SHORT FORM ORDER INDEX NO. 17767/2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

BEECHWOOD CORAM BUILDING CO., LLC,

Plaintiff,

-against-

CESAR CHAIKIN, P.E., P.C. and
CESAR CHAIKIN,

Defendants.

ORIG. RETURN DATE: FEBRUARY 7, 2007
FINAL SUBMISSION DATE: OCTOBER 11, 2007
MTN. SEQ. #: 001
MOTION: MD

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Upon the following papers numbered 1 to 8 read on this motion TO DISMISS.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Answering Affidavits and supporting papers 5, 6; Memorandum of Law 7; Reply Affirmation and supporting papers 8 it is,

ORDERED that this motion by defendants, for an Order, pursuant to CPLR 3211(a)(1) and 3211(a)(7), dismissing plaintiff's verified complaint in its entirety, or in the alternative, dismissing the claims against defendant CESAR CHAIKIN individually ("CHAIKIN"), is hereby **DENIED** for the reasons set forth hereinafter.

This action arises out of the sale of a new home located at 177 Kettles Lane, Coram, New York, situated in a housing development known as "Country Pointe at Coram," to CHAIKIN's daughter, KARINA PAOLA CHAIKIN. Plaintiff developed and constructed Country Pointe in 2006, which consists of 210 units, and later sold the aforementioned property to Ms. Chaikin, prior to construction. Upon construction of the home, Ms. Chaikin was given the

opportunity to inspect the unit and prepare a "punch list," which was to be reviewed by a representative of plaintiff to make repairs if needed. Plaintiff alleges that at various times after the property was sold to Ms. Chaikin, both Ms. Chaikin and CHAIKIN made complaints to plaintiff regarding construction defects in Ms. Chaikin's property. Plaintiff further alleges that the defects were investigated by plaintiff, and many were addressed and/or remedied.

Thereafter, on or about May 22, 2006, CHAIKIN sent a letter to the Board of Directors of Country Pointe at Coram advising of "numerous construction defects" in Ms. Chaikin's unit. The letter was sent on the letterhead of the corporate defendant, and was signed by "Cesar Chaikin, P.E., President." On or about June 23, 2006, CHAIKIN sent a second letter addressed to "Home Owner of Country Pointe," advising the homeowner that their home may have been constructed below industry standards, thereby entitling them to monetary compensation "should the developer refuse to adhere to his contractual obligations." The letter was also sent on the corporate letterhead, signed in the same fashion as the May 22, 2006 letter, and indicated that a copy of the May 22, 2006 letter was attached thereto.

Plaintiff alleges that CHAIKIN's sole purpose in sending the letters was to inflict harm on plaintiff, and as a result, plaintiff has suffered substantial damage. As such, plaintiff commenced the instant action, on or about July 21, 2006, asserting three causes of action against both defendants, to wit: tortious interference with contract, *prima facie* tort, and defamation.

Defendants have now filed a pre-answer motion to dismiss the complaint in its entirety, arguing that: (1) the statements at issue were not defamatory or otherwise tortious; (2) a qualified privilege precludes plaintiff's defamation claim; and (3) there is no basis for asserting claims against CHAIKIN individually. CHAIKIN alleges that after plaintiff ignored his requests to perform repairs at his daughter's home, he contacted the Board of Directors of Country Pointe via the letter of May 22, 2006. CHAIKIN further alleges that after the Board of Directors took no action, he personally walked the grounds of the development and observed numerous defects in other homes. CHAIKIN then sent the letter of June 23, 2006 to other homeowners in the community.

As discussed, plaintiff has asserted three causes of action: tortious interference with contract, *prima facie* tort, and defamation. A claim for tortious interference with contract requires: (1) the existence of a valid contract between

the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional and improper procuring of the third party's breach of contract without justification; and (4) damages resulting therefrom (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422 [2007]; *New York Merchants Protective Co., Inc. v Rodriguez*, 41 AD3d 565 [2007]; *Fusco v Fusco*, 36 AD3d 589 [2007]).

Plaintiff's second cause of action claiming *prima facie* tort consists of four elements: (1) intentional infliction of harm; (2) causing special damages; (3) without excuse or justification; and (4) by an act or series of acts that would otherwise be lawful (*Curiano v Suozzi*, 63 NY2d 113 [1984]; *Morrison v Woolley*, 2007 NY Slip Op 8161 [3d Dept]; *Del Vecchio v Nelson*, 300 AD2d 277 [2002]). While *prima facie* tort may be pleaded in the alternative with a traditional tort, once a traditional tort is established the cause of action for *prima facie* tort disappears (*Curiano v Suozzi*, 63 NY2d 113, *supra*).

With respect to plaintiff's third cause of action for defamation, the elements are: (1) a false statement; (2) published without privilege or authorization to a third party; (3) constituting fault as judged by, at a minimum, a negligence standard; and (4) it must either cause special harm or constitute libel or slander *per se* (*Salvatore v Kumar*, 2007 NY Slip Op 8435 [2d Dept]; *Dillon v City of New York*, 261 AD2d 34 [1999]; *Rivera v NYP Holdings, Inc.*, 2007 NY Slip Op 51529[U] [Sup Ct, NY County 2007]). "Slander *per se*" consists of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman (*see Moore v Francis*, 121 NY 199 [1890]; *Privitera v Town of Phelps*, 79 AD2d 1 [1981]; *Warlock Enters. v City Ctr. Assocs.*, 204 AD2d 438 [1994]). When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven (*Warlock Enters. v City Ctr. Assocs.*, 204 AD2d 438, *supra*). Moreover, CPLR 3016(a) provides that the particular words complained of shall be set forth in the complaint.

Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance. The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Golub v Enquirer/Star Group*, 89 NY2d 1074

[1997]; *Fusco v Fusco*, 36 AD3d 589, *supra*). 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" (*Mencher v Chesley*, 297 NY 94 [1947]).

In the context of a defamation claim, there are three factors that should be considered in distinguishing between protected expressions of opinion and actionable assertions of fact: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact (*Brian v Richardson*, 87 NY2d 46 [1995]; *Gross v New York Times Co.*, 82 NY2d 146 [1993]).

Here, the particular words complained of, to wit: "numerous construction defects," "discovered various construction defects in homes," and "poor and below construction industry's standards" are set forth in the complaint in compliance with CPLR 3016(a), and may constitute defamation *per se*, in that they relate to plaintiff's business and profession as a developer who constructs and sells homes prior to completion. As such, plaintiff need not plead special damages. In addition, the Court finds that the words at issue are actionable assertions of fact, in that the words have a precise meaning which is readily understood, are capable of being proven true or false, and in the full context of the communications, i.e., within letters sent on a professional engineer's letterhead, would signal a reader that what is being read is likely an assertion of fact, not opinion.

With respect to defendants' reliance upon an alleged qualified common interest privilege, this reliance is premature at this stage inasmuch as a claim of qualified privilege is an affirmative defense to be raised in defendants' answer. Defendants may then move for summary judgment on any such defense available to them and, upon their making a *prima facie* showing of qualified privilege, the burden would shift to plaintiff to demonstrate, as it now claims, that CHAIKIN's statements were uttered with malice (*see Garcia v Puccio*, 17 AD3d 199 [2005]; *Demas v Levitsky*, 291 AD2d 653 [2002], *lv dismissed* 98 NY2d 728 [2002]). In taking the position that the allegations establish the privilege as a matter of law, defendants would, in effect, "short-circuit that procedure" and improperly place the burden on plaintiff of anticipating their affirmative defense

prior to joinder of issue (*Demas v Levitsky*, 291 AD2d 653, *supra*). It would be error to give conclusive effect to defendants' position of privilege before any affirmative defense to that effect has been raised in their answer (*see Immuno AG v Moor-Jankowski*, 77 NY2d 235 [1991]).

With regard to defendants' contention that the complaint must be dismissed pursuant to CPLR 3211(a)(1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; *see Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). In the instant application, it cannot be said that the documentary evidence submitted by defendants, including, among other things, the two letters at issue, resolve all factual issues as a matter of law. Accordingly, this ground cannot serve as a basis for dismissal.

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). Upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submissions (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417, *supra*), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether it can ultimately establish the truth of its allegations before the trier of fact, the Court finds that the complaint sufficiently pleads the elements of causes of action for tortious interference with contract, *prima facie* tort, and defamation, as set forth hereinabove.

Finally, with respect to that branch of defendants' application seeking to dismiss plaintiff's complaint as asserted against CHAIKIN individually, to pierce the corporate veil, a showing must be made that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*TNS Holdings Inc. v MKI Sec. Corp.*, 92 NY2d

335 [1998]; *Matter of Goldman v Chapman*, 2007 NY Slip Op 8068 [2d Dept]). In this matter, although the letters were sent on the corporate defendant's letterhead, CHAIKIN has admitted to sending the letters on his daughter's behalf and on the authority of a power of attorney given to him on or about January 23, 2006. As such, at this juncture it is premature to dismiss the individual claims against CHAIKIN, as it is unclear in what capacity CHAIKIN sent the letters. If it is established that he sent the letters in his capacity as president of the corporate defendant, he still may be personally liable if the two aforementioned criteria are satisfied to pierce the corporate veil.

In view of the foregoing, defendants' application seeking dismissal of the complaint, or in the alternative, dismissing the claims against defendant CHAIKIN individually, is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: December 26, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court