SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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MONEY GROUND, INC., doing business as VICTORIA,

Plaintiff,

- v -

ELDRIDGE STREET BLOCK ASSOCIATION, ROBERT CROZIER, MARGARET CHO, MERAL BOZKURT, PABLO GARCIA, ADRIAN ABEY GINES, and ROBERT WEIGAND

Defendants.

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INDEX NO. 157396/2022

MOTION DATE 02/01/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for SUMMARY JUDGMENT AFTER JOINDER.

In this action to recover damages for abuse of process, commercial disparagement, and tortious interference with contracts, the defendants move pursuant to CPLR 3212(h) for summary judgment dismissing the complaint on the ground that the action constitutes a strategic lawsuit against public participation (SLAPP) and is thus barred by Civil Rights Law §§ 70-a and 76-a, which are the New York anti-SLAPP statutes. The defendants also move for an award of costs, attorneys' fees, and punitive damages. The plaintiff opposes the motion, and cross-moves pursuant CPLR 3212 for summary judgment dismissing the defendants' anti-SLAPP counterclaim and pursuant to CPLR 3212(f) and 3124 for limited discovery permitting it to conduct depositions so that it can oppose the defendants' motion. The defendants' motion is granted to the extent that they are awarded summary judgment dismissing the complaint, along with costs and attorneys' fees, the complaint is dismissed, and the motion is otherwise denied. The plaintiff's cross motion is denied.

On October 5, 2021, the plaintiff applied to the New York State Liquor Authority (SLA) for an on-premises liquor license permitting it to serve alcoholic beverages at a bar and tavern that

it wished to open and operate at 235 Eldridge Street, a location on the Lower East Side of Manhattan. Prior to that date, several neighborhood residents had written to New York City Community Board No. 3, expressing their opposition to what they had heard was to be the plaintiff's proposed bar and tavern. On April 27, 2022, the SLA, after having providing neighborhood residents with the proper notice of the application, accepting written statements from those residents, and conducting the applicable public hearings at which several residents voiced their opposition to the issuance of the license, voted to grant the license. On July 29, 2022, the defendants commenced a CPLR article 78 proceeding against the SLA and the plaintiff in this court, contending that the SLA's determination to grant the license was arbitrary and capricious. In a written decision dated August 16, 2022, the SLA formally memorialized the April 27, 2022 vote, and determined to grant the license. On August 30, 2022, and, thus, prior to this court's disposition of the CPLR article 78 proceeding, the plaintiff commenced this action against the defendants, asserting causes of action to recover for abuse of process, commercial disparagement, and tortious interference with contracts, based on the defendants' activities in opposing the plaintiff's liquor license application before the Community Board and the SLA.

In a decision, order, and judgment dated December 12, 2022, this court denied the defendants' CPLR article 78 petition, and dismissed their CPLR article 78 proceeding against the SLA and the plaintiff, concluding that the SLA's determination was rational and not arbitrary and capricious (*see Matter of Eldrige St. Block Assn. v New York State Liquor Auth*., 2022 NY Slip Op 34206[U], 2022 NY Misc LEXIS 7786 [Sup Ct., N.Y. County, Dec. 12, 2022] [Kelley, J.]).

After answering the complaint in this action, the defendants moved pursuant to CPLR 3212(h) for summary judgment dismissing the complaint. CPLR 3212(h) mandates that summary judgment be granted where the moving party

> "has demonstrated that the action . . . subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law . . . unless the party responding to the motion demonstrates that the action . . . has a substantial basis in fact and law or

> is supported by a substantial argument for an extension, modification or reversal of existing law."

Civil Rights Law § 76-a(1)(a) defines "an action involving public petition and participation" as a claim based upon "(1) any communication in a place open to the public or a public forum in connection with an issue of public interest" or "(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."

Here, the defendants established, prima facie, that the instant action involved the plaintiff's response to their "public petition and participation" within the meaning of Civil Rights Law § 76-a(1)(a). Specifically, the plaintiff's claims arise out of statements that the defendants made during the course of the Community Board's consideration of the plaintiff's anticipated application for a liquor license, the SLA's review of the plaintiff's application for the issuance of the liquor license, and the subsequent CPLR article 78 proceeding that challenged the SLA's determination. This scenario is a prototypical situation to which the anti-SLAPP statute was intended to apply (*see, e.g., 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 133-134 [1992] [action arising out of statements made during Community Board meeting concerning plaintiff's application for sidewalk café was an action involving public petition and participation]). Inasmuch as the defendants made a prima facie showing that this is an action involving public petition and participation, the burden shifted to the plaintiff to demonstrate that its causes of action had a substantial basis in fact and law.

To state a cause of action to recover for abuse of process, a party must allege "three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi,* 63 NY2d 113, 116 [1984], citing *Board of Educ. v Farmingdale Classroom Teachers Assn*., 38 NY2d 397, 403 [1975]; *see also Case de Meadows Inc. [Cayman Islands] v Zaman*, 76 AD3d 917 [1st Dept 2010]). The essence of an abuse of

process claim is that process "was improperly used after it was issued" (*Curiano v Suozzi,* 63 NY2d at 117). "As a matter of law, the mere filing by plaintiff of a summons and complaint," or, in this case, a notice of petition or petition, "is an insufficient predicate for an abuse of process claim" (*Gleich v Rose*, 294 AD2d 177, 177 [1st Dept 2002]). Merely alleging that an action was commenced with malicious intent is insufficient to maintain an abuse of process claim (*see id*.).

Here, the plaintiff failed to demonstrate that its abuse of process cause of action had a substantial basis in fact or law. The plaintiff merely alleged, in conclusory fashion, that the defendants commenced the CPLR article 78 proceeding to "harm Plaintiff without any legitimate excuse or justification" and that, in doing so, the defendants "attempted to use a regularly issued process in a perverted manner to obtain a collateral objective" of "commercial diversity" in the Eldridge Street neighborhood. Nowhere in its pleadings or opposition papers did the plaintiff allege that the defendants improperly used process in the CPLR article 78 proceeding after it was issued; at most, the plaintiff alleged that the CPLR article 78 proceeding was instituted with malicious intent, which is insufficient to maintain an abuse of process cause of action (*Curiano v Suozzi,* 63 NY2d at 117). Hence, summary judgment must be awarded to the defendants dismissing that cause of action.

Trade disparagement, also referred to as trade libel or product disparagement, "requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment" (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010]). The elements of a cause of action to recover for defamation/disparagement are "'a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard and it must either cause special harm or constitute defamation per se'" (*Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007], quoting *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Here, the plaintiff failed to identify any allegedly false or derogatory facts about itself that the defendants purportedly published. Although the plaintiff

referred to negative statements made by the defendants in their CPLR article 78 petition and supporting affidavits concerning the SLA's issuance of the plaintiff's liquor license, no fair reading of these documents can support a trade libel claim.

Initially, most of the factual assertions and negative statements set forth in the affidavits that the individual defendants submitted to the Community Board and the SLA did not mention the plaintiff at all; rather, they described the general conditions of the Eldridge Street neighborhood or referred to incidents that occurred at establishments that the plaintiff did not own or operate. To the extent that the defendants' CPLR article 78 petition or supporting affidavits contained allegations about the future detrimental effects of a separate, independent drinking establishment owned by the plaintiff in the neighborhood, they were merely statements of opinion and, therefore, were not actionable (*see Costanza v Seinfeld*, 279 AD2d 255, 256 [1st Dept 2001]).

The plaintiff did not even attempt to dispute the veracity of the defendants' descriptions of the specific incidents recounted in the affidavits that they submitted in opposition to the license. Rather, the plaintiff contended that these statements falsely implied that the plaintiff itself was responsible for these occurrences. For instance, the plaintiff characterized the affidavit of the defendant Robert Crozier as falsely implying that the plaintiff caused a 2019 assault of a patron outside the subject premises. This assertion is incompatible with a fair reading of Crozier's affidavit, which plainly stated that the assault occurred outside "the previous bar located at the applicant's property," without reference to the identity of that bar's owner. Similarly unavailing is the assertion that another defendant, Meral Bozkurt, portrayed the plaintiff as being "responsible for the poor quality of life on Eldridge Street," as her affidavit made clear that quality of life concerns were the result of a general "saturation" of the block with bars and lounges since approximately 2008, and not as the specific result of the plaintiff's conduct or behavior.

The plaintiff further contended that the affidavit submitted by the defendant Adrian Abey Gines to the SLA falsely implied that the plaintiff itself caused the high blood pressure of Gines's wife due to the presence of crowds and cigarette smoke on the street outside their apartment. However, this affidavit made clear that its allegations concerned the "previous licensee," which definitionally excluded the plaintiff from Gines's complaints. As to the plaintiff's allegation that the defendant Pablo Garcia falsely implied that the plaintiff operated "a noisy and raunchy licensed premise" or "hell square," the Court again concludes that these statements concerned the state of the neighborhood generally and prior operators of a bar on the premises. Garcia's affidavit made clear that "hell square" is a nickname for the neighborhood around Eldridge Street, and that noise on the block was the result of outdoor dining and the operation of a bar at the subject premises by the previous licensee. The plaintiff next accused the defendant Reobert Weigand of falsely implying in his affidavit "that vibrations from the Plaintiff's music caused his apartment to violently shake, destroying dishes." This allegation cannot support a trade libel or disparagement claim, as Weigand's affidavit did not mention the plaintiff at all in connection with this incident, which allegedly occurred in 2018 and, thus, prior to the opening of the plaintiff's establishment at the premises. To the extent that Weigand's affidavit contained negative statements about bar owners in the neighborhood, they either related to the previous licensee at the premises or generally to "club and bar owners in the area [who] have aggressively retaliated against whistleblowers or public interest groups."

The court notes that many of the defendants' affidavits cited by the plaintiff were executed in September 2021, and submitted to the Community Board prior to both the plaintiff's formal submission of its license application to the SLA and the opening of the plaintiff's establishment at the premises. The plaintiff admitted as much in its complaint by repeatedly emphasizing that it was not operating a bar at the time of the specific incidents of which the defendants complained. Logically, none of the specific allegations lodged in the defendants' affidavits about these occurrences could have referred to or involved the plaintiff. To the extent

that the defendants sought to comment upon these past events to illustrate their concerns about the licensing of an additional drinking establishment on Eldridge Street, their expression amounts to nonactionable opinion (*see Costanza v Seinfeld*, 279 AD2d at 256).

In addition, the plaintiff alleged that all of the defendants disparaged it when they published, in their CPLR article 78 petition, "false and disparaging statements" claiming that the plaintiff "had poor character and was not fit, citing four citations . . . . causing customers to regard Plaintiff as vile, dangerous and reprehensible." The CPLR article 78 petition, however, did not contain any language alleging poor character and unfitness on the plaintiff's part, but merely asserted that "the character and fitness of the applicant to be granted *was never put into issue* because the ALJ never inquired into the prior[ ] disciplinary record of the applicant" (emphasis added). Specifically, the petition averred that "the ALJ report did not cite the fact that the applicant had been previously disciplined by the [SLA] under its other licenses multiple times" for, inter alia, "operating over maximum capacity and as an unlicensed cabaret; selling alcohol to a minor; and for operating a disorderly premises."

In any event, "'statements made by parties and their attorneys in the context of litigation are absolutely privileged if, by any view or under any circumstances, they are pertinent to the litigation'" (*Frechtman v Gutterman*, 115 AD3d 102, 106-107 [1st Dept 2014], quoting *Grasso v Mathew*, 164 AD2d 476, 479 [3d Dept 1991]). Hence, any statements set forth in the CPLR article 78 petition or supporting affidavits are privileged from a claim of disparagement (*see Frechtman v Gutterman*, 115 AD3d at 106-107). To the extent that the allegedly disparaging statements were contained in affidavits submitted to the Community Board, the defendants enjoyed a qualified privilege protecting them from liability in the absence of malice (*see 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d at 136). The plaintiff has not demonstrated with any evidence that the defendants made their statements to the Community Board with malice.

. In further support of its disparagement claim, the plaintiff also alluded to a story published about the CPLR article 78 proceeding in the New York Daily News, based on a

purported "leak" of the petition. However, the plaintiff failed to set forth with specificity the allegedly defamatory statements contained in that article (*see* CPLR 3016[a]), and did not annex it to its opposition papers, although the defendants attached the article as an exhibit to their reply papers. Upon review of the article, the court concludes that this article merely relayed the allegations set forth in the CPLR article 78 petition and supporting affidavits and, therefore, is privileged as a fair and true account of judicial proceedings (*see* Civil Rights Law § 74; *Golan v Daily News, L.P.*, _____ AD3d_____, 2023 NY App Div LEXIS 1589 [1st Dept, Mar. 23, 2023]).

In light of the foregoing, the court must award summary judgment to the defendants dismissing the trade/commercial disparagement cause of action.

To state a cause of action for tortious interference with a contract, a plaintiff must allege "(1) the existence of a contract between [itself] and a third party; (2) defendant's knowledge of the contract; (3) defendants' intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993], citing *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]). The plaintiff alleged in its complaint that the defendants tortiously interfered with contracts to which the plaintiff is or was a party, namely, its lease for the premises, a contract for the renovation of the premises, and long-term contracts with equipment suppliers and alcohol vendors. Although the plaintiff alleged the existence of various contracts between itself and third parties, and the defendants' knowledge of them, it failed to allege that the defendants intentionally induced any of the third parties to breach these contracts or to render performance impossible. The complaint merely recited conclusory allegations that the defendants' purportedly "false and disparaging statements about Plaintiff tortiously interferes with" the plaintiff's contracts with its landlord, suppliers, and vendors. The plaintiff failed to submit any exhibits in its opposition papers demonstrating a factual basis for its tortious interference cause of action; in its memorandum of law in opposition to the instant motion, the plaintiff merely reiterated the conclusory allegations of tortious

interference and damages set forth in its complaint. It therefore failed to show, as required by CPLR 3212(h), a substantial basis in fact or law supporting its third cause of action. Hence, the tortious interference cause of action must be dismissed.

The defendants also seek an award of costs and attorneys' fees pursuant to Civil Rights Law § 70-a(1)(a), and to recover punitive damages pursuant to Civil Rights Law § 70-a(1)(c).

Civil Rights Law § 70-a(1)(a) provides that

> "costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to [CPLR 3212(h)], that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law."

Having succeeded on their summary judgment motion pursuant to CPLR 3212(h), the defendants have demonstrated that the plaintiff commenced this action without a substantial basis in fact or law, while, in opposition to the motion, the plaintiff has not urged the court to consider an extension, modification, or reversal of existing law as a ground for denying the motion. The defendants thus are awarded costs and attorneys' fees.

The court, however, declines to award punitive damages to the defendants, as they have not made an "additional demonstration" that this action "was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise inhibiting the free exercise of speech, petition or association rights" (Civil Rights Law § 70-a[1][c]). They merely stated that that the complaint is "without any legal or factual justification whatsoever" and argue, without further support, that the plaintiff commenced the action solely to harass or intimidate them. This conclusory assertion alone is insufficient to constitute the additional demonstration required by Civil Rights Law § 70-a(1)(c) to support an award of punitive damages (*see Southampton Day Camp Realty, LLC v Gormon*, 118 AD3d 976, 978-979 [2d Dept 2014]).

For the same reason as it is granting that branch of the defendants' motion seeking summary judgment dismissing the complaint, the Court denies that branch of the plaintiff's cross motion seeking to dismiss the defendants' anti-SLAPP counterclaims. That branch of the

plaintiff's cross motion seeking further discovery is also denied. Although CPLR 3212(f) permits a court to deny a summary judgment motion where "facts essential to justify opposition may exist but cannot then be stated," the plaintiff here failed to demonstrate how further discovery might lead to relevant evidence (*see Alcor Life Extension Found. v Johnson*, 136 AD3d 464 [1st Dept. 2016]). "The 'mere hope' of [plaintiff] that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough" (*Frierson v Concourse Plaza Assoc*., 189 AD2d 609, 610 [1st Dept 1993]). To properly oppose the defendants' motion by virtue of CPLR 3212(f), or to obtain further discovery to enable it to oppose the motion, the plaintiff was "bound to show there was a likelihood of discovery leading to such evidence, i.e., that facts may exist but cannot be stated at that time" (*id.*). The plaintiff, however, failed to make such a showing here (*see Gyabbah v Rivlab Transp. Corp*., 129 AD3d 447 [1st Dept 2015]).

Accordingly, it is

ORDERED that the defendants' motion is granted to the extent that they are awarded summary judgment dismissing the complaint, and are awarded costs and attorneys' fees, the motion is otherwise denied, the complaint is dismissed, and the Clerk of the court is directed to enter judgment accordingly; and it is further,

ORDERED that the plaintiff's cross motion is denied; and it is further,

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the proper amount of costs and attorneys' fees to be awarded to the defendants; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the

"References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel shall immediately consult one another and counsel for the defendants shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the defendants shall serve a proposed accounting of the number of hours of attorneys' and paralegals' time incurred in defending this action, along with a statement of the hourly billing rate for that time, within 24 days from the date of this order and the plaintiff shall serve objections to the proposed accounting within 20 days from service of the defendants' papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts and, after consideration of any such motion, and either the confirmation or modification of the Report, the court shall direct the Clerk of the court to enter an appropriate money judgment for costs and attorneys' fees in favor of the defendants and against the plaintiff.

This constitutes the Decision and Order of the court.

5/10/2023
DATE

JOHN J. KELLEY, J.S.C.

MOTION:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**			
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**	
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**			
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[X]	**REFERENCE**	
CROSS MOTION:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**			
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**	
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**			
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**	