law “is required in order to prevent manifest injustice.” *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 164 (2d Cir. 1998). But, on appeal, Conte has not responded to appellants’ argument that he may not challenge the insufficiencies in appellants’ Rule 50(a) motion because he did not bring those issues to the attention of the district court in his opposition to appellants’ Rule 50(b) motion. Conte’s counsel acknowledged the point at oral argument. Contrary to our dissenting colleague’s recollection, *see* dissenting op. at 4, 7 n.3, Conte’s counsel conceded in no uncertain terms that we are to review for sufficiency of the evidence under the general standard of review for judgments as a matter of law that is identified in the text above. Oral Arg. Tr. 9:13–10:08.

1 a careful review of the trial record, we conclude that appellants are
2 entitled to judgment as a matter of law because no reasonable juror
3 could have properly inferred from the evidence that at least two
4 elements were satisfied: intent and causation.

5 *Intent.* The jury was properly instructed that appellants could
6 be liable for tortious interference with contract only if they acted with
7 the “purpose of inducing [a] breach of contract.” App’x 611. *See, e.g.,*
8 *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp.*, 87 N.Y.2d 614, 621 (1996).
9 In *NBT Bancorp*, the Court of Appeals noted that the requirement of
10 “an existing, enforceable contract” is what distinguishes a claim for
11 tortious interference with contract from a claim for tortious
12 interference with business relations, as to which interference with
13 prospective contracts will suffice, *id.*, a separate tort claim that Conte
14 did not bring. It is clear that New York law emphasizes the
15 requirement that a tortious interference with contract claimant
16 establish that the defendant purposefully intended to cause a contract
17 party to breach a particular contract. *Id.* at 620 (“Ever since tortious
18 interference with contractual relations made its first cautious
19 appearance in the New York Reports . . . our Court has repeatedly
20 linked availability of the remedy with a breach of contract.”). As
21 stated in *NBT Bancorp*, although the contract-based claim carries a
22 lesser culpability requirement than the more general business-
23 relations claim, the contract-based claim is strictly “defined by the

1 nature of the plaintiff's enforceable legal rights." *Id.* at 621 (citing
2 *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 193
3 (1980)); *see also Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189–90 (2004).

4 Here, there was no evidence presented to permit a reasonable
5 inference that appellants met the standard as set forth by the above
6 authorities. To begin, there was no evidence that appellants had any
7 personal interest in the breach of any contracts that Conte may have
8 had with route distributors, printers, or advertisers. *Rodrigues v. City*
9 *of New York*, 193 A.D.2d 79 (1st Dep't 1993) is instructive. There, the
10 First Department allowed an investigatory subject's tortious
11 interference with contract claim against prosecutors to proceed past
12 the pleading stage, but only on allegations that the prosecutors
13 "sabotage[d]" plaintiffs' contracts "in order to extort bribes from
14 plaintiffs." *Id.* at 88 (internal quotation marks omitted). We are far
15 afield from *Rodrigues*, which is the only instance we know of in which
16 a court recognized with approval a New York law tortious
17 interference with contract claim against prosecutors (or their staff) for
18 their conduct in investigating allegations of criminal activity.

19 Conte's strongest evidence on intent (viewed in his favor) was
20 that one of the appellants, Investigator Falzarno, had a personal
21 animus towards Conte, which manifested itself in an aggressive and
22 harmful handshake on delivery of a document subpoena, stopping a
23 route distributor on the street to tell him that Conte was a "fraud["]"

1 and “scam artist” and threatening that he could be arrested if he told
2 Conte about that conversation, and a comment reflecting Falzarno’s
3 intent to “get” Conte. Conte also relies on the fact that Assistant
4 District Attorney Wallace contacted certain of Conte’s counterparties
5 informing them that Conte was under investigation for fraud, and
6 that the term “Ponzi scheme” may have come up in a conversation
7 Wallace had with an attorney. There was virtually no evidence
8 pertaining to Assistant District Attorney Emmons’ state of mind.

9 For the jury to have inferred that this investigative conduct
10 evinced an ulterior purpose outside of appellants’ law enforcement
11 goals could only have been “sheer surmise and conjecture.” *Warren*
12 *v. Pataki*, 823 F.3d 125, 139 (2d Cir. 2016) (quoting *S.E.C. v. Ginder*, 752
13 F.3d 569, 574 (2d Cir. 2014)). Without evidence to the contrary, *see*
14 *generally Rodrigues*, 193 A.D.2d at 88, these actions cannot reasonably
15 be interpreted as anything but those of public servants pursuing
16 aggressively, and perhaps overly so, their law enforcement mandate.
17 At best, the evidence showed that appellants became passionately
18 invested in effectuating that mandate, but that does not allow for the
19 inference that their intent went beyond their lawful charge. Rather,
20 the record makes clear that any effect the investigation had on the
21 destruction of Conte’s contracts was simply incidental to appellants’
22 intent to get to the bottom of widely reported allegations of
23 fraudulent conduct and, moreover, that appellants never targeted

1 particular contracts. And New York law, for good reason, does not
2 allow tortious interference with contract claims to “rest on conduct
3 that is incidental to some other lawful purpose.” *Aetna Cas. & Sur. Co.*
4 *v. Aniero Concrete Co.*, 404 F.3d 566, 589 (2d Cir. 2005) (per curiam)
5 (internal quotation marks omitted); *see also Montano v. City of*
6 *Wateroliet*, 47 A.D.3d 1106, 1110 (3d Dep’t 2008) (dismissing claim
7 where “Plaintiff failed to offer proof that [an official’s] conduct was
8 not in furtherance of his official duties and not motivated by genuine
9 municipal/public health and safety concerns”).

10 In our view, it would be to the detriment of law enforcement to
11 accept the jury’s inferential finding of a purposeful intent on this bare
12 record. It would invite suits against prosecutors (and their staff) any
13 time a plausible allegation that the subject of an investigation lost
14 business as the result of a reasonably triggered investigation is
15 coupled with *some* indication that the investigators were somewhat
16 overzealous in going after the subject. The jury’s intent finding that
17 the appellants purposefully targeted particular contracts is wholly
18 without support.

19 **Causation.** The jury was also properly instructed that for
20 Conte to recover, he must have shown that “but for the defendants’
21 actions, the third party would not have breached.” App’x 611. *See,*
22 *e.g., Cantor Fitzgerald Assocs., L.P. v. Tradition N. Am., Inc.*, 299 A.D.2d
23 204, 204 (1st Dep’t 2002) (“An essential element of such a claim is that

1 the breach of contract would not have occurred but for the activities
2 of the defendant.”). Conte failed to establish this element as well. Our
3 review of the trial record unearths no admissible evidence allowing
4 for a reasonable inference that any of Conte’s contracting
5 counterparties stopped performing under a contract because of
6 anything appellants did or said.

7 Conte’s theory of causation as to his tortious interference with
8 contract claims was that his contracting counterparties breached their
9 agreements with him as a result of appellants’ investigative conduct.
10 At trial, Conte called only one route distributor, with whom he was
11 purportedly under contract, that interacted with any of the
12 appellants. The distributor, Paul Hoppe, testified that Falzarno
13 threatened him and told him and others that Conte was a fraud. But
14 Hoppe’s testimony was unequivocal that his “conversation with []
15 Falzarno had no bearing, whatsoever, on [his] continued business
16 relationship with I Media,” and that he stopped working with Conte
17 simply because “[t]he product wasn’t available.” App’x 141. Others
18 consistently testified similarly about I Media’s unsuccessful
19 relationships with printers and potential advertisers. See App’x 456,
20 486, 540–41. No witness remotely testified that they stopped
21 performing under a contract with Conte because of the statements or
22 actions of *appellants*.

1 Notably, in summation, Conte specifically listed thirty-one
2 non-testifying individuals and entities whose contracts were
3 purportedly interfered with. App'x 582–83. But because not one of
4 them testified, the record is silent as to whether, and, as importantly,
5 why, they stopped performing under their contracts with Conte.
6 Conte acknowledged this deficiency, conceding that “people are
7 reluctant to speak up and testify about what happened in this case.”
8 App'x 581. Aware of his lack of direct evidence, Conte asked the jury
9 to instead rely on “circumstantial evidence,” “and the logical
10 inferences that common sense should lead you to draw.” App'x 581.
11 But to conclude with no direct evidence that third parties breached
12 their contracts with Conte due to the acts of appellants—rather than
13 for business reasons or because of word spreading from the
14 disgruntled individuals with whom Conte battled in the early stages
15 of I Media—was not a permissible inference, but an improper
16 speculation.

17 In short, there was no evidence that anyone stopped
18 performing under a specific contract because of anything said or done
19 by appellants. And, to the extent the jurors relied on Conte's
20 testimony about what Conte's contracting counterparties told him
21 were the reasons for their breach, they relied improperly on hearsay
22 testimony.

