

PROVING PUNITIVE DAMAGES IN COMMERCIAL LITIGATION CASES

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The general standard for Punitive Damages in Commercial Cases

A fact finder may award punitive damages when the defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations. (*3320 Leasehold Corp. v. Sahim*, 2016 NY Slip Op 3014(U), 2016 N.Y. Misc. LEXIS 252, * 10 [Sup Ct New York County, 2016] quoting *Ross v. Louise Wise Servs. Inc.*, 8 NY3d 478, 489 [2007]).

The wrongdoing in addition to being intentional, must be morally culpable, or be actuated by evil and reprehensible motives. (*Emmet & Co., v. Catholic Health E.*, 49 Misc.3d 1058, 1073 [Sup Ct New York County 2015] quoting *Walker v. Sheldon*, 10 NY2d 401, 405 [1961]). Thus, mere commission of a tort, even intentionally with malice, is not enough. There must be aggravating or outrageous circumstances, or a fraudulent or evil motive by defendant. (*Id.* quoting *Hoeffner v. Orrick Herrington & Sutcliffe, LLP* 85 A.D.3d 457, 458 [1st Dep't 2011]). The nature of the wrongdoing must be such that the character of the outrage is that associated with a crime. (*Ross*, 8 NY3d at 489 quoting *Prozeralik v. Capital Cities Communications, Inc.*, 82 NY2d 466, 479 [1993]).

Punitive damage claims lacking such allegations will be dismissed. (*Morsette v. "The Final Call,"* 309 AD2d 249, 254 [1st Dep't 2003]). For these reasons, punitive damages are rare, even in commercial tort cases such as fraud. They are only appropriate in extreme cases such cited above. (*See Spectrum Source Corp. v. Milano Diamond Galery, LLC*, 2015 NY Slip Op 3097(U), 2015 N.Y. Misc. LEXIS 2035, * 18 [Sup Ct New York County 2015]).

General Caveats in Punitive Damages Cases

The PJI contains an excellent summary of punitive damages and the reader would do well to start analysis there. (See PJI 2:278). It identifies certain factors to keep in mind when assessing whether the case is right for a punitive damages claim:

1. The jury may not award punitive damages unless there has been some award, even if nominal, for compensatory damages. (See 1B NY PJI3d 2:278 at 895 [2017] citing *Kaiser v. Van Houten*, 12 AD3d 1012, 1015, n.2 [3rd Dept 2004]).

2. The standard of proof for a punitive damages claim differs by department. The First and Second Departments require “clear and convincing evidence” or its equivalent. The Fourth Department requires only “a preponderance of the evidence.” (See 1B NY PJI3d 2:278 at 888 [2017]). In 1920, the Court of Appeals held that the “preponderance of the evidence standard” applied in determining whether to award punitive damages. (*Id.* at 905). The practitioner should consider the law in his department and as a practical matter at trial prove up to the higher standard.
3. There is a due process limitation on imposition of punitive damages set by the United States Supreme Court. (See *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 US 408 [2003]). Anything over a single digit multiplier is likely to be scrutinized with an eye to reversal. (See 1B NY PJI3d 2:278 at 888 [2017]).
4. Punitive damage claims require a bifurcated, and sometimes trifurcated trial. At the trial of the compensatory damage claims and causes of actions, the jury will be asked to consider and determine whether the plaintiff is entitled to punitive damages by way of special verdict. If the jury answers “Yes” to an interrogatory on punitive damages, the Plaintiff is at that point entitled to take limited discovery of the defendant’s wealth before starting proof with the same jury on determining the amount of punitive damages. (See 1B NY PJI3d 2:278 at 906 citing *Rupert v. Sellers*, 48 AD2d 265, 272 [4th Dep’t 1975]). Plaintiff must demonstrate a separate factual basis for discovery of a defendant’s financial records to receive during the case in chief or for the first trial. (*Id.* at 907).
5. A separate question as to each defendant is required on a punitive damages verdict sheet because there is no contribution or joint and several liability for punitive damages. (*Id.* at 908, citing *Felice v. Delporte*, 136 AD2d 913, 914 [4th Dep’t 1988]).
6. Punitive damages may be awarded against a corporation only if its officers or directors authorized, participated in, consented to, or after discovery ratified the conduct giving rise to such damages. (See 1B NY PJI3d 2:278 at 902 citing *Murray v. Long Island R. Co.*, 35 AD2d 579, 580 [2d Dep’t 1970], *aff’d* 28 NY2d 849 (1971).
7. If relevant, a jury may not use evidence of out of state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. (See 1B NY PJI3d 2:278 at 889, citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 US 408 [2003]).
8. When the jury hears about injuries to other persons arising from the defendant’s conduct, it does so only to assess the reprehensibility of such conduct, and may not award punitive damages for injuries to such other persons not before the jury. (*Id.* at 889 citing *Frankson v. Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 221-222_ [2d Dep’t 2009]).

Punitive Damages in Breach of Contract Actions

To state a claim for punitive damages in a breach of contract case, a plaintiff must plead that:

1. Defendant's conduct is actionable as an independent tort;
2. The tortious conduct is egregious;
3. The egregious conduct is directed at to the plaintiff;
4. It is part of a pattern of conduct directed at the public in general.

(See *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 315-317 [1995]; *Looks Great Servs. Inc., v. National Grid El. Servs. LLC*, 2015 NY Slip Op. 32651(U), 2015 NY Misc LEXIS 5128, * 9 [Sup Ct. Nassau County 2015]).

The threshold task on a motion to dismiss such a claim where breach of contract is claimed is to identify a tort independent from the contract. (See *Dinstber v. Allstate Ins. Co.*, 110 A.D.3d 1410, 1411 [3rd Dep't 2013]; *Drezin v. New Yankee Stadium Cmty. Benefits Fund, Inc.*, 94 A.D.3d 542, 543 [1st Dep't 2012]).

A plaintiff that does not plead the type of conduct set out above will suffer dismissal of the punitive damages claim in the complaint. (See *Schwartz v. Hotel Carlyle Owners Corp.*, 132 A.D.3d 541, 543 [1st Dep't 2015]). Conclusory allegations as to the motive for an action claimed to warrant punitive damages will not suffice. (*Miller v. Allstate Indem. Co.*, 132 A.D.3d 1306, 1308 [4th Dep't 2015]).

The Public Harm Requirement when Pleading and Proving Punitive Damages

In a breach of contract action, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally. (*Wildenstein v. 5H&Co, Inc.*, 97 A.D.3d 488, 492 [1st Dep't 2012]; *Emmet & Co.*, 49 Misc.3d at 1073, quoting *Rocanova v. Equitable Life Assurance Society*, 83 NY2d 603, 613 [1994]).

Punitive damages do not lie in private commercial disputes over money between sophisticated parties that does not impact the public. (*Perella Weinberg Partners LLC v. Kramer*, 2016 NY Slip Op 31387(U), 2016 NY Misc. LEXIS 2701, * 50 [Sup Ct. New York County 2016]; citing *Hoeffner*, 85 A.D.3d at 458). This is particularly true when parties disagree as to complex financial issue without clear precedent to guide them. (*Emmet & Co.*, 49 Misc3d at 1073).

The Second Circuit Court of Appeals, applying New York law, has held that this harm must be directed at the general public. (See *Mayline Enters. v. Milea Truck Sales Corp.*, 641 F.Supp.2d 304, 311-312 (SDNY 2009) citing *TVT Records v. Island Def Jam Music Group*, 412 F.3d 83, 92, & n.12 [2d Cir. 2005]).

There is a lack of clarity as to whether the "public requirement" prong of the punitive damages claim pled in the complaint is necessary to sustain such a claim. (*Id.*, citing *Sikarevich Family L.P., v. National Mutual Ins. Co.*, 30 F.Supp.3d 166, 174 [EDNY 2014]).

The causes of action on which punitive damages are sought will determine whether a public harm requirement must be pled and proven as part of a punitive damages claim. (See 1B NY PJI3d 2:278 at 897 citing cases). For example, while the public harm requirement is generally required in breach of contract cases, it is not required in tort cases in which the plaintiff has also alleged a breach of fiduciary duty (*Id.* citing *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 45 AD3d 419, 420 [1st Dept 2007], rev'd on other grounds, 12 NY3d 132 [2009]).

Punitive Damages in Fraud and Deceit Cases

To sustain a claim for punitive damages based on a fraud cause of action, a plaintiff must plead and prove: (a) the fraud is gross, involves high moral culpability and is aimed at the public generally, or (b) the defendant's conduct evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply criminal indifference to civil obligations. (*Pacific Jin An Trading, Inc. v. Zhou*, 2008 NY Slip Op 30453(U), 2008 NY Misc. LEXIS 7830, * 11 [Sup Ct Queens County 2008]).

Punitive damages are not recoverable in the ordinary fraud and deceit case. (See *Shimiaie v. Shadan*, 2011 NY Slip Op 32885(U), 2011 NY Misc. LEXIS 5211, * 11-12 [Sup Ct Nassau County 2011]). Fraudulent representations made to induce a buyer to enter into a purchase contract, while serious, do not rise to the heightened threshold of pleading or proof for punitive damages. (See *Maesa LLC v. Jouer Cosmetics, LLC*, 2014 NY Slip Op. 30026(U), 2014 Misc. LEXIS 44, * 14-16 [Sup Ct New York County 2014]).

However, a punitive damages claim in a fraud case will survive dismissal on the pleadings on the appropriate alleged facts. Thus, plaintiffs alleging wrongful acts by a stock broker defeated a motion to dismiss when they alleged that the stock broker had concealed mandatory reporting, that he had intimidated them with his disproportionate power as fiduciary over them, and that he had failed to advise them that he had been disciplined for committing fraud on his other customers. (See *Drain v. Paragon Capital Mgt. Corp.*, 16 Misc3d 1115(A) [Sup Ct Suffolk County 2007]).

Punitive Damages in Trespass Cases

On causes of action alleging trespass on real property, the jury may award punitive damages if the plaintiff proves that the defendant trespasser acted with actual malice in committing an intentionally wrongful act, or that such conduct amounted to a wanton, willful or reckless disregard of the plaintiff's rights. The purpose of the award is to penalize the trespasser and warn others. See *Doin v. Champlain Bluffs Dev. Corp.*, 68 AD3d 1605, 1614-1615 [3rd Dept 2009]).

Punitive Damages in Breach of Quiet Covenant of Lease

A plaintiff may recover punitive damages, even in the absence of a public harm, where the actions of the offending landlord in denying the tenant demonstrated a level of reprehensible behavior that justified punitive damages. See *Suffolk Sports Ctr. v. Belli Constr. Corp.*, 212 AD2d 241, 246-248 [2d Dept 1995]). The Second Department in reaching this holding expressed concern that failing to allow the award of punitive damages would condone extralegal wrongful conduct by the

landlord defendant. To that extent the punitive damages award served the public good. *Id.* at 247-248.

Punitive Damages for cases involving Breaches of the Implied Warranty of Habitability under RPL § 235-b

On sufficiently egregious and reprehensible facts, a plaintiff may recover punitive damages for a breach of implied warranty of habitability under Real Property Law §235-b. (*See Morris v. Flaig*, 511 F.Supp.2d 282, 292-299 [EDNY 2007]).

Punitive Damages in Breach of Fiduciary Duty Cases

A plaintiff may recover punitive damages based on a cause of action for breach of fiduciary duty without a public harm requirement if the allegations are of such a high degree of moral turpitude as to the defendant as to imply criminal indifference to civil obligations. (*See Priya Hospitality LLC v. Patel*, 2011 NY Misc LEXIS 6847, *14-15 [Sup Ct. Queens County 2011]). The rule that an award of punitive damages must be limited to conduct directed to the general public applies in breach of contract cases, not tort cases for breach of fiduciary duty. (*See* 1B NY PJI3d 2:278 at 897 citing *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 45 AD3d 419, 420 [1st Dept 2007], rev'd on other grounds, 12 NY3d 132 [2009]).

Diversion of assets to a secretly created competitive organization constitutes a breach of fiduciary duty, and thus does not require an allegation of public harm to properly claim punitive damages. (*See Vandashield Ltd v. Isaacson*, 146 AD3d 552, 555[1st Dept 2017]; *Don Buchwald & Assocs. v. Rich*, 281 AD2d 329, 330, [1st Dept 2001]).

Punitive Damages in Defamation Cases

In cases involving a private person and a non-public matter, punitive damages may be assessed if the plaintiff proves common law malice, hatred, ill will, spite or wanton, reckless or willful disregard for the rights of another or the injurious effect of the defendant's conduct upon another. (*See* 1B NY PJI3d 2:278 at 898 citing *Prozeralik v. Capital Cities Communications, Inc.*, 82 NY2d 466, 479 [1993]).