

<b>Bunche Consulting, LLC v St. Francis of Assisi Sch.</b>
2018 NY Slip Op 33512(U)
November 5, 2018
Supreme Court, Bronx County
Docket Number: 0022172/2018E
Judge: Fernando Tapia
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SUPREME COURT OF THE STATE OF NEW YORK  
BRONX COUNTY: Part 13

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BUNCHE CONSULTING, LLC,

Plaintiff,

v.

Index No.: 0022172/2018E

ST. FRANCIS OF ASSISI SCHOOL and MARC SILVA  
Defendant(s).

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**DECISION**

BUNCHE CONSULTING, LLC (hereinafter BUNCHE) alleges Defendants, ST. FRANCIS OF ASSISI SCHOOL (hereinafter ST. FRANCIS), a private school and MARC SILVA (hereinafter SILVA), principal of ST. FRANCIS tortiously interfered with BUNCHE’s contract. The contract pertains to educational services BUNCHE provides to children enrolled in ST. FRANCIS. Defendants jointly seek dismissal pursuant to CPLR §3211(a)(1) and (7), based on documentary evidence and failure to state a cause of action, respectively. BUNCHE cross moves to amend its complaint pursuant to CPLR § 2214.

Prior to this complaint, BUNCHE had been providing educational remediation services to students of ST. FRANCIS. BUNCHE contracted with parents of ST. FRANCIS’ students, authorizing BUNCHE to escort their children from the school to BUNCHE’s premises. BUNCHE alleges SILVA recently “erected barriers” preventing BUNCHE from providing its educational services. (*See*, Plaintiff Counsel’s Affirmation in Support of Cross Motion and Opposition to Motion, ¶ 8). According to BUNCHE, SILVA misrepresented to parents that ST. FRANCIS contracted with another entity to provide similar services at the school, rendering BUNCHE’s services no longer necessary. *Id.* at ¶ 30. Finally, BUNCHE claims it was no longer permitted onto school grounds to escort children to BUNCHE’s premises. *Id.* at ¶ 12.

**TORTIOUS INTERFERENCE OF CONTRACT**

Defendants seek dismissal as they contend BUNCHE has not met the burden for a tortious interference claim. A claim for tortious interference must allege: (a) plaintiff had business relations with a third party; (b) defendant interfered with those business relations; (c)

defendant acted with the sole purpose of harming plaintiff or by using unlawful means; and (d) a resulting injury to the business relationship. *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16 (1<sup>st</sup> Dep't 2009). "Wrongful means" is conduct amounting "to crime or an independent tort." This includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is involved. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182 (2004); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183 (1980). Here, BUNCHE alleged Defendants' misrepresented to the parents of the children they would be unable to contract with BUNCHE, and the school acted wrongfully by not releasing the children to BUNCHE. (*See*, Plaintiff Counsel's Affirmation in Opposition, ¶¶ 8-17; ¶¶ 30-31).

Defendants argue dismissal is proper pursuant to CPLR § 3211(a)(1) as documentary evidence is permitted on a motion to dismiss where it serves to "flatly contradict" factual claims set forth in the complaint. (*See*, Defense Counsel's Affirmation in Support, Pg. 3, ¶ 10). Under CPLR § 3211(a)(1), where a motion to dismiss is based upon documentary evidence, "such a motion may be appropriately granted only where the documentary evidence utterly refutes plaintiffs factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 (2002). Here, SILVA's letter neither utterly refutes BUNCHE's allegations nor conclusively establish a statutory defense as a matter of law. Rather, the letter appears to bolster BUNCHE's claims.<sup>1</sup> Defendants further argue SILVA's letter did not preclude BUNCHE from continuing to provide services to ST. FRANCIS' students, however, this only creates a question of fact, as to the reason why BUNCHE was prohibited from entering school grounds. (*See*, Defense Counsel's Affirmation in Support, Pg. 4, ¶ 13).

Lastly, on the issue of BUNCHE's failure to identify a specific business relationship that was interfered with, BUNCHE admits to its previous failure in doing so. However, BUNCHE contends it did not identify its third-party relationship to protect the identities of the children, and its amended complaint does in fact identify the third-party relationship. (*See*, Plaintiff Counsel's Affirmation in Support of Cross Motion and Opposition to Motion, ¶ 36; Ex. A).

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<sup>1</sup> In SILVA's letter to BUNCHE, SILVA prohibits BUNCHE from entering the school. *See*, Defense Counsel's Affirmation in Support, Ex. B ("To be clear, neither you nor any employee or agent of Bunche Consulting is allowed on or in St. Francis of Assisi School property. Any failure to comply with this directive will be considered trespassing and the school will respond accordingly").

FAILURE TO STATE A CAUSE OF ACTION

Defendants seek dismissal under CPLR § 3211(a)(7), as they contend BUNCHE has failed to meet the burden for prima facie tort, since it did not allege malevolence as the sole motivation for Defendants action. However, by meeting the elements for tortious interference, BUNCHE has satisfied its burden for a prima facie tort action.

“It is well settled that on a motion to dismiss, a court must liberally construe the complaint in the light most favorable to plaintiff and all factual allegations therein must be accepted as true.” *Goldman v. Metro. Life Ins. Co.*, 13 A.D.3d 289 (1<sup>st</sup> Dep’t 2004). “The test on a motion directed at the sufficiency of the complaint is not whether a cause of action is artfully drafted but whether, accepting the allegations of the complaint as true and according them the benefit of every favorable inference, a legally cognizable cause of action is made out.” *Banc of Am. Sec. LLC v. Solow Bldg. Co. II, L.L.C.*, 47 A.D.3d 239 (1<sup>st</sup> Dep’t 2007). “In assessing a motion under CPLR § 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and ‘the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.’” *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976).

In the present matter, when drawing all reasonable inferences from each party’s allegations and SILVA’s letter in the plaintiff’s favor, BUNCHE presents a cognizable claim. As stated above, SILVA’s letter appears to bolster BUNCHE’s claims as the letter shows BUNCHE’s prohibition from ST. FRANCIS’ premises. (*See*, Defense Counsel’s Affirmation in Support, Ex. B). Additionally, in its amended complaint BUNCHE’s pleadings meet the requirements to bring forth a prima facie tort claim.

A prima facie tort claim must allege: (1) intentional infliction of harm; (2) causation of special damages; (3) without excuse or justification; and (4) by an act or series of acts that would otherwise be lawful. *Curiano v. Suozzi* 63N.Y.2d 113 (1984). A critical element of prima facie tort is a specific and measurable loss, which requires an allegation of special damages. *Id.*; *Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453 (1967). With respect to malevolence, “there is no recovery in prima facie tort unless malevolence is the sole motive for defendant’s otherwise lawful act or, unless defendant acts from ‘disinterested malevolence,’ by which it is meant ‘that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another.’” *Burns Jackson Miller*

*Summit & Spitzer v. Lindner*, 59 N.Y.2d 314 (1983); *American Bank & Trust Co. v. Federal Bank*, 256 U.S. 350 (1921); *Beardsley v. Kilmer*, 236 N.Y. 80 (1923).

Here, BUNCHE has alleged intentional infliction of harm by claiming Defendants acted for the sole purpose of interfering with BUNCHE's contract. (*See*, Plaintiff Counsel's Affirmation in Opposition, ¶ 40). Second, BUNCHE has claimed special damages exceeding \$65,000 resulting from Defendants' interference. *Id.* at ¶ 43. Third, in its cross motion and amended complaint, BUNCHE has stated that SILVA recently "erected barriers" without explanation. *Id.* at ¶ 8; Ex. A, ¶ 8. Fourth, BUNCHE does not allege that Defendants acted unlawfully in prohibiting BUNCHE from entering ST. FRANCIS, but that it acted wrongfully in doing so. *Id.* at ¶ 27. Finally, with respect to malevolence, as detailed above, the reason(s) as to why BUNCHE was prohibited from school grounds is a question of fact.

CROSS MOTION TO AMEND

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom. *Jacobson v. McNeil Consumer & Specialty Pharms.*, 891 N.Y.S.2d 387 (1<sup>st</sup> Dep't 2009). BUNCHE's cross motion does not add any new causes of action. As detailed above, BUNCHE seeks to amend to specify the third-party relationships in its claim. Consequently, Defendant would not be prejudiced by the proposed amendment.


For the foregoing reasons:

It is **ORDERED** Defendants' motion to dismiss is **DENIED**.

It is **ORDERED** BUNCHE's Cross Motion to Amend the Complaint is **GRANTED**, and the proposed amended complaint annexed as Exhibit A to its moving papers shall be deemed served upon service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: November 5, 2018  
Bronx, NY

  
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**Hon. Fernando Tapia, J.S.C.**