Entech Eng'g, PC v Hirani Eng'g & Land Surveying, PC
2016 NY Slip Op 31036(U)
June 3, 2016
Supreme Court, New York County
Docket Number: 158084/12
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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ENTECH ENGINEERING, PC,

Index No.158084/12

Plaintiff,

-against-

HIRANI ENGINEERING & LAND SURVEYING, PC, and JITENDRA HIRANI

Defendants.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, EnTech Engineering, PC (EnTech) moves for summary judgment on its claim for libel *per se*. Defendants Hirani Engineering & Land Surveying, PC (Hirani Engineering) and Jitendra Hirani (Hirani) (collectively Defendants) cross-move for an order dismissing EnTech's claim. Defendants' cross-motion is granted and this action is dismissed.

Background

EnTech is an engineering firm that specializes in, among other things, construction inspection and management, civil engineering and design and building information modeling (Bayat Affidavit [Aff] at ¶ 5).

In 2007, The New York City School Construction Authority (SCA) entered into a construction contract with Leon D. DeMatteis Construction Corp. (DeMatteis) for a public improvement at Mott Haven Educational Campus in the Bronx (the Project)(Bayat Aff at ¶ 8). SCA requested a full-time licensed safety manager for the Project from September 2008

through September 2010 (*id.*). In 2008, DeMatteis entered into an agreement with EnTech to provide site-safety management services for the Project at $77 per hour with additional amounts to be paid for overtime (*id.* at ¶ 9).

EnTech, in turn, entered into a sub-agreement with Hirani Engineering to provide services for the Project at an hourly rate of $50 per hour with additional amounts to be paid for overtime (Sub-Agreement)(*id.* at ¶ 10). Hirani Engineering performed under the Sub-Agreement.

Subsequently, SCA determined that EnTech's hourly rate was unacceptable and made payment to DeMatteis at a lower rate. Between October 2008 and September 2010, EnTech billed DeMatteis for $553,249 but received $347,089 (*id.* at ¶ 15). Hirani Engineering billed EnTech $341,050 but received $248,934 (*id.* at ¶¶ 16-17).

Soudabeh Bayat (Bayat), EnTech's owner and president, swears that she explained to Hirani, the principal of Hirani Engineering, that the unpaid balance was due to DeMatteis' failure to pay EnTech in full (Bayat Aff at ¶ 18). Frustrated that Hirani Engineering had not been paid in full, Hirani sent emails to SCA and DeMatteis, stating:

- "I am sorry that I have to write again to all of you <u>to get paid as we have not gotten paid till today while EnTech has collected the money</u> . . . EnTech has intentionally misrepresented lots of facts attempting to circumvent standard policy and receive payments from DeMatteis at a higher rate including

> not informing anyone of using a sub consultant to make an enormous profit and also violated the general condition . . . and according to the mediation EnTech is only entitled to make overhead on [a] direct employee which they had none. So please help Hirani collect funds as per your mediation and I am surprise[d] no action has been taken for misrepresentation and nonpayment against EnTech. . . . I would really like to investigate this as it is a fraud to not tell the truth and mislead [SCA] and not pay [Hirani] after [Bayat] is paid for our work . . .
> (Bayat Aff, Ex J [emphasis added]).

- ". . . EnTech misled DeMatteis and [SCA] for the site safety manager task on this project. EnTech stated that they were a WBE firm and would perform the work not telling the truth that they will be using a sub consultant to fulfill this requirement. . . . EnTech never submitted [Hirani Engineering] as a sub on this project to DeMatteis or SCA as she didn't want anyone to know that she had subbed out the work for a much lesser price. EnTech intentionally never informed DeMatteis about [Hirani Engineering] as EnTech did not want DeMatteis or the SCA to know that they were attempting to circumvent standard policy and receive payments from DeMatteis at a higher rate. . . she didn't tell the whole truth. . .. I really would like to investigate this as it is a fraud to not tell the truth and mislead [SCA and Hirani Engineering] and not to pay [Hirani Engineering] after [Bayat] is paid for our work . . .. Please take some action as [Bayat] has been playing games with all of us for a long time as she want[s] to make an enormous unethical profit without doing any work (Bayat Aff, Ex I [emphasis added]).

In response to Bayat's request that he stop his "negative campaign," Hirani emailed Bayat the following, with a copy to an executive at SCA:

> "Everything I have stated is fact and I am going to send [an email to everyone at SCA during] the weekend if I don't get the check today. You have basically embezzled our funds by collecting from the prime and not paying us" (Bayat Aff, Ex H).

After commencing a legal action against SCA, DeMatteis and EnTech, Hirani obtained a judgment against EnTech and was eventually paid in full (Affidavit of Hirani in Opposition [Hirani Aff], Ex 3).

In 2012, after it had been sued, Entech commenced this separate action against Defendants, seeking recovery for defamation. EnTech alleges that the statements in Hirani's emails have had substantial adverse effects on EnTech's ability to secure site-safety manager work and other projects from SCA (Bayat Aff at ¶ 21). EnTech further asserts that the emails were sent to SCA "for the purpose of subverting EnTech in the eyes of [SCA and] to promote [Hirani] and his own firm, at EnTech's expense" (*id.* at ¶ 27). EnTech maintains that seeking SCA's assistance in getting paid is "an obvious, false pretext for sending the disparaging written statements" (*id.*).

EnTech moves for summary judgment declaring that Defendants are liable for libel *per se* and awarding it $1,000,000 in damages or another amount determined after a hearing. Defendants oppose the motion and cross-move for judgment.

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material

triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

EnTech contends that it is entitled to a judgment against Defendants for libel *per se*, urging that they improperly charged EnTech with the "serious crime" of embezzlement, which affected its business reputation and ability to secure work (*see Liberman v Gelstein*, 80 NY2d 429, 435-36 [1992]).

Not every imputation of unlawful behavior is actionable. Some statements, moreover, even if defamatory, are subject to a qualified privilege "where the communication is made to persons who have some common interest in the subject matter" (*Foster v Churchill*, 87 NY2d 744, 751 [1996]; *Liberman v Gelstein*, 80 NY2d 429, 437 [1992];*Present v Avon Products, Inc.*, 253 AD2d 183, 188-189 [1st Dept 1999], *lv dismissed* 93

NY2d 1032; *Clark v Somers*, 162 AD2d 982 [4th Dept 1990][common-interest qualified privilege applied to statements made by a company's consultant to the company's employees "all of whom were concerned with the hiring of contract employees"]; *Shapiro v Health Ins Plan of Greater NY*, 7 NY2d 56, 60 [1959]). The purpose of this privilege is to enable the free flow of information between persons sharing a common interest without fear of liability. The privilege is not limited to those with "'identical, congruent or even parallel interests. [It] is applied to those who are contemplating or have engaged in business activities with each other" (David Elder, Defamation: A Lawyer's Guide at § 2:24 [2015]).

Hirani's statements were made to entities that shared a common interest. Hirani Engineering, after all, was retained to do work on SCA's Project as was DeMatteis. The statements related to non-payment for work on the Project and were made to address concerns that arose related to the Project.

Plaintiff contends that even if the emails are subject to a qualified privilege, Defendants acted with malice, defeating the privilege's applicability (Reply at ¶ 13). EnTech maintains that the statements were made "in a campaign of purposeful spite to create for himself and his company . . .

a direct business relationship with the SCA (and DeMatteis) on future projects, at EnTech's expense" (Reply at ¶ 13).

"A triable issue as to common-law malice is raised only if a reasonable jury could find that the speaker was *solely* motivated by a desire to injure the plaintiff" (*Present v Avon Products, Inc.*, 253 AD2d 183 [1st Dept 1999]; *Boehner v Heise*, 734 F Supp 2d 389, 401 [SD NY 2010]). The fact that Defendants may have harbored ill will towards plaintiff is insufficient without evidence that it was the one and only cause for the publication (*Present v Avon Products, Inc.*, 253 AD2d 183 [1st Dept 1999]).

EnTech has not presented evidentiary facts sufficient to permit an inference of malice (*Kaiser v Raoul's Rest. Corp.*, 112 AD3d 426, 427-428 [1st Dept 2014]; *Constantine v Teachers Coll.*, 93 AD3d 493, 494 [1st Dept 2012]). The statements in the emails were specific and accompanied by facts related to nonpayment for work on the Project. The statements were not published so widely as to fall outside the scope of the privilege. It is clear, moreover, that the statements were made, at very least in part, to get payment for services that had been provided and not solely to injure EnTech.

Plaintiff's motion for summary judgment is therefore denied and Defendants' cross-motion granted. Defendants'

counterclaim for damages for filing "frivolous and false claims" is dismissed after searching the record.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED that Defendants' cross-motion for summary judgment is GRANTED and the complaint is dismissed with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Judgment of the Court.

Dated: June 3, 2016

HON. JENNIFER G. SCHECTER