

CAUSE NO. 2006-45366

GREATER HOUSTON RETAILERS ASSOCIATION, INC.,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
VS.	§	HARRIS COUNTY, T E X A S
	§	
TARA ENERGY, INC.,	§	
	§	
Defendant.	§	157TH JUDICIAL DISTRICT

TARA’S TRIAL BRIEF SUPPORTING ITS CLAIM OF TORTIOUS INTERFERENCE

TO THE HONORABLE DISTRICT COURT JUDGE:

Counter-plaintiff Tara Energy, Inc. (“Tara”) contends that the Plaintiff Greater Houston Retailers Association, Inc.’s (the “GHRA”) premature switching of over 300 of Tara’s customer retail electricity contracts (the “Tara Contracts”) in June 2007 was tortious, because these contracts had remaining terms until October 2007 and beyond.

A. Facts To Support Intentional Conduct to Interfere

Tara’s Counterclaim seeks damages caused by the GHRA’s tortious interference with Tara’s contractual relationships with the GHRA members and other prospective affinity group members because the facts demonstrate wanton action to thwart Tara’s contract and business relationships. The facts show that the GHRA knew and understood there to be a five year contract relationship with Tara to endorse it to its members, entailing the entity contract expired no earlier than October 2007. Similarly, the GHRA knew and understood the member contracts resulting from the GHRA endorsement were also five years in length, and began no earlier than in the months after the entity contract was done. The evidence demonstrates that Tara first entered into a two-year agreement with GHRA effective in October 2002 whereby the GHRA would endorse Tara as the preferred provider of discounted electricity to the GHRA’s members

under two year individual retail electricity contracts. After October 2002 and through January 2003, Tara accordingly signed up GHRA members to two year contracts. Because the contract relationship went so well, the GHRA and Tara decided in 2004 to renew and extend the endorsement agreement another three years beyond its existing term. Thereafter, over the next seven months GHRA members began to individually sign three year renewal contracts with Tara that similarly extended their individual contracts having a two year term. As a result, it was always objectively determinable and known that no GHRA member contract would terminate any earlier than October 2007, and given the lag time in individual member contract signing, many of the contracts for members would not expire for many months after October 2007.

In June 2007, the evidence will be undisputed that the GHRA took action to switch 296 GHRA member customers from Tara to another retail electricity provide before the term of their contract expired. GHRA's intentional actions thus prematurely terminated Tara's contracts with these customers in violation of the terms of their agreements. The value of the contracts to Tara was substantial given the revenues to be obtained from these 296 customers, as well as the prospective business advantage Tara could expect in further renewing these relationships and having these customers further promote Tara's level of service to others in affinity groups was harmed.

B. Knowledge Requirement of Tortious Interference

GHRA has only a general denial on file in this case. Its defense has always been premised upon Tara being unable to prove GHRA "intended" to interfere or was "willful" in its interference. The elements of tortious interference with an existing contractual relationship by a third party are (1) the existence of a contract, (2) the willful or intentional act of interference, (3) that was a proximate cause of damages, and (4) actual damage or loss occurred. *Hopkins v.*

Highlands Ins. Co., 838 S.W.2d 819, 823 (Tex. App.—El Paso 1992, reh’g overruled); *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 656 (Tex. App.—Corpus Christi 1991, writ denied). This brief demonstrates why there was willful and intentional action.

In order to be subject to liability, the interfering third party must only have knowledge of the existence of the contract with which he is interfering. *Restatement (Second) of Torts* § 766, comment i (1979). The knowledge requirement is part of the intent element of the tort of inducing a breach of contract, and it is a question of fact that may be proved by either direct or circumstantial evidence. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 797 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.), *cert dismiss’d*, 485 U.S. 994 (1988). The interferer, contrary to the GHRA rationale, is not required to have full or complete knowledge of all the detailed terms of the contract. *Id.* at 796. Even if the interferer claims that it lacked actual knowledge of the existence of the contract, the third party will be deemed to have the requisite knowledge if it knew of facts and circumstances from which a reasonable person would conclude the existence of a contract. *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 656 (Tex. App.—Corpus Christi 1991, writ denied); *Kelly v. Galveston County*, 520 S.W.2d 507, 513 (Tex. App.—Houston [14th Dist.] 1975, no writ); *see Texaco*, 729 S.W.2d at 827, 832 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.), *cert dismiss’d*, 485 U.S. 994 (1988). In this case, the facts stated above which were open and notorious to the GHRA itself from its direct negotiations and agreements with Tara mandate that the GHRA had sufficient knowledge of the member contracts that Tara had which remained in term for the GHRA to be liable for interference.

The GHRA’s defense appears to be grounded in the “we just did not know when the contracts expired, or we did not remember or realize.” This is preposterous, and belied by what common sense and GHRA’s knowledge of what its own contract with Tara had as a term and

when it could have expired at its earliest—it was a total of sixty months that began no earlier than October 2002 and ended no earlier than October 2007. Yet the member contracts that the GHRA interfered with, which could never have been entered until after its own original and extension contracts were entered allowing for the endorsement, were prematurely switched away from Tara at the GHRA’s direction in June 2007. Plainly, Tara can prove that the interferer had knowledge of the contract by showing that it intentionally refused to ascertain the facts regarding the existence of the contract. *Texaco*, 729 S.W.2d at 827. Here, GHRA not only cannot claim an inability to know the obvious, its own direct dealings and endorsement agreement with Tara mandate it knew these member contracts had never expired.

C. Intent to Interfere with the Contract

It is accepted that interference with a contract will only be considered tortious if the third party acts intentionally. *Sw. Bell Tel. Co. v. John Carlo Tex., Inc.*, 843 S.W.2d 470, 472 (Texas 1992). Tara has satisfied its burden of proof on the element of intentionally interfering with the contract by proving that the GHRA knew that breach or failure to perform the member contracts would occur as a result of its actions to switch them away from Tara. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 804 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.), *cert dismiss’d*, 485 U.S. 994 (1988) at 826. Interference with the contract will be deemed intentional not only if the third party acts for the primary purpose of interfering or desires such result but when the third party knows that interference with the contract is substantially certain to occur as a result. *Sw. Bell Tel. Co.*, 843 S.W.2d at 472; *see also* RESTATEMENT (SECOND) OF TORTS § 766, comment j (1979).

Because the GHRA objectively knew that the GHRA members still had existing individual contracts with Tara which could never have expired before October 2007 or even

much later, the GHRA's actions were substantially certain to result in interference with the member contracts. Switching the retail electricity provider for its members when these members still owed contractual obligations to Tara certainly amounts to intentional interference by the GHRA with the member contracts.

D. The Case Law Illustrates How the Interference that Occurred was Wrongful

In *Exxon Corp. v. Allsup*, Exxon claimed that no lifetime employment contract existed between the plaintiff and his former employer, King Ranch. 808 S.W.2d 648, 654 (Tex. App.—Corpus Christi 1991, writ denied). In May 1961, the plaintiff and King Ranch agreed that the plaintiff would hold the gate guard position, allowing access to Exxon operations on the Alazan oilfield for life, and that King Ranch would provide him with a house at his guard post, pay his utilities and a minimum hourly wage, and upon retirement, allow him to continue living on the ranch until his death. *Id.* at 651. In June 1976, King Ranch informed the plaintiff that it was relinquishing the management of all gate guards to Exxon. *Id.* at 651-52. Exxon then sub-contracted gate guard management that same year to Walter Hock d/b/a Walter's Oilfield Services ("WOS"). *Id.* at 651. King Ranch and Exxon specifically ordered WOS to hire the plaintiff as a gate guard as a condition of WOS receiving the gate guard contract. *Id.* at 656. Both King Ranch and Exxon management personnel informed Hock that the plaintiff had an overriding lifetime employment contract with King Ranch as a gate guard. *Id.* at 652, 655.

Then, in late 1988, Exxon awarded the 1989 gate guard management contract to Don Brock Distributor ("DBD") instead of WOS. *Id.* at 651. The plaintiff was informed in December 1988 that DBD would not hire him as a gate guard because Exxon told DBD not to hire the plaintiff. *Id.* at 651-652. WOS's supervisor Jim Scott told DBD's president Don Brock in 1998 before DBD's performance began that King Ranch wanted the plaintiff to retain his post

regardless of the gate guard contractor and that the plaintiff had a lifetime contract with King Ranch. *Id.* at 653, 655. Brock then asked Matthew Soulant, an upper-level Exxon supervisor, whether the plaintiff had an employment contract as a gate guard with either Exxon or King Ranch. Soulant informed Brock that Exxon owed no obligation to the plaintiff and that King Ranch's Stephen Kleberg told Soulant that he did not believe King Ranch had an obligation to continue employing the plaintiff. *Id.* at 654. Exxon was found to have interfered with the contract and held liable.

Exxon asserted on appeal that there was no evidence that any person in Exxon management in 1988 knew that a lifetime employment contract existed between the plaintiff and King Ranch, specifically pointing to the fact that Soulant was told by someone from King Ranch that no such contract existed. *Id.* at 656. Exxon thus claimed that it could not have tortiously interfered with the plaintiff's existing contract with King Ranch because it lacked knowledge of the contract and did not have the requisite intent to interfere. *See id.* The Court of Appeals rejected Exxon's argument that it lacked the requisite intent to interfere based on the facts in the record, upholding the jury's finding of tortious interference. *Id.* at 657. The Court found that there was sufficient evidence from which the jury could find that Exxon previously knew in 1988 that the plaintiff held a lifetime contract with King Ranch and that Exxon intentionally interfered with the contract by informing Don Brock to not hire him. *Id.* Specifically, the Court found that based on Exxon's statements to Hock in 1976, Exxon knew and for later purposes was plainly charged with knowing then that the plaintiff had a lifetime employment contract with King Ranch and that Exxon should have continued to know in 1988 that the contract still existed and of the plaintiff's interest in that contract. *Id.* at 656. Additionally, despite Exxon's

contention that Soulant lacked actual knowledge of the contract, the Court found that Soulant could have investigated within Exxon to ascertain facts that the contract did exist. *See id.*

The GHRA claims that it lacked actual knowledge of when the GHRA member contracts with Tara expired. The GHRA, however, did have actual knowledge of when its contractual obligations with Tara ended and that the member contracts could have never been entered until after its own extension contract was entered, similar to the actual knowledge possessed by Exxon in 1976 regarding the employment contract between the plaintiff and King Ranch. Just as the Court of Appeals found that Exxon based on its actual knowledge should have known that the contract still existed in 1988 when the guard management changed control, so too should the GHRA have known that the contracts between its members and Tara still existed in June 2007 when it took action to switch over 300 GHRA member customers from Tara to another retail electricity provider. Furthermore, the GHRA could have investigated the expiration of the member contracts prior to switching out the retail electricity provider to positively determine whether the contracts had expired given all the facts known to the GHRA indicating that the member contracts could have never expired before October 2007.

E. Conclusion

The GHRA's anticipated claim that it had a "pure heart but empty head" to somehow justify the action it took to directly force the premature termination of the GHRA member contracts is irrelevant and inadequate to block Tara's proof here. What matters is that a reasonable party would have known that the member contracts had not yet expired and that the GHRA's actions in switching the retail electricity provider would result in its members prematurely breaking their existing contracts with Tara. Tara has proven its claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on all counsel of record on this 2nd day of June, 2008, pursuant to the TEXAS RULES OF CIVIL PROCEDURE.

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/s/ Patrick L. Hughes

PATRICK L. HUGHES



I, Theresa Chang, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date
Witness my official hand and seal of office
this _____

Certified Document Number: _____

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