

<b>Stapleton Studios, LLC v City of New York</b>
2004 NY Slip Op 30279(U)
September 14, 2004
Supreme Court, New York County
Docket Number: 119708/2003
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
*Justice*

PART 17

Stapleton Studios

INDEX NO. 119708103

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

City of NY

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision*

**FILED**

SEP 29 2004

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9/14/04



EMILY JANE GOODMAN  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
STAPLETON STUDIOS, LLC, and HARBOUR  
ENTERTAINMENT, INC.

Plaintiffs,

- against -

Index No.: 119708/2003

THE CITY OF NEW YORK, THE ECONOMIC  
DEVELOPMENT CORPORATION OF THE CITY  
OF NEW YORK, ANDREW M. ALPER in his official  
capacity as President of the New York City Economic  
Development Corporation, THE DEPT OF  
BUSINESS SERVICES OF THE CITY OF NEW  
YORK, and MICHAEL R. BLOOMBERG, in his official  
capacity as Mayor of the City of New York,

Defendants.

-----X  
EMILY GOODMAN, J.

This action arises from plaintiffs' failed efforts to develop a former naval base into, among other things, a world-class movie studio. Defendants now move to dismiss the complaint, and plaintiffs oppose the motion.

### BACKGROUND

By a deed from the federal government dated June 1, 1995, the defendant City of New York (City) became the owner of 154 acres of waterfront property (36 of which are above water), located on the northeastern shoreline of Staten Island, known as the Homeport. The City's Department of Small Business Services (DSBS) has jurisdiction over the Homeport because it is waterfront property, and the City's Economic Development Corporation (EDC) manages the Homeport on behalf of the City and DSBS.

The members of plaintiff Stapleton Studios, LLC (Stapleton) envisioned developing the Homeport into a movie studio, luxury hotel, and a marina in three phases, beginning with the construction of motion picture stages and state-of-the-art studio facilities. Pursuant to an Occupancy Permit dated December 27, 2001, Stapleton began occupying Buildings 2 and 3 at the Homeport (the Premises).<sup>1</sup> Under this Occupancy Permit, Stapleton's monthly base charge was \$6,500. When this permit expired on June 30, 2002, Stapleton entered into a second Occupancy Permit dated July 8, 2002, which was set to expire on October 31, 2002. Under the second permit, Stapleton's monthly base charge increased to \$54,895.83 per month.

The City decided not to go forward with the development plans, citing various concerns, such as the financial viability and backing for the development, and issues with the criminal conviction of an individual who dealt with the City on petitioner's behalf. By a notice dated September 4, 2002, the City informed Stapleton to vacate the Premises by October 31, 2002.

On November 4, 2003, Stapleton commenced an Article 78 proceeding challenging the City's decision not to go forward with the proposed development as arbitrary and capricious. In that proceeding, Stapleton sought an order directing the City to submit the development proposal through the Uniform Land Use Review Procedure (ULURP). However, in deciding whether Stapleton was entitled to discovery in the proceeding, the Appellate Division, First Department

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<sup>1</sup>The Premises are described specifically as  
“(i) that certain property known as Building 2, including the adjoining freezer component, consisting of approximately 67,000 square feet in total (“Building 2”) as indicated on page 1 of Exhibit A, and (ii) that certain property, consisting of approximately 10,500 square feet located in the southern portion of Building 3 (“Portion of Building 3) as indicated on page 1 of Exhibit A and more particularly indicated on page 2 of Exhibit A”  
(see Isselbacher Affirm., Exs B & C).

ruled that, “the pleadings and the terms of the Permit establish that Stapleton is not entitled to the relief it seeks” (*Stapleton Studios, LLC v City of New York*, 7 AD3d 273, 275 [1<sup>st</sup> Dept 2004]). Accordingly, this court dismissed the Article 78 proceeding by a decision and judgment dated June 9, 2004.

While the Article 78 proceeding was pending, Stapleton and Harbour Entertainment, Inc. (Harbour), which allegedly provided the initial capital and equity in the development project, commenced this plenary action,<sup>2</sup> asserting nine causes of action: breach of an alleged development contract; unjust enrichment; breach of the duty of good faith & fair dealing; breach of fiduciary duty; antitrust violations of the Donnelly Act (General Business Law § 340); tortious interference with a contract; lost profits and lost business opportunities; specific performance; and slander & defamation. The court held oral argument on the motion to dismiss on July 29, 2004.

### DISCUSSION

“On a motion to dismiss pursuant to CPLR 3211, a court must construe the complaint liberally, accept as true the facts alleged in the complaint and accord the plaintiff the benefit of every possible favorable inference” (*Cointech v Masyrk Towers Corp.*, 7 AD3d 376, 379 [1<sup>st</sup> Dept 2004]). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1<sup>st</sup> Dept 2003]). “[A] court may freely consider affidavits submitted by the plaintiff to remedy any

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<sup>2</sup>The original complaint also included Stapleton’s members as individual plaintiffs, but they were not included in the amended complaint.

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 NY2d 83, 88 [1994][citations omitted]).

“On a motion to dismiss pursuant to CPLR 3211 (a) (1), ‘a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law’” (*Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1<sup>st</sup> Dept 2003][citing *Leon*, 84 NY2d at 88]).

#### First Cause of Action: Breach of the Development Agreement

According to plaintiffs, defendants agreed that plaintiffs would be the designated developer of the Homeport (Amended Complaint ¶ 152). The parties allegedly agreed that plaintiffs would assume a ground lease for the entire property, with a right to sublet (*id.* ¶¶ 48-49). EDC allegedly promised that it would enter into a long-term lease with plaintiffs at the end of the first occupancy permit, and to support plaintiffs’ development project if certain requirements were met (*id.* ¶¶ 69, 72). These allegations are not sufficient to establish an agreement with defendants, because they do not contain all the material terms of this alleged development agreement. Such an agreement would be, at best, an unenforceable agreement to agree (*Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 110 [1981]; *Williamsburg Bus. Park v Brooklyn Navy Yard Dev. Corp.*, 2 AD3d 439 [2d Dept 2003]).

In an attempt to supplement the complaint, plaintiffs maintain that the terms of the parties’ development agreement were memorialized in the City’s Request for Proposals, three business plans, and other documents (Opp. Mem. at 13; *see also* Walker Opp. Aff. ¶ 17). While these submissions shed light on plaintiffs’ obligations (*see* Walker Opp. Aff., Ex 1 at Exhibit B

[RFP], Ex 17 [Business Plan]), they do not indicate the material terms of defendants' obligations to "support" plaintiffs, nor do they indicate the terms of the ground lease. Moreover, defendants' intentions in the Request for Proposal cannot be elevated to contractual promises of performance. The Request for Proposal was soliciting offers, not making them. Plaintiffs also contend that EDC promised to seek approvals for the project (Opp. Mem. At 13, 16). Though that alleged promise is sufficiently definite, the Statute of Frauds bars the alleged development agreement, including this promise.

General Obligations Law § 5-701 (a) (1) requires the development agreement to be in writing because it cannot be performed within a year. Plaintiffs' business plans indicate that the three phases of the Homeport development would be completed in five years (Walker Opp. Affirm., Ex 17 at 3). General Obligations Law § 5-703 also requires a writing for any lease of real property greater than one year. Plaintiffs failed to produce any writing contain the alleged promises. "[A]n oral agreement to execute an agreement that is within the Statute of Frauds is itself within the Statute and thus unenforceable" (*Brickman v Woolworth Co.*, 66 AD2d 737, 738 [1<sup>st</sup> Dept 1978][Murphy, J., dissenting], *revd* 58 NY2d 639 [1982][reversed for the reasons stated in the dissent]).

Plaintiffs rely on the doctrine of part performance as an exception to the Statute of Frauds. According to plaintiffs, they secured financing, submitted business plans, and occupied two buildings at the Homeport. However, this exception does not apply here. The exception of part performance does not apply to any part of the alleged development agreement that cannot be performed within a year (*see Stephen Pevner, Inc. v Ensler*, 309 AD2d 722, 722 [1<sup>st</sup> Dept 2003][citing *Aegis Group*, 93 NY2d at 234 n1]). Although plaintiffs' actions are consistent with

the existence of an alleged agreement, they are not “unequivocally referable” to the alleged agreement, which is required to invoke the exception of part performance (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999]). “[T]he actions alone must be ‘unintelligible or at least extraordinary’, explainable only with reference to the oral agreement” (*Anostario v Vicinanza* 59 NY2d 662, 664 [1983]). This is not the case here. The fact that plaintiffs took occupancy at the Homeport is explained by the occupancy permits that plaintiffs had executed. That plaintiffs may have submitted business plans and secured financing could be explained as part of the proposal that the City ultimately rejected by letters dated February 25, 2000 and June 8, 2000 (*see* Isselbacher Affirm., Ex G).

Therefore, the first cause of action is dismissed.

Second Cause of Action: Unjust Enrichment

Plaintiffs seek to recover \$2 million that they allegedly spent in making improvements to the space Stapleton occupied pursuant to the occupancy permits. Plaintiffs allege that they were “duped” into building a working sound stage.

As defendants point out, paragraph 14 (b) of the occupancy permits identically provides that, “All additions and improvements made at any time during the Period shall be at no cost or expense to Permitter or Permit Administrator and shall become property of Permitter.” The existence of valid, written agreements governing the subject matter of the dispute precludes recovery on a quasi-contract theory (*Clark-Fitzpatrick, Inc. v Long Is. R.R., Co.*, 70 NY2d 382, 388-89 [1987]). The merger clauses in paragraph 41 of these occupancy permits refute plaintiffs’ argument that they did not reflect the terms of the parties’ alleged “overall agreement.”

Therefore, this cause of action is dismissed.

Third Cause of Action; Breach of the covenant of good faith and fair dealing

Plaintiffs allege that the development agreement required the parties to cooperate in good faith to obtain necessary approvals to lease the Homeport (Walker Opp. Affirm. ¶ 5; *see also* Amended Complaint ¶ 158). Plaintiffs contend that EDC and the City breached the agreement by allegedly interfering with construction progress, raising the base rent under the second occupancy permit, allegedly slandering them in the press, and “abruptly terminating” the occupancy permits (*id.* ¶ 6).

The duty of good faith and fair dealing is implied from a contract (*see 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]), which in this case is the development agreement. However, “there can be no covenant of good faith and fair dealing implied where there is no contract” (*Lakeville Pace Mech. v Elmar Realty Corp.*, 276 AD2d 673, 676 [2d Dept 2000]; *Levine v Yokell*, 258 AD2d 296 [1<sup>st</sup> Dept 1999]). Dismissal of plaintiffs’ first cause of action results in dismissal of this cause of action.

Plaintiffs’ reliance on *Goodstein Constr. Corp. v City of New York* (67 NY2d 990 [1992]) is misplaced. There, the Court held that a construction and real estate joint venture stated causes of action against the City for breach of a duty to negotiate in good faith, based on “letters of agreement to negotiate” with the City’s Department of Housing Preservation and Development (HPD). Pursuant to these letters, HPD designated the joint venture to negotiate the terms of a sale of land to joint venture, but ultimately “de-designated” it, allegedly without cause and for improper motives. Unlike this case, “[t]he contract in *Goodstein* . . . was ‘unusually detailed and clearly enforceable’” (*Trade & Indus. [USA] Inc v Euro Brokers Inv. Corp.*, 222 AD2d 364 [1<sup>st</sup> Dept 1995])[citing *Goodstein Constr. Corp. v City of New York*, 111 AD2d 49, 50 (1<sup>st</sup> Dept

1985)). Indeed, the appellate court in *Goodstein* noted that the “the designation agreements contain intricate terms and conditions of the respective obligations of the parties” (*Goodstein Constr. Corp.*, 111 AD2d at 52). By contrast, the only detailed terms of plaintiffs’ alleged development agreement are based on the business plans themselves, which do not contain defendants’ obligations, and which the City rejected.

Fourth Cause of Action: Breach of Fiduciary Duty

This cause of action is dismissed for lack of a fiduciary relationship between plaintiffs and defendants. Plaintiffs’ contention that they entered into a partnership agreement with defendants is without merit. The complaint is devoid of any allegations that defendants agreed to pool their money, efforts, labor or skill with plaintiffs, and to share in the profits and losses (*see e.g. Chanler v Roberts*, 200 AD2d 489, 491 [1<sup>st</sup> Dept 1994]; *Missan v Schoenfeld*, 95 AD2d 198, 207 [1<sup>st</sup> Dept 1983]). An internal EDC e-mail describing the administrative process for a sole source agreement is hardly probative of the existence a partnership agreement (*see Walker Opp. Affirm.*, Ex 20).

Fifth Cause of Action: Antitrust Violations under state law

“The Donnelly Act declares, among other things, that ‘[e]very contract, agreement, arrangement or combination whereby \* \* \* [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained [is] against public policy, illegal and void’ (General Business Law § 340 [1])

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[T]he Donnelly Act--often called a “Little Sherman Act”--should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result”

(*Anheuser-Busch v Abrams*, 71 NY2d 327, 333 & 335 [1988]).

Here, Stapleton claims that the City was in a conspiracy with other movie studios to keep Stapleton from establishing another, competing movie studio. However, the complaint is devoid of specific factual allegations that could support an inference that defendants either “knowingly agreed to cooperate in a . . . scheme” (*see LeFebvre v New York Life Ins. & Annuity Corp.*, 214 AD2d 911, 912 [3d Dept 1995]), or had a “conscious commitment to a common scheme designed to achieve an unlawful objective” (*Monsanto Co. v Spray-Rite Serv. Corp.*, 465 US 752, 764 [1984]). Thus, conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act (*Sands v Ticketmaster-New York*, 207 AD2d 687, 688 [1st Dept 1994]).

To show evidence of a conspiracy, plaintiffs also submit e-mails discussing complaints that Silvercup Studios allegedly made to the City (Walker Opp. Affirm., Ex 1 at Ex J).<sup>3</sup> However, “[p]ermitt[ing] an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about ‘in response to’ complaints, could deter or penalize perfectly legitimate conduct” (*Monsanto Co.*, 465 US at 763).

Absent a conspiracy, the City’s unilateral refusal to deal with Stapleton is not an antitrust violation (*see United States v Colgate & Co.*, 250 US 300, 307 [1919]). “It is the well-settled law of this State that the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully, for reasons he deems sufficient or for no reasons whatever” (*Locker v American Tobacco Co.*, 121 App Div 443, 451-452 [2d Dept 1907], *affd*

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<sup>3</sup>Exhibit 1 to Walker’s affidavit is a copy of the Amended Summons and Complaint, attached with exhibits A-K. The copy of the amended pleadings filed with the County Clerk does not contain any attached exhibits. Exhibits A-K are attached only to the original Summons and Complaint on file.

195 NY 565 [1909]; *see also Alexander's Dept. Stores, Inc. v Ohrbach's Inc.*, 266 App Div 535, 539 [1<sup>st</sup> Dept 1943]). Although plaintiffs accuse the City of granting subsidies to other movies studios (Amended Complaint ¶ 197), the Donnelly Act does not apply to price discrimination (*Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 19 [1982][citing *State of New York v Mobil Oil Corp.*, 38 NY2d 460 (1976)]).

Plaintiffs' attempt to recast their allegations of slander and tortious interference as antitrust violations is also unavailing. Therefore, the fifth cause of action is dismissed. .

#### Sixth Cause of Action: Tortious Interference

Plaintiffs allege that EDC officials secretly met with Stapleton's principal investor brokers to "exclude" Stapleton from the development project, and met with representatives from Billboardlive to "usurp control" of the project (Amended Complaint ¶¶ 219-220; *see also Walker Opp. Affirm.*, Ex 16). According to plaintiffs, EDC "misrepresented" to the brokers and others that there was no agreement for long-term use of the site. Plaintiffs also claim that defendants interfered with contract negotiations between Stapleton and Paramount Pictures to film "School of Rock" (Walker Opp. Affirm. ¶¶ 81-83).

Plaintiffs fail to state a cause of action for tortious interference with a contract based on defendants' alleged misrepresentations to Stapleton's principal investors-brokers, or in meetings with Billboardlive. Plaintiffs do not allege that these brokers were induced to breach any agreement to invest in Stapleton as a result of the alleged statements (*see NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 621-2 [1996][“our Court has repeatedly linked availability of the remedy with a breach of contract”]). Plaintiffs do not allege that they have any agreement with Billboardlive.

However, plaintiffs do state a cause of action against defendants for tortious interference with a prospective deal with Paramount Pictures. “To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff[s]’ prospects either was undertaken for the sole purpose of harming plaintiff[s], or that such conduct was wrongful or improper independent of the interference allegedly caused thereby” (*Jacobs v Continuum Health Partners*, 7 AD3d 312, 313 [1<sup>st</sup> Dept 2004]). Contrary to defendants’ argument, the element of wrongful means is apparently based on defendants’ allegedly defamatory statements to the press (Opp. Mem. at 26-28), which is sufficient (*see Butler v Delaware Otsego Corp.*, 218 AD2d 357, 361 [3d Dept 1996]). Though defendants deny any wrongdoing, the propriety of defendants’ actions cannot be determined on a motion to dismiss.

Therefore, the motion is granted only with respect to tortious interference based on allegations of defendants’ misrepresentations made to Stapleton’s investors-brokers and others, and misrepresentations made during meetings with Billboardlive.

#### Seventh Cause of Action: Lost Profits and Business Opportunities

Plaintiffs allege that they lost revenues as a result of defendants’ breach of the alleged development agreement, defendants’ interference with plaintiffs’ contracts and business arrangements, and defendants’ allegedly false promises and fraudulent inducement (Amended Complaint ¶¶ 230, 232-234).

This cause of action seeks damages related to plaintiffs’ other causes of action, most of which are dismissed. To the extent that this cause of action could be read as pleading fraud, lost profits are not recoverable under a theory of fraud. “Under the out-of-pocket rule, there can be

no recovery of profits which would have been realized in the absence of fraud” (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

Plaintiffs might be entitled to lost profits if they prevail on their cause of action for tortious interference (see *Guard-Life Corp. v S. Parker Hardware Mfg.*, 50 NY2d 183, 197 [1980]). Viewed in this way, the allegedly lost profits are not too speculative to recover. However, this cause of action cannot be considered a separate cause of action, and is therefore dismissed.

#### Eighth Cause of Action: Specific Performance

Here, plaintiffs seek specific performance directing defendants to submit the proposed project to the Franchise Concession and Review Committee, the City Council, and Community Board 1 for review, in accordance with ULURP. However, this cause of action is based on the unenforceable alleged development agreement. Plaintiffs admit that Stapleton sought this remedy in the Article 78 proceeding (see Amended Complaint ¶ 126), and the Appellate Division, First Department, specifically stated that Stapleton “was not entitled to the relief it seeks” (*Stapleton Studios, LLC*, 7 AD3d at 273). Thus, res judicata also bars plaintiff’s right to specific performance, to the extent that it requires administrative action from defendants (*Brooklyn Welding Corp. v City of New York*, 198 AD2d 189 [1<sup>st</sup> Dept 1993]).

#### Ninth Cause of Action: Slander and Business Defamation

“Defamation is defined as a false statement that exposes a person to public contempt, ridicule, aversion or disgrace” (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002][citation omitted]). To find defamation with respect to one’s business, profession, or occupation, “it is essential that the allegedly offensive [statement] charge the

plaintiff, in effect, with being 'ignorant, incompetent, or incapable in his calling'[citation omitted] and thereby tend to injury him in that capacity" (*Amelkin v Commercial Trading Co.*, 23 AD2d 830 [1<sup>st</sup> Dept 1965], *affd* 17 NY2d 500 [1966]). On a motion to dismiss, the issue is "whether the contested statements are reasonably susceptible of a defamatory connotation. In making this determination, the court must give the disputed language a fair reading in the context of the publication as a whole" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995][citations omitted]).

Here, plaintiffs allege that EDC's president, Andrew Alper, falsely stated to the press that Stapleton failed to submit a business plan on time, failed to obtain financing and that a principal of Stapleton was a convicted felon (Amended Complaint ¶ 109). Attached to the original complaint is an October 29, 2002 article from the online version of the New York Daily News, which quotes Alper as saying,

"They've misled us. We've discovered that one of Stapleton Studios' officers has a felony stock fraud conviction. They have missed multiple construction and filing deadlines. It's a mess, a bad project. These people aren't capable of raising financing nor do they have the professional capability of running such a venture"

(Complaint, Ex E). According to plaintiffs, Bob Walker, who pleaded guilty to securities fraud, is an employee of Stapleton, not an officer.

Plaintiffs also submit an article, dated October 8, 2002, from the online version from the Staten Island Advance, which quotes Alper as saying:

"This has truly been amateur hour since Day 1"  
"It's a totally fly-by-night operation, which is surprising for a project of this magnitude. If you borrow money, you've got to repay it"

(Walker Opp. Aff., Ex 10). Last, plaintiffs also allege that, in November 2002, Alper allegedly

gave false testimony to the City Council that plaintiffs lacked permits and insurance (Amended Complaint ¶¶ 128-129).

Contrary to defendants' argument, plaintiffs have pled defamation with particularity, based on Alper's alleged statements to the New York Daily News and Staten Island Advance. Because these statements tend to injure plaintiffs in their business and impugn their creditworthiness, plaintiffs are not required to plead special damages (*see Matherson v Marchello*, 100 AD2d 233, 236 [2d Dept 1984][citations omitted]; *see also John Langenbacher Co. v Tolksdorf*, 199 AD2d 64, 65 [1<sup>st</sup> Dept 1993]). Although defendants argue that, to some extent, the statements in the articles are non-actionable opinions (Mem. at 32, n 8), the statements can reasonably be viewed as expressing opinions implying a basis in facts which are not disclosed to the reader or listener, which are actionable (*see Gross v New York Times Co.*, 82 NY2d 146,154 (1993); *Pontarelli v Shapero*, 231 AD2d 407, 411-12 [1<sup>st</sup> Dept 1996]). The court also declines to extend absolute immunity to Alper based on the statements he allegedly made to the press, which do not appear to have been uttered during any formal proceeding (*see Stukuls v State of New York*, 42 NY2d 272, 277-278 [1977]).

However, plaintiffs' allegations that EDC made further statements that plaintiffs were "amateurs" and that their financing was a "joke" were not pled with particularity, to the extent that they are not based on the statements contained in the newspaper articles that plaintiffs submitted.<sup>4</sup> Plaintiffs offer no details as to when those statements were made, or the third parties

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<sup>4</sup>The October 8, 2002 article from the Staten Island Advance contains the headline, "City: Studio funding a joke" (Walker Opp. Affirm., Ex 10). However, the article does not actually quote anyone from the City or EDC making that statement. The headline appears to be the newspaper's spin on defendants' statements in the article.

who heard the statements (*Bell v Alden Owners*, 299 AD2d 207 [1<sup>st</sup> Dept 2002]; *see also Geddes v Princess Props. Intl.*, 88 AD2d 835, 835 [1<sup>st</sup> Dept 1982][“the time, manner and persons to whom the publication was made should be alleged”]). With respect to Alper’s allegedly false statements to the City Council, it appears that plaintiffs did not set forth the particular defamatory words (*Farmelant v City of New York*, 187 AD2d 281, 281 [1<sup>st</sup> Dept 1992]). Assuming that Alper stated only that plaintiffs lacked permits and insurance in November 2002, plaintiffs should have pleaded special damages, because the statements do not “reflect on [their] performance or [are] incompatible with the proper conduct of [their] business” (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]; *see also Bell v Alden Owners*, 299 AD2d 207 [1<sup>st</sup> Dept 2002]).

Therefore, defendants’ motion to dismiss is denied as to this cause of action, except as discussed above. Whether Bob Walker’s conduct misled defendants to believe that he was an officer of Stapleton is a defense that cannot be considered on a motion to dismiss. The court also rejects defendants’ argument that Alper’s statements are protected speech in that they concern a matter of public interest, because it was raised for the first time in reply (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1<sup>st</sup> Dept 1992]).<sup>5</sup>

Accordingly, it is

ORDERED that defendants’ motion to dismiss is granted only as to the first through fifth causes of action, and the seventh and eighth causes of action, which are dismissed, along with so

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<sup>5</sup>In any event, statements on matters of public concern are not absolutely privileged. Rather, plaintiffs would need to prove that defendants acted in “a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties” (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975]).

much of the sixth and ninth causes as detailed in the court's decision, and the motion is otherwise denied; and it is further

ORDERED that defendants shall serve an answer to the remaining causes of action within 10 day of service of a copy of this order with notice of entry.

Dated: 9/19/04

ENTER:



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J.S.C.

**EMILY JANE GOODMAN**

**FILED**

SEP 29 2004

NEW YORK  
COUNTY CLERKS OFFICE