Benintani v Fraser
2013 NY Slip Op 30566(U)
March 19, 2013
Supreme Court, Suffolk County
Docket Number: 19767-2012
Judge: Emily Pines
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[* 1]

SHORT FORM ORDER INDEX NO. 19767-2012

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:

HON. EMILY PINES
J. S. C.

Motion Date: 10-22-12; 12-20-12
Submit Date: 01-08-2012
Motion No.: 001 MGCASEDISP
002 MDCASEDISP

[X] FINAL
[ ] NON FINAL

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MARIE BENINTANI and FINE HOMES & DISTINCTIVE PROPERTIES INC d/b/a BENINATI ASSOCIATES,

Plaintiffs,

- against -

DOUGALL C. FRASER, J.R., PATRICIA J. PETERSON and DANIEL GALE SOTHEBY'S INTERNATIONAL REALTY,

Defendants.

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In this action, plaintiffs Marie Beninati ("Beninati") and Fine Homes & Distinctive Properties, Inc. d/b/a Beninati Associates ("Beninati Assocs.") (collectively "Plaintiffs") sue defendants Dougall C. Fraser, Jr. ("Fraser"), Patricia J. Petersen ("Petersen"), and Daniel Gale Sotheby's International Realty ("DGSIR")(collectively "Defendants") for defamation, tortious interference with business relations, and prima facie tort. Defendants move (Mot. Seq. 001) pursuant to CPLR 3211(a)(7) to dismiss the complaint. Plaintiffs oppose the motion and cross-move (Mot. Seq. 002) pursuant to CPLR 3025 for leave to amend the complaint.

Factual and Procedural Background

The Verified Complaint alleges, among other things, that Marie Beninati, a licensed real estate broker, is the managing broker of Beninati Associates. On or about June 27, 2011, Beninati and Beninati Assocs. were engaged by Beverly Petersen, as Executor of the Estate of Shirley Harrison ("Petersen"), together with her sisters Cynthia Harrison-Faulkner ("Harrison-Faulkner") and Leslie Cooper ("Cooper"), as the listing real estate broker ("listing broker") to sell real property known as 705 Kimogenor Point, New Suffolk, New York. Between July 2, 2011 and July 13, 2011, Beninati Assocs. and other real estate brokers ("cooperating brokers") showed the property to potential purchasers. Offers to purchase the property were made by potential purchasers through their cooperating broker to Beninati, in accordance with rules and regulations of the Multiple Listing Service of Long Island, Inc. ("MLSLI"). Beninati communicated offers received from cooperating brokers to Petersen, Harrison-Faulkner and Cooper.

Sometime after July 4, 2011, Fraser, a licensed associate broker employed by DGSIR met with Cooper and showed her a copy of an MLSLI Complaint dated July 2, 2011, and an addendum thereto dated July 11, 2011, both of which Fraser had authored and sent to the Long Island Board of Realtors, Inc. The MLSLI Complaint alleges that Beninati violated MLSLI rule 703 by failing to submit or improperly submitting an offer to purchase the property to the sellers that Fraser, as a cooperating broker, had advanced to Beninati, the listing broker. The MLSLI Complaint and addendum state, "[i]n my opinion, my offer was never submitted correctly and/or Marie was shopping my bid in order to keep both sides of the commission with her own deal. Either way as a Zone Chair this was very poorly handled." The MLSLI Complaint was signed by Petersen as the managing broker of DGSIR. Plaintiffs allege that prior to the preparation and filing of the MLSLI Complaint, the Defendants failed to follow MLSLI rules to determine whether the offer had been properly submitted to the sellers. Plaintiffs also allege that the Defendants violated

the Code of Ethics and Standards of Practice of the National Association of Realtors.

On September 8, 2011, the MLSLI Complaint came on to be heard by the Administrative Review Panel of the Long Island Board of Realtors. Beninati appeared at the hearing and denied that she had failed to submit or improperly submitted an offer with regard to the property. Neither Fraser, Petersen, nor anyone else appeared at the hearing on behalf of DGSIR. Thereafter, the Administrative Review Panel found that there had been no violation of MLSLI Rule 703 and dismissed the MLSLI Complaint.

The first cause of action in the Verified Complaint alleges, among other things, that the contents of the MLSLI Complaint authored by Fraser and signed by Petersen "are false and defamatory, were known to be false by the defendants, tended to injure the plaintiffs, and were made with malice." The second cause of action alleges, among other things, that the aforementioned actions of the Defendants constitute tortious interference with a business relationship. The third cause of action alleges, among other things, that the Defendants actions were "intentional, without justification, and are designed to inflict temporal harm on plaintiffs."

As stated above, Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(7). The Defendants contend, among other things, that the alleged defamatory language is a non-actionable statement of opinion and that the statement in the MLSLI Complaint is absolutely privileged, as it was submitted to the Long Island Board of Realtors, Inc. and reviewed by its Administrative Review Panel. Defendants also argue that Plaintiffs have failed to properly plead a claim for tortious interference with business relations because the complaint fails to allege malicious intent and that a third-party would have entered into a contract with Plaintiffs but for Defendants conduct. Finally, Defendants contend that the complaint fails to properly state a cause of action for prima facie tort.

In opposition, the Plaintiffs contend, among other things, that the statement in

the MLSLI Complaint is actionable because it is a statement of fact or mixed opinion. Plaintiffs also contend that the Defendants have prematurely raised the defense of privilege. Plaintiffs argue that the Defendants were under no compulsion to file the MLSLI Complaint, did not comply with MLSLI rules to determine whether the offer had been properly submitted to the sellers, and failed to show up at the administrative hearing. Plaintiffs contend that they have properly pled a claim for tortious interference with business relations as the Verified Complaint alleges that the Defendants violated the code of ethics for their profession in contacting Beninati's client. Finally, Plaintiffs argue that the Verified Complaint sufficiently alleges a cause of action for prima facie tort.

Discussion

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7):

> [t]he complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-195 [2d Dept 2009]).

As recently stated by the Appellate Division, Second Department:

> "'Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an

[* 5]

> action for defamation' (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]; *see Gross v New York Times Co.*, 82 NY2d 146, 152-153 [1993]). In determining whether a statement constitutes a nonactionable opinion, a question of law for the court (*see Mann v Abel*, 10 NY3d at 276), the 'factors to be considered are: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full text of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact' (*Brian v Richardson*, 87 NY2d 46, 51 [1995][internal quotation marks omitted]; *see Thomas H. v Paul B.*, 18 NY3d 580 [2012]). The dispositive inquiry is "'whether the reasonable [listener] would have believed that the challenged statements were conveying facts about the . . . plaintiff'" (*Brian v Richardson*, 87 NY2d at 51, quoting *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254 [1991], *cert denied*, 500 US 954 [1991]; *see 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139 [1992], cert denied 508 US 910 [1993]).

(*Melius v Glacken*, 94 AD3d 959, 959-960 [2d Dept 2012]).

A "pure opinion," which is not actionable, is a statement of opinion which is either accompanied by a recitation of the facts on which it is based or which does not imply that it is based on undisclosed facts (*see Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]). A statement of opinion which is not accompanied by a recitation of the facts or implies a basis in facts which are not disclosed to the reader is actionable because "a reasonable listener or reader would infer that 'the speaker [or writer] knows certain facts, unknown to [the] audience, which support [the] opinion are detrimental to the person [toward] whom [the communication is directed' (Id. at 153-154, quoting *Steinhilber v Alphonse*, 68 NY2d 283, 290 [1986]).

Here, given the context in which the challenged statements were made, a reasonable reader would have believed that they were opinion. The defamation claim is predicated on the MLSLI Complaint by Fraser, a "cooperating broker," to the Long

Island Board of Realtors alleging that Beninati, the "listing broker," violated a rule applicable to real estate brokers regarding the submission of bids received by the listing broker from a cooperating broker. The clear purpose of the MLSLI Complaint was to seek an independent investigation of the matter by the Long Island Board of Realtors (*cf. Brian v Richardson*, 87 NY2d 46, 53 [1995][purpose of article published on opinions page of newspaper was to advocate independent governmental investigation into purported misuse of software sold to Justice Department]; *see Vengroff v Coyle*, 231 AD2d 624 [2d Dept 1996][statements in letter to U.S. Senator seeking investigation into allegations of criminal conduct were opinion not fact]; *Amodei v New York State Chiropractic Assoc.*, 160 AD2d 279 [1st Dept 1990][use of term "unprofessional conduct" describing nature of complaints against chiropractor was constitutionally protected expression of opinion]). Additionally, the text of the Complaint specifically states that it was based on Fraser's "opinion" that Beninati failed to properly submit a bid for the property, thereby clearly signaling to the reader that what was being read was likely to be opinion, not fact (*cf. Vengroff v Coyle*, supra at 625 [use of words "apparently", "rumored", and "reportedly" in letter would cause reasonable reader to understand that statements were mere allegations to be investigated rather than facts]). Finally, although Plaintiffs contend that the statements in the MLSLI Complaint are actionable as mixed opinion, they make no specific argument in support of such a finding. In any event, that portion of the MLSLI Complaint quoted in the Verified Complaint is accompanied by a recitation of the facts on which it is based and does not imply that it is based on undisclosed facts. Accordingly, the Court finds that statements in the MLSLI Complaint are nonactionable opinion and the first cause of action is dismissed.

The second cause of action fails to adequately state a cause of action sounding in tortious interference with a business relationship.

> "The elements of interference with a prospective contract or business relationship are: (1) defendant's knowledge of plaintiff's business opportunity with another party, (2) defendant's intentional interference with that opportunity, (3) defendant's use of wrongful

> means or sole purpose of inflicting harm, (4) a showing that the contract or prospective business relationship would have been entered into but for defendant's interference, and (5) resulting damages."

(2 NY PJI2dI 3:57 at 570 [2013]).

Plaintiff is required to specifically allege that defendant had knowledge of the prospective contract or business relationship (*Burns Jackson Miller Summit & Spitzer v Linder*, 88 AD2d 50, 72 [2d Dept 1982]). Conclusory allegations without factual support are insufficient to state a cause of action for tortious interference with prospective advantage (*M.J. & K. Co., Inc. v. Matthew Bender and Co., Inc.* 220 AD2d 488, 490 [2d Dept. 1995]). Where the alleged harm is injury to plaintiff's reputation, the cause of action is for defamation, not tortious interference with prospective contract or business relationship (*Demas v Levitsky*, 291 AD2d 653 [3d Dept 2002]).

Here, the Plaintiffs allege that the actions of the Defendants "constitute a tortious . . . interference with a business relationship." However, the Plaintiffs do not identify the business relationship that the Defendants allegedly interfered with nor do they allege that the Defendants had knowledge of the prospective contract or business relationship. The only "business relationship" mentioned in the Verified Complaint is the engagement of Plaintiffs as the listing broker by the sellers of the property at issue on June 27, 2011. This was clearly a contractual relationship, either written or oral. However, the Plaintiffs do not assert a claim for tortious interference with the contract between Plaintiffs and the sellers. Moreover, the Plaintiffs fail to allege that a contract or prospective business relationship would have been entered into but for the Defendants' interference. Therefore, the second cause of action is dismissed.

The elements of a cause of action for prima facie tort are: (1) the intentional infliction of harm; (2) that results in special damages; (3) without any excuse or justification; (4) by an act or series of acts that would otherwise be lawful (*Freihofer v Herst Corp.*, 65 NY2d 135, 142-143 [1985]; *Burns Jackson Miller Summit &*

Spitzer v Linder, supra). The complaint must contain "a particularized statement of the reasonable, identifiable, and measurable special damages" (*Varela v Investors Ins. Holding Corp.*, 185 AD2d 309, 311 [2d Dept 1992]).

Here, in the third cause of action the Plaintiffs simply allege that they "have been damaged by defendants action [sic] as aforesaid in an amount to be determined by the trier of fact" and that they "have suffered special damages." Such broad and conclusory terms are insufficient (*Id.*) Accordingly, the third cause of action is dismissed.

Finally, the Plaintiff's cross-motion for leave to amend the Verified Complaint is denied as the language the Plaintiffs seek to add does not cure the deficiencies noted above. Accordingly, it is

ORDERED that the Defendants' motion (Mot. Seq. 001) is granted and the Verified Complaint is hereby dismissed; and it is further

ORDERED that the Plaintiffs' cross-motion (Mot. Seq. 002) for leave to amend the Verified Complaint is denied.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: March 19, 2013
Riverhead, New York

EMILY PINES
J. S. C.

[X] Final
[ ] Non Final