

**DiPizio Constr. Co., Inc. v New York State Urban
Dev. Corp.**

2014 NY Slip Op 33914(U)

February 6, 2014

Supreme Court, Erie County

Docket Number: 2013-801815

Judge: Timothy J. Walker

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DIPIZIO CONSTRUCTION COMPANY, INC.,

Plaintiff,

vs.

**COMMERCIAL DIVISION
DECISION AND ORDER**
Index No.: 2013-801815

NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE
DEVELOPMENT,
ERIE CANAL HARBOR DEVELOPMENT
CORPORATION,
SAM HOYT,
THOMAS DEE, and
MARK E. SMITH,

Defendants.

BEFORE: HON. TIMOTHY J. WALKER, Presiding Justice

APPEARANCES: LIPSITZ GREEN SCIME CAMBRIA LLP

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WALKER, J.

This action arises out of a public improvement project to redevelop the site of the former Memorial Auditorium sports arena in the City of Buffalo, New York, known as the Inner Harbor Development Phase 3A - Canal Side Public Canal Environments Project (the "Project").

On or about April 25, 2012, Plaintiff, DiPizio Construction Company, Inc. ("DiPizio"), and Defendant, Erie Canal Harbor Development Corporation ("ECHDC"), entered into the Inner Harbor Development Phase 3A - Canal Side Owner/Contractor Agreement pursuant to which DiPizio was to act as general contractor to complete the Project (the "Owner/Contractor Agreement"). On May 8, 2013, Defendant, New York State Urban Development Corporation d/b/a Empire State Development ("Empire"), issued to DiPizio a written notice of intention to terminate the Owner/Contractor Agreement (the "Termination Letter"). Thereafter, on or about May 13, 2013, DiPizio commenced an action in this Court against ECHDC, entitled, *DiPizio Construction Company, Inc. v. Erie Canal Harbor Development Corporation*, Index No. 2013-602666 (the "Related Action"). In the Related Action, DiPizio claims, *inter alia*, that ECHDC breached the Owner/Contractor Agreement.

On or about September 13, 2013, DiPizio commenced the Instant Action, which includes causes of action for defamation, injurious falsehood, tortious interference with contract and punitive damages. Defendants have made an application, pursuant to CPLR §3211, to dismiss DiPizio's Complaint, dated September 13, 2013.

STANDARD OF REVIEW

It is well settled that, in considering a motion to dismiss pursuant to CPLR §3211, the complaint shall be liberally construed [*see* CPLR §3026], and the court shall accept the facts, as alleged in the complaint, as true, and afford the plaintiff the benefit of every favorable inference (*Leon v. Martinez*, 84 NY2d 83 [1994]). Moreover, the court shall avoid assessing the merits of the complaint or any of its factual allegations and instead determine only whether the facts as alleged fit within any cognizable legal theory (*Id.*). It is equally well settled that allegations

lacking factual support need not be accepted as true (*Dominski v. Frank Williams and Son, LLC*, 46 AD3d 1443 [4th Dept. 2007]).

DISCUSSION

Defamation

This cause of action is grounded in the statements Defendants made in the Termination Letter, because excerpts of same were published in the *Buffalo News* as a result of Defendants having provided it to the newspaper for publication.

Whether particular words are defamatory presents a question of law to be determined by the court (*Aronson v. Wiersman*, 65 NY2d 592 [1985]). The court is charged with construing the words “in the context of the entire statement or publication as a whole, tested against the understanding of the average reader” (*Id.*, at 594). If such words are “not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction” (*Id.*). If, on the other hand, the contested statements are reasonably susceptible to a defamatory meaning, then “it becomes the jury’s function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader” (*James v. Gannett Co.*, 40 NY2d 415, 419 [1976], quoting *Mencher v. Chelsey*, 297 NY 94, 100 [1947]).

Generally, a written statement may be defamatory “if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community” (*Golub v. Enquier/Star Group, Inc.*, 89 NY2d 1074, 1076 [1997], quoting *Mencher*, 297 NY at 100).

On a professional level, “derogatory statements that would cause apprehension about a person's ability to conduct business” may be defamatory (*Golub*, at 1076). Moreover, defamation

per se exists where the statement “imputes to plaintiff incompetence, incapacity or unfitness in the performance of his trade, occupation or profession” (*Elibol v. Berkshire-Hathaway, Inc.*, 298 AD2d 944, 945 [4th Dept 2002], quoting *Van Lengen v. Parr*, 136 AD2d 964, 964 [4th Dept 1988]). Where defamation *per se* exists, injury is presumed and the plaintiff is not required to plead special damages (*Ruder & Finn Inc. v. Seaboard Surety Co.*, 52 NY2d 663, 670 [1981] [“Where a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed”]).

Turning to the Instant Action, the Termination Letter identifies several reasons for terminating the Owner/Contractor Agreement, and also comments on DiPizio’s work performance. The Complaint alleges that Defendants provided a copy of the Termination Letter to the press for publication to the general public (Complaint, ¶¶64, 66, 67). Indeed, an article appeared in the *Buffalo News* on May 25, 2013 (Complaint, Exhibit Q), which describes the Project as “the \$20 million project,” and attributes Project delays to DiPizio by quoting the following language from the Termination Letter:

ECHDC and its consultants have repeatedly advised your firm [i.e., DiPizio] of its deficient work and taken all reasonable steps to ensure the work can be completed in a timely and efficient manner. ... Despite these efforts, DiPizio has failed to demonstrate any significant improvement in its performance, necessitating the actions taken here.

The article proceeds to refer to the Termination Letter’s comment that DiPizio had failed to improve its performance over time, despite assistance from Defendant ECHDC’s consultant engineer:

In his letter to DiPizio [i.e., the Termination Letter], [Defendant Thomas] Dee cited a Jan. 24 report compiled by Liro Engineering

that reviewed DiPizio's work and offered ways to reduce delays and make improvements. The recommendations, he wrote, still failed to 'demonstrate any significant improvement in its performance.'

The Court finds, as a matter of law and as limited to a consideration of DiPizio's Complaint for purposes of evaluating the instant motion to dismiss, that the Complaint sufficiently alleges defamation *per se*. DiPizio has alleged that Defendants intentionally provided the Termination Letter to the *Buffalo News* for public dissemination. The *Buffalo News* then published excerpts of same pertaining to DiPizio's inability to complete the Project in a timely and efficient manner, and lack of improvement in its performance, despite the receipt of assistance from ECHDC and its consultants, including recommendations made by Liro Engineering. These statements "impute[] to plaintiff incompetence, incapacity or unfitness in the performance of [its] trade, occupation or profession," potentially constituting defamation *per se* (*Elibol*, 298 AD2d at 945).

The Court rejects Defendants' contention that the Termination Letter may not be actionable as a defamatory statement, because it merely notified DiPizio of the manner in which it breached the Owner/Contractor Agreement. However, this cause of action is not limited to the Termination Letter. Rather, DiPizio claims that, by providing the Termination Letter to the *Buffalo News* "for public consumption," Defendants' disparaging remarks were needlessly but injuriously disseminated to the public at large (Complaint, ¶64). While Defendants cannot be held accountable for commentary made by the *Buffalo News*' reporters over DiPizio's termination (*see Hoffman v. Landers*, 146 AD2d 744 [2d Dept 1989]), Defendants are responsible for the publication of the above-quoted portions of the Termination Letter, because

they provided the Termination Letter to the *Buffalo News* with the intent that it be published.¹ These facts are distinguished from a scenario whereby the Buffalo News obtained a copy of the Termination Letter without Defendants' assistance, such as a request made pursuant to the Freedom of Information Law.

Defendants rely on *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.* (70 NY2d 382 [1987]), for the contention that the defamation claim must be dismissed because it does not constitute an intentional tort that is independent of Defendants' purported breach of the Owner/Contractor Agreement. *Clark-Fitzpatrick* stands for the proposition that a simple breach of contract may not be considered a tort unless the defendant breaches a legal duty independent of the contract itself. Such legal duty

must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract (*Id.*, at 389).

Similarly, Defendants contend that the defamation claim is merely an amplification of DiPizio's claims for breach of contract made in the Related Action.

Defendants' reliance on *Clark-Fitzpatrick, Inc.*, which does not address a defamation claim, is misplaced. This Court has already determined that Defendants' conduct, taken as a whole (which includes providing the Termination Letter to the *Buffalo News*), may constitute defamation *per se*. Regardless, providing the Termination Letter to The Buffalo News constitutes a "circumstance[] extraneous to ... the [Owner/Contractor Agreement]" (*Id.*).

Finally, while statements made by Defendants Hoyt, Dee, and Smith (the "Individual

¹DiPizio will be required to prove these facts at trial. The Court accepts them as true in this Decision and Order solely for the purpose of considering the pending application to dismiss.

Defendants”) in the course of discharging their official duties are entitled to a qualified immunity (*Toker v. Pollack*, 44 NY2d 211, 219 [1978]), the privilege may be lost where the speaker acted with malice (*Terry v. County of Orleans*, 72 AD2d 925 [4th Dept 1979]). DiPizio sufficiently pleads malice at paragraphs 32 and 39 of the Complaint. On the instant motion to dismiss, the Court shall not determine the truth such allegations, and DiPizio is under “no obligation to show evidentiary facts” (*Id.*, at 927).

Accordingly, Defendants’ motion to dismiss the defamation cause of action is denied.

Injurious Falsehood

Defendants’ sole basis for challenging this claim is that DiPizio allegedly failed to plead special damages. Pleading special damages with particularity is an essential element of a claim for injurious falsehood (*Emergency Enclosures, Inc. v. National Fire Adj. Co., Inc.*, 68 AD3d 1658 [4th Dept 2009]). Moreover,

[i]n pleading special damages, actual losses must be identified and causally related to the alleged tortious act [and] general allegations of lost sales from unidentified lost customers are insufficient (*Id.*, at 1660).

Equally relevant, a “round figure” of alleged pecuniary loss, such as \$1 million, is insufficient to satisfy this pleading mandate (*Talbot v. Johnson Newspaper Corp.*, 124 AD2d 284 [3rd Dept 1986]).

DiPizio contends that it sufficiently pled special damages in support of its injurious falsehood claim at paragraphs 21, 55 and 81 of its Complaint, which state as follows:

Complaint, ¶21

Prior to the events pleaded herein, Plaintiff enjoyed a reputation as a Responsible Bidder and for quality, timely, and on-budget work, and had excellent relationships with its vendors, unions, and with

owners, architects, and engineers with whom it has worked alongside on many state-funded projects.

Complaint, ¶55

Defendants' actions, to date, have cost Plaintiff millions of dollars as well as loss of bond capacity, ability to bid, and consequential lost profits.

Complaint, ¶81

As a direct result of the foregoing, Plaintiff was damaged in its reputation as a "responsible Bidder," lost bond and bidding capacity, and potentially exposed Plaintiff to financial obligations under its bonds.

Paragraph 21 of the Complaint describes DiPizio's reputation and relationships with vendors preceding the events that form the bases for the Instant Action, but fail to state how such events damaged its reputation and relationships. At best, such damages are implied, but the pleading falls far short of alleging "actual losses" (*Emergency Enclosures*, 68 AD3d at 1658).

The reference in paragraph 55 of the Complaint to a loss of "millions of dollars" is precisely the type of general allegation the *Emergency Enclosures* court found to be insufficient. Similarly, while DiPizio also pleads a "loss of bond capacity, ability to bid, and consequential lost profits," DiPizio fails to identify, *inter alia*, the extent of such lost capacity, the projects for which it was unable to bid, and the amount of such lost profits, by project.

The allegations in paragraph 81 of the Complaint are insufficient for the same reasons. DiPizio fails to identify the projects over which it was unable to bid and the projects for which it may be exposed under its bonds. Moreover, DiPizio fails to state the amount of such damages with respect to each such project.

Accordingly, Defendants' motion to dismiss the injurious falsehood cause of action is granted.

Tortious Interference with Contract

The elements of a claim for tortious interference with contract are: (1) the existence of a contract between the plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach the contract; and (4) damages to the plaintiff (*Kronos, Inc. v. AVX Corp.*, 81 NY2d 90, 94 [1993]).

This claim is limited to the Individual Defendants. The Complaint sufficiently alleges each element of the claim (*see* Complaint, ¶¶7, 83-87).

The Individual Defendants contend that this claim must be dismissed, because it may only survive if an underlying breach of contract cause of action succeeds in the first instance (*NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]). However, the facts in *NBT Bancorp* are distinguishable from the Instant Matter. In *NBT Bancorp*, the Court of Appeals upheld the dismissal of a claim for tortious interference with **prospective** business relations, because the parties had not actually entered into a binding contract. Here, the parties entered into a binding contract, consisting of the Owner/Contractor Agreement. Although Defendants' breach of contract claim is not part of the Instant Action, it is before this Court as the subject of the Related Action.

The Individual Defendants also contend that the tortious interference with contract claim should be dismissed, because it is merely an amplification of the claims DiPizio makes in the Related Action. This contention is incorrect. ECHDC is the sole Defendant in the Related Action. The Individual Defendants in the Instant Action are not parties to the Related Action.

Accordingly, the Individual Defendants' motion to dismiss the tortious interference with contract cause of action is denied.

Punitive Damages

The law is well settled that punitive damages may not be awarded against the State and its political subdivisions (*Sharapata v. Town of Islip*, 56 NY2d 332 [1982]). In so holding, the Court of Appeals has recognized that the goals of punishment and deterrence are not served when punitive damages are imposed against the State, because it is the innocent taxpayer who is ultimately punished (*Id.*, at 338). For purposes of an award of punitive damages, a municipality is distinguished from a private profit-making corporation, because

[i]t is not organized for any purpose of gain or profit, but it is a legal creation engaged in carrying on government and administering its details for the general good and as a matter of public necessity (*Id.*, at 337).

The same rationale applies to a public benefit corporation of the State of New York (*Clark-Fitzpatrick*, 70 NY2d at 386).

Defendant New York State Urban Development Corporation d/b/a Empire State Development ("Empire") is a "corporate governmental agency of the state, constituting a political subdivision and public benefit corporation" (Chapter 174 of the Laws of 1968 of the State of New York, §4). ECHDC is a subsidiary of Empire. The Individual Defendants are officers and/or employees of said public agencies, and the allegations asserted against them in the Complaint involve actions they took while in the course of their employment.

Accordingly, there is no basis in law for DiPizio's claim for punitive damages, and it is hereby dismissed.

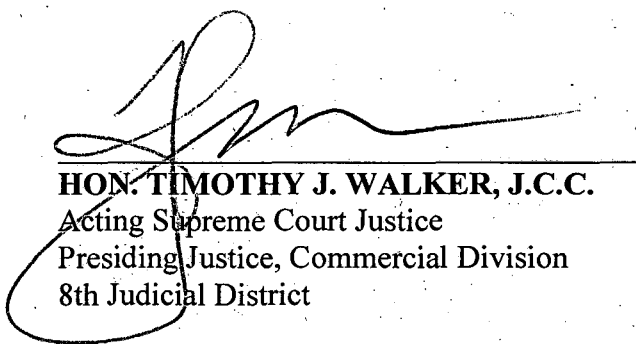
For the forgoing reasons, it is hereby

ORDERED, that the Complaint's second cause of action (injuries falsehood) and fourth

cause of action (punitive damages) are dismissed.

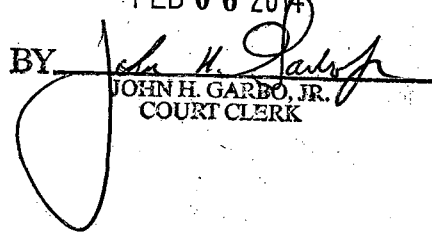
This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The mailing of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: February 6, 2014
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

GRANTED

FEB 06 2014
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