

41 A.D.3d 388, 839 N.Y.S.2d 727, 2007 N.Y. Slip Op. 05660
(Cite as: 41 A.D.3d 388)

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Minnelli v. Soumayah
N.Y.A.D. 1 Dept., 2007.

Supreme Court, Appellate Division, First
Department, New York.
Liza MINNELLI, Plaintiff-Respondent-Appellant,
v.
M'Hammed SOUMAYAH,
Defendant-Appellant-Respondent.
June 28, 2007.

Background: Employer brought action against former employee, alleging extortion and attempted extortion, breach of contract and breach of fiduciary duty. The Supreme Court, New York County, Barbara R. Kapnick, J., dismissed extortion and attempted extortion claims. Cross-appeals were taken.

Holdings: The Supreme Court, Appellate Division, held that:

(1) extortion and attempted extortion were criminal offenses that did not imply a private right of action, and

(2) employer had cause of action against former employee for breach of contract and breach of fiduciary duty based on former employee's alleged violation of agreement not to make any unauthorized disclosures of confidential information he might have acquired during course of his employment.

Affirmed.

McGuire, J., filed a concurring opinion.
West Headnotes

[1] Action 13 ⇌ 5

13 Action

13I Grounds and Conditions Precedent
13k5 k. Criminal Acts. Most Cited Cases
Extortion and attempted extortion were criminal offenses that did not imply a private right of action. McKinney's Penal Law §§ 110.00, 155.05(2)(e).

[2] Contracts 95 ⇌ 95(3)

95 Contracts

95I Requisites and Validity
95I(E) Validity of Assent
95k95 Duress

95k95(3) k. Threats in General. Most Cited Cases
Mere threat that does not force the other party to accede to some further demand does not constitute economic duress.

[3] Labor and Employment 231H ⇌ 145

231H Labor and Employment

231HIII Rights and Duties of Employers and Employees in General
231Hk143 Actions by Employer Against Employee
231Hk145 k. Right of Action. Most Cited Cases

Employer had cause of action against former employee for breach of contract and breach of fiduciary duty based on former employee's alleged violation of agreement not to make any unauthorized disclosures of confidential information he might have acquired during course of his employment.

*728 Harvey S. Mars, New York, for appellant-respondent.
Greenberg Traurig, LLP, New York (Israel Rubin of counsel), for respondent-appellant.

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MAZZARELLI, J.P., ANDRIAS, MARLOW,
BUCKLEY, McGUIRE, J.J.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered May 22, 2006, which, to the extent appealed from as limited by the briefs, granted so much of defendant's dismissal motion as was directed to the first cause of action (extortion and attempted extortion) in the amended complaint, and denied the motion with respect to the second and third causes of action (breach of contract and fiduciary duty), affirmed, without costs.

[1] The first cause of action for extortion and attempted extortion, alleging that defendant attempted to compel and compelled plaintiff to deliver money to him by threatening physical harm to plaintiff and her employees and a breach of their confidentiality agreement, was properly dismissed on the ground that extortion and attempted extortion are criminal offenses (*see* Penal Law § 155.05[2][e]; § 110.00) that do not imply a private right of action (*Niagara Mohawk Power Corp. v. Testone*, 272 A.D.2d 910, 911, 708 N.Y.S.2d 527 [2000]; *Crandall v. Bernard, Overton & Russell*, 133 A.D.2d 878, 879, 520 N.Y.S.2d 237 [1987], *lv. dismissed, lv. denied* 70 N.Y.2d 940, 524 N.Y.S.2d 672, 519 N.E.2d 618 [1988]). Moreover, although extortionate behavior, coercion and duress may be elements of a cause of action for tortious interference with contract or unjust enrichment, at common law there was never a private cause of action for extortion. Rather, extortion, as it has come to be understood today-obtaining of money by force or fear-was considered robbery to be punished criminally.

[2] To the extent that the first cause of action encompasses a claim for economic duress, that cause fails because a mere threat that does not force the other party to accede to some further demand does not constitute economic duress (*see 805 Third Ave. Co. v. M.W. Realty Assoc.*, 58 N.Y.2d 447, 451, 461 N.Y.S.2d 778, 448 N.E.2d 445 [1983]). And notwithstanding plaintiff's argument to the contrary, the first cause of action does not even hint at a claim for prima facie tort, which, we note, was eliminated as a separate cause of action when plaintiff amended her complaint.

[3] Defendant had a contractual obligation not to disclose confidential information*729 he might have acquired during the course of his employment with plaintiff. Construing the pleadings liberally and accepting the facts alleged as true (*see Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120, 672 N.Y.S.2d 8 [1998]), the court correctly determined that the complaint states a cause of action for breach of contract based on defendant's alleged violation of this agreement not to make such unauthorized disclosures, and for breach of fiduciary duty (*see Mandelblatt v. Devon Stores*, 132 A.D.2d 162, 167-168, 521 N.Y.S.2d 672 [1987]).

We have considered the parties' other arguments for affirmative relief and find them unavailing.

All concur except McGUIRE, J. who concurs in a separate memorandum as follows:McGUIRE, J. (concurring).

I agree with the majority's conclusion that plaintiff's first cause of action was properly dismissed, but disagree with the majority's discussion of extortion and attempted extortion. In my judgment, plaintiff makes a strong case for her position that recognizing a private right of action for extortion would be consistent with the three-pronged test set forth in *Sheehy v. Big Flats Community Dev.* 73 N.Y.2d 629, 633-634, 543 N.Y.S.2d 18, 541 N.E.2d 18 [1989]; *but cf. Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 230, 718 N.Y.S.2d 66 [2001] [declining to recognize a private right of action for conduct constituting the crime of commercial bribery because "the creation of such a right of action under the statute would be inconsistent with the existing legislative and remedial scheme, which gives the power of enforcement to the District Attorney"]. We need not resolve that issue, however, since plaintiff does not allege that she delivered money or property to defendant because of defendant's extortionate acts. Concerning attempted extortion, the Fourth Department has observed, "there is no independent tort in New York for civil conspiracy ... and an attempt to commit a crime or tort is analogous to a conspiracy to undertake such conduct" (*Niagara Mohawk Power Corp. v. Testone*, 272 A.D.2d 910, 911, 708 N.Y.S.2d 527 [2000] [citations omitted]). Thus, I would hold that there is no private right of

41 A.D.3d 388

Page 3

41 A.D.3d 388, 839 N.Y.S.2d 727, 2007 N.Y. Slip Op. 05660
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action for attempted extortion. I otherwise agree
with the majority's analysis.

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