SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Holtzman Opportunity Fund, L.P. and Seymour Holtzman,

Plaintiffs,

– against –

New Castle Partners, L.P. JWL Acquisition Corporation, Mark E. Schwarz, and Steven J. Pully,

Defendants.

DECISION/ORDER

Index No. 601873/06

Motion Seq. 3

Present:
Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendants' motion to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (7):

Papers	**Numbered**
Notice of Motion, Affirmation in Support	**1, 2 (Ex. A-F)**
Memorandum of Law in Support of Motion	**3**
Affirmation in Opposition, Memorandum of Law	**4**
Reply Memorandum of Law	**5**

Plaintiff Holtzman Opportunity Fund, L.P. and Seymour Holtzman ("plaintiffs") commenced the instant action against defendants Newcastle Partners, L.P., JWL Acquisition Corporation, Mark E. Schwarz, and Steven J. Pully ("defendants") for defamation, tortious interference with business relations, and tortious interference with prospective business relations. Specifically plaintiffs allege that an action commenced by defendants against plaintiffs in January 5, 2006 in the United District Court for the Southern District of New York, docketed at No. 06-CIV-3076 alleging violations of certain federal securities laws by plaintiffs was meritless and was initiated solely to malign and defame plaintiffs in their social, business and investment communities.

The lawsuit was based upon the competing prospective acquisition of Whitehall Jewellers, Inc. by Prentice Capital Management, L.P. and Holtzman Opportunity Fund and a tender by defendant Newcastle. The federal complaint alleged that Prentice and the Opportunity Fund took actions in concert with Whitehall to significantly tilt the "playing field" in their favor in order to control Whitehall, including making an illegal *de facto* tender offer to increase the probability of a favorable outcome for them, and failing to make certain mandated disclosures about their activities under the securities law. Plaintiffs subsequently brought the instant action alleging that the federal complaint was unfounded, and aimed at defaming plaintiffs, and sabotaging plaintiffs' business relations with Whitehall, its shareholders, and with members of the business, investment and financial communities. Defendants in turn move to dismiss the complaint pursuant to CPLR § 3211.

In evaluating a motion to dismiss for failure to state a claim under CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory. CBS Corp. v. Dumsday, 268 A.D.2d 350 (1st Dept. 2000); see also Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001)(motion must be denied if "from [the]four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law"); Weiner v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept 1998)("so liberal is th[is] . . . standard that the test is simply 'whether the pleading has a cause of action,' not even 'whether he has stated one'").

In order to state a cause of action for tortious interference with contract, plaintiffs must allege (1) a business relationship (i.e. a contract) between plaintiffs and a third party; (2) that defendants knew of that relationship and purposefully interfered with it; and (3) damages. Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413 (1996). Thus, there must be a breach of contract in order to state a cause of action for interference with contract. NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 87 N.Y.2d 614 (1996). Here, plaintiffs have failed to allege any contract to which they and Whitehall Jewellers were parties. Plaintiffs have also failed to allege that defendants engaged in any activities directed toward a specific relationship between plaintiffs and Whitehall. See WFB Telecomms., Inc. v. NYNEX Corp., 188 A.D.2d 257 (1st Dept. 1992).

In any event, it is uncontroverted that defendants and plaintiffs were both competing to acquire Whitehall subject to shareholder approval and which was terminable by the board of directors if a superior proposal was offered. Such a contract "terminable at will or a voidable contract cannot be the basis of an action for interference with contract but may be the subject of an interference with prospective advantage action." P.J.I 3:56 p. 504. Plaintiffs, however, has likewise failed to state a cause of action for interference with tortious interference with prospective business relations. In order to establish a cause of action for tortious interference with prospective business relations, plaintiffs must demonstrate (1) they had a business relationship with a third party; (2) defendant interfered with that relationship; (3) the proposed contract would have been entered into but for defendants' actions; (4) defendant's interference was done by wrongful means; and (5) damages. See Guard -Life Corp. v. Parker Hardware Mfg. Corp., 50 N.Y.2d 183 (1980). A "general allegation of interference... without any sufficiently particular allegation of interference with a specific contract or business relationship" fails to state a cause of action. Enviroscience, Inc. v. Horsehead Res. Dev. Co., 1996 WL 363091 at * 14 (S.D.N.Y. July 1, 1996).

Plaintiffs' allegation of interference with prospective business merely conclusorily alleges that defendants intended to sabotage defendants without even citing what business relationship plaintiffs would have entered into. Plaintiffs naked assertion that they "possessed a reasonable likelihood" of entering into an unspecified contract is insufficient to defeat defendants' motion. See P.J.I 3:57 at p. 517 ("Plaintiff must show that, but for the interference, a contract would have been entered into, not just that it was reasonably certain that it would have been entered into."). In any event, it is irrefutable that plaintiffs and defendants were competitors with opposing interests in the outcome of the Whitehall proxy contest, and plaintiffs have failed to demonstrate that defendants acted solely to harass plaintiffs rather than being "motivated by legitimate economic self-interest" once defendants felt plaintiffs were involved in violations of securities laws. Carvel Corp. v. Noonan, 3 N.Y.3d 182, 191 (2004).

Finally, defendants' motion to dismiss plaintiffs' first cause of action for defamation based upon the federal complaint is likewise granted. It is well established that statements made in the course of legal proceedings are absolutely privileged if they are anyhow pertinent to the litigation. Youmans v. Smith, 153 N.Y. 214 (1897). As noted, defendants, as competitors with plaintiffs, had a good faith belief that plaintiffs violated certain securities laws in attempting to acquire Whitehall stock and thus are afforded the privilege that attaches to a good-faith

complaint. See Lacher v. Engel, 817 N.Y.S.2d 37, (1st Dept. 2006); see also Grasso v. Matthew, 164 A.D.2d 476 (1991) ("in the context of a legal proceeding, statements by parties and their attorneys are absolutely privileged if, by any view or under any circumstances, they are pertinent to litigation." Accordingly, based upon the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: April 12, 2007

ENTER

SO ORDERED

ROLANDO T. ACOSTA
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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