

**Markey v Dulfon**

2008 NY Slip Op 32195(U)

July 21, 2008

Supreme Court, Suffolk County

Docket Number: 0017017/2005

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
 I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
 Justice of the Supreme Court

MOTION DATE 3-19-08  
 ADJ. DATE 5-30-08  
 MNEMONIC: 005 - MotD

NEIL MARKEY and KRISTINE HENDEL-MARKEY,	X	KUJAWSKI & DELLICARPINI Attorneys for Plaintiffs 1637 Deer Park Avenue Deer Park, New York 11729
Plaintiffs,	:	
- against -	:	HAMMILL, O'BRIEN, CROUTIER, et al. Attorneys for Plaintiffs on Counterclaim 6851 Jericho Turnpike, Suite 250 Syosset, New York 11791
PETER DULFON d/b/a BIG APPLE CONTRACTING CO.,	:	JOHN HOWARD LYNCH, ESQ. Attorneys for Defendants
Defendant.	:	4250 Veterans Memorial Hwy, Suite 302 Holbrook, New York 11741

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross-Motion and supporting papers   ; Answering Affidavits and supporting papers 15 - 21; Replying Affidavits and supporting papers 22 - 23; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (005) by the plaintiffs on the counterclaim, Neil Markey (hereinafter "Markey") and Kristine Hendel-Markey, pursuant to CPLR 3212 for summary judgment dismissing the defendant's counterclaim is decided as follows:

This is an action for breach of contract and fraud arising out of a contract entered into between the parties on August 9, 2004 for an addition to and alteration of the plaintiffs' premises located at 104 Christian Avenue, Stony Brook, Town of Brookhaven, Suffolk County, New York wherein the work was to be completed November 9, 2004. The plaintiffs allege, inter alia, that there were building code violations, structural problems in the work performed, inadequate and improper materials used in the construction, and deceptive practices employed by the defendant builder.

The answering defendant, Peter Dulfon d/b/a Big Apple Contracting Co., (hereinafter "Dulfon") raised a first counterclaim alleging that the plaintiffs acted as the general contractors and failed to properly coordinate and direct the work they demanded, failed to file the necessary plans with the appropriate governmental agencies, demanded changes to the original plans and specifications, failed and refused to obtain new architectural drawings, refused to sign and approve change work orders, refused to pay for materials and other expenses. A second counterclaim asserts the plaintiffs refused to pay the defendant for the work, labor and services and material provided. A third counterclaim alleges the plaintiffs defamed Dulfon by making false, malicious and misleading statements about him and his work, causing injury to his reputation and business. The moving defendant seeks monetary damages on the counterclaims.

The plaintiffs seek summary judgment dismissing the counterclaims, submitting, inter alia, copies of the pleadings; copies of the transcripts of the examinations before trial of the parties; a proposal of Big Apple Contracting; an inspection notice, dated November 22, 2004, of the Town of Brookhaven Building Division (hereinafter "Town"); a letter from an investigator of the Bureau of Licensing, dated March 17, 2005; uncertified inspection report of Hawkins, Webb and Jaeger, Engineers, dated December 14, 2004; and copies of the 1040 Income Tax returns of Dulfon for the years 2003, 2004, 2005. The defendant opposes this motion submitting, inter alia, the affidavit of Dulfon; a copy of the proposal; a copy of the application for the building permit with the Town; and a copy of the change work order.

At his examination before trial Dulfon testified he attended college for two years at Farmingdale University but did not receive a certificate or degree; he did not attend any trade schools; is currently licensed in the Towns of Southampton and East Hampton in Suffolk County, New York as a home improvement contractor and operates PCJ Big Apple Contracting Corporation which was formed in about March 2006. In 2004, he was the sole owner and proprietor of Big Apple Contracting and was vice-president of the corporation; his wife, Carol Dulfon, was president and secretary of the corporation; and Jonathan Dulfon, his twenty six year old son, was treasurer and foreman. Also Dulfon employed Thomas Palumbo as a carpenter.

Dulfon testified that he did work at the plaintiffs' premises from around August 10, 2004 until about the middle of October 2004. He met Markey when Markey purchased a house trailer from him to be used on Markey's property while the plaintiffs' home was under construction. Dulfon stated he had not been hired to do the construction work at that time, but Markey, at a later time, showed him some plans drawn by an architect. He then drafted drawings for Markey consisting of a foundation and an overview of how the house would look from the outside, but he did not draft anything that would show structurally how the house would have to be built because he (Dulfon) was not a licensed architect and it would be beyond his ability to do so. He stated that he "pretty much used the set of plans that Mr. Markey submitted to the Building Department" for the construction, which plans were incomplete from Markey's point of view.

Markey testified that he and his wife Kristine Hendel-Markey (hereinafter "Mrs. Markey") bought their home in 1997. They had an engineer inspect the house, but did not obtain a written report as they did not want to pay for the report and they had what they needed to know from the inspection to buy the house. Markey stated he has a degree in landscape architecture from the Environmental Science and Forestry School in Syracuse, New York, where he attended three years. He stated he also attended the State University at Farmingdale, New York from 1985 to 1991. He is self-employed in an S-corporation which he established in 1997 or 1998. He and his wife are the shareholders and the officers of the corporation; he is president and his wife is the vice president, secretary and treasurer. He stated he does not have a license to be a landscape architect. However, he does draw designs, layouts for driveways, walkways and plantings which require drafting and drawings.

Markey testified that he hired an architect, Peter Cardonna, (hereinafter architect) to draw the plans for the renovation of his home, which plans he received in December 2002, but he had the architect make some changes in the turret to pull it away from the house. He had numerous other changes but decided instead of having the architect make these changes that he would have the builder who was going to do the job make the changes. He stated these changes from the original plan consisted of the staircase, the great room, extending the dormer on the side of the house, and extending the back wall of the master bedroom. Markey testified that these changes were not reflected on the plans which were used by the architect in applying for the building permit and submitted to the Town Building Department. The building permit expired January 16, 2004. He stated that none of the work that was indicated on that permit was completed prior to the expiration date as he stated he did not have the money to do the project. Markey stated that in order to make the application for the building permit he had to list himself as the general contractor, but he stated he does not have any building knowledge. He further stated he was trying to beat the deadline for the hurricane straps and the tempered glass windows and the new codes that were coming out for the sheathing, so he applied for the permit early to save money on those things.

He testified that he first met Dulfon when he purchased Dulfon's trailer for his family to live in once the construction was started on his house. He, however, did not return Dulfon's license plates for the trailer, so Dulfon called him several months later to retrieve the plates. It was then he learned Dulfon was a contractor and could be available for the construction on his home. He stated they met several times and he showed Dulfon the architect's plans, a model he built, and his drawings and asked that Dulfon give him a bid on the construction job.

He stated that Dulfon also did drawings which did not represent how the house was to be built as Markey wanted it. Also he stated he made no change in the foundation but the foundation was supposed to be fourteen inches lower. He stated that Dulfon never finished drawing the plans before the job was started as he was able to start the job earlier, and the plans were finished when they were well into framing, but he never got a finished set of plans.

He said Dulfon did not come to the job site as often as needed during the construction, even when he pleaded for him to come and see what the framing crew was building without a plan. Markey himself was at the job site from "time to time." He said that there was a problem initially with the foundation and the crew called Dulfon to tell him that the foundation was not working out, but Dulfon told them to just follow the plan. Markey stated that Dulfon failed to get the permit for the foundation, and the foundation that was poured needed to have a dutch wall foundation underpinned to the existing foundation but this was never done and consequently there was a massive washout in the basement which washed out the footings on the existing foundation.

Markey testified that this dutch wall underpinning was not reflected in the original architectural plans drawn by the architect but he had made that change with Dulfon. He also stated a change work order was needed as the eight feet wall made the house too high so they agreed to five to six feet walls. He stated Dulfon then planned to build the floor system above the ceiling of the existing house, increasing the house scale by eighteen to twenty four inches. This was not on the original plans and it put the ridge above the permit height code, so the framers had to pull down the wall they constructed. A change work order was also put in for roof pitch changes and for the main reverse gable. He stated there was no roof pitch change for the great room and master room, the french doors were agreed upon and this was not a change, and there were no french doors installed upstairs as they were supposed to be as Dulfon ordered the wrong windows and doors so they had to be removed and replaced.

Markey testified that Dulfon tried to strong arm him by pulling off the job and faxing an extra work order in October 2004. But Markey said he had an engineer come to the site who advised him there were major problems which had to be rectified before any more work could continue.

#### FIRST COUNTERCLAIM

In the first counterclaim the defendant alleges that the plaintiffs acted as the general contractors and failed to properly coordinate and direct the work they demanded and failed to file the necessary plans with the appropriate governmental agencies, demanded changes to the original plans and specifications, failed and refused to obtain new architectural drawings and refused to sign and approve change orders and also refused to pay for materials and other expenses.

The respective examinations before trial of the parties raise factual issues as to whether the plaintiffs or the defendant acted as the general contractor on this construction site. Dulfon stated Markey was a contractor and did the excavating for the project and some landscaping with some retaining walls and steps. He also stated that Markey, as the general contractor, obtained the building permit and originally that he worked from the plans Markey gave him to use, but that Markey had him draw different plans to make the original plans look a little more like Markey wanted. He stated he told Markey that he would have to get a different

set of plans from the architect and get the plans to the Town Building Department. He stated he never asked Markey if he had any prior building construction experience and knew him to be a landscape contractor.

Markey testified that he contacted several contractors about the job, then entered into a contract with Dulfon. He stated he made drawings to relay to Dulfon what he wanted the house to look like, changed the great room, changed the open breezeway to a covered porch, pulled the turret out, reduced the size of the dormer over the roof, enlarged the dormer over the side of the house, and that he did so many different drawings over the course of a year, but did not show them to his architect. Markey testified he renewed the permits that he had from the Town, but did not file new plans which he had drawn.

Dulfon testified that he drew up plans for Markey but did not have the plans certified or reviewed by an architect. Concerning his drawing of a foundation with no underpinnings, he stated that he had a discussion with Markey about the need for concrete underpinnings after there was a torrential rain which undermined the foundation in the back corner where the excavator (Markey) failed to backfill causing the water to come into the foundation (basement) under the footing. He stated this was corrected with rebar. He stated the reason the water came in was because it had not been backfilled around the foundation and that Markey was supposed to do all the excavation, but had not done it since he decided on the spur of the moment that he wanted a window in the foundation and a retaining wall away from the window. He stated that he warned Markey of this (water) problem due to the slope of the roof. He stated there had been an inspection on the footing and that it passed.

Markey stated that Dulfon said he had a friend who was an architect and that he would have him draw up the plans. Mrs. Markey testified that Dulfon told them he drew his own plans and worked with an architect who could stamp them, but he did not prepare a full set of drawings and first presented a foundation plan. Markey stated he did not return to the architect to change the plans because, in his own profession, he was responsible for the whole project from start to finish and made changes himself. He said Dulfon told him that "we'll make the changes and when they come to inspect, they'll just sign off on it because you already have your permits."

Markey testified he had ripped down the garage himself prior to the construction on the house. He also testified that he, with his employees from his landscaping company, cut up the roof shingles to the size he wanted, cut out the rafter tails for the roof overhangs, built the masonry staircase to the basement, painted rafter tails, painted boards, and he did the excavation for the concrete foundation. Mrs. Markey testified that her husband did the window well and put a window into the foundation for egress, installed stairs, then backfilled the whole foundation after it was inspected.

Markey testified that when Dulfon "pulled out of the job" that he had Hawkins, Webb and Jaeger, Engineers, draw plans, which the new construction company, Morningstar, used to make corrections and finish the job. He stated that he couldn't afford to do all this work. He

testified that while an application for an amendment to the building permit was submitted, he did not pay for it as he could not afford it. Because he had not finished the great room as it has to be ripped out and rebuilt down to the floor, he had to tarp it for the last three years. He stated the stucco has not been finished.

Dulfon testified that he was at the job about once a week, sometimes more, depending on his scheduling. Dulfon testified that he hired the subcontractors who were used for the foundation, framing, and roofing, but only spoke to the electrician about the electrical work, and that he told the concrete company, framers and roofers when to arrive. He stated this was all coordinated with Markey because Markey was involved in just about every aspect of the job and, as Markey was the excavator, Markey had to tell him when he could get everybody there.

Based upon the foregoing, the plaintiffs on the counterclaim have not demonstrated prima facie entitlement to summary judgment dismissing the first counterclaim as there are factual issues concerning whether Markey or Dulfon acted as the general contractor on the construction project.

Accordingly, that part of motion (005) which seeks dismissal of the first counterclaim asserted by Dulfon is denied.

## SECOND COUNTERCLAIM

In the second counterclaim Dulfon asserts that the plaintiffs refused to pay the defendant for the work, labor and services and material provided.

Dulfon testified he presented a handwritten proposal to Markey in the amount of \$350,000.00 for constructing the project and he and Markey critiqued it and reduced it, and prepared a typed version. An adjustment was made for a window in the foundation, a staircase change, electrical for a generator, demo siding and roofing on existing structures, insulation, three quarter tongue and groove dowel, and he stated he had lowered his price because Markey agreed to pay him partly in cash, and as he paid some of the subcontractors in cash and received a cheaper price, he passed it on to Markey.

Markey testified that he agreed to pay \$307,500 for the construction which included \$155,000 to put on a roof and to frame it, to put in the foundation and the windows. He stated the fifteen items of work on the contract reflected the work to be done at his house, and he did not ask Dulfon to do any work not listed on the contract.

Dulfon stated there were change work orders and around the first or second week in October 2004 Markey told him he would not make the payment on the change work orders because he didn't like the window on the front of the house. He testified that he charged Markey for the change work order for lowering the wall on the extension. He stated that the original architectural plans and permit called for eight feet walls, which he had framed out by subcontractors, and after it was complete, Markey wanted the roof to be steeper on one wall on

the right side of the house on the second floor. Therefore, that wall had to be lowered to six feet, so he had to dismantle the rafters that were up, lower the wall, then rebuild it. He stated that Markey never spoke to him about the height of the wall before he built it. After the height of the wall was changed, he stated Markey had him install windows about eight inches off the floor, but he stated he told Markey that the windows would not be the correct distance from the floor since the walls were lowered, so they had to have safety glass in the windows due to the drop and the Town code requirements. He stated he told Markey that it wouldn't fly with the Town Building Department. Concerning the windows on the second floor, he stated that Markey then decided he did not want the series of three four-foot windows, and that there were continual changes, every other day.

Dulfon testified that Markey decided to put in a french door instead of windows, that it was part of the extra cost of the job and Markey never paid him for that. He stated he had to switch everything and put in a reverse gable after everything was done to accommodate that change. He stated that because the change took the strength out of the middle of the wall, he put a header above it, but both sides of the wall pushed out, so he then put come-alongs across to pull it back in. He stated he told Markey beforehand, but Markey just did not want to hear it, as he just didn't care.

Mrs. Markey testified that after they had the water wash under the foundation (they were experiencing the remnants of a hurricane) that Dulfon stated that they were making changes. She stated she told him that the foundation was built too high, and she thought there were to be two or three steps but they only had one. She further stated that he told her that he gave her a better foundation and that they should not have made the changes.

Dulfon testified he met with Markey and Markey's engineers, William Jaeger and Bill Duryea, at the construction site after he left the job, and that William Jaeger showed him all the structural steel that he wanted to put in the ridges, and also showed him a set of plans that he drew and which should have been done a long time ago because structural steel had to be in the building to accommodate the way Markey wanted it to be built. He then stated that he told Markey that if he bought the steel that he would install it, and Markey said, "no way" (he would not buy the steel). Dulfon did not make the corrections then.

Based upon the foregoing, the Court finds that the plaintiffs have failed to demonstrate prima facie entitlement to summary judgment on the second counterclaim as there are factual issues which preclude the same. Markey states that there were no changes other than the fifteen stated on the contract which he agreed to pay for, and Dulfon testified that Markey made constant changes to the plans for which he had to do extra work and that Markey refused to pay on the change work orders. Dulfon claims that he was not permitted to follow the original plans by the architect which were submitted for the building permit and claims that Markey made changes to the plans without consulting with an architect and then directed Dulfon to follow Markey's plans instead of the architect's plans. Therefore, this Court cannot determine what monies, if any, are owed to or by whom as it cannot be determined what change work orders were effectuated in total work.

Accordingly, that part of motion (005) which seeks dismissal of the second counterclaim is denied.

### THIRD COUNTERCLAIM

The defendant has asserted a third counterclaim wherein the defendant claims that on March 10, 2005, the plaintiffs defamed him, made false, malicious and misleading statements about him and his work, causing injury to his reputation and business. The words complained of are that the defendant "is unable to complete the work in a workmanlike manner; is a liar and a cheat; is a fraud; and does not know how to do his job. " The defendant asserts in the counterclaim that these statements were made to representatives of the Town, Suffolk County Department of Consumer Affairs (hereinafter "CA") orally and in writing, as well as to John Ciminelli, the roofer/framer on the job and his workers, and to Christopher Scala, the electrician on the job. Dulfon also claims that a writing dated, October 21, 2004, was made with actual malice toward the defendant and was made with reckless disregard of its effect, and with a wrongful, willful intent to injure the defendant, his reputation and business, and to expose him to ridicule and contempt.

Dulfon further testified at his examination before trial that John Ciminelli told him that Markey said that he (Dulfon) was unable to complete the job in a workmanlike manner, that Dulfon was a fraud, and did not know how to do this job. He stated that he thought that it was at the meeting with CA that Markey said Dulfon was a liar and a cheat, and that Christopher Scala was also told the same thing by Markey. He claims that these statements hurt his impeccable reputation and he had never before been reported to the CA for anything. He alleges that this report caused him to lose jobs, one in Westhampton, New York for sure, and a couple of other jobs where people called the CA and based upon the CA report he did not get those jobs. He further claims that his loss or decrease in income is reflected in his income tax returns.

Therefore, it is determined that the defendant has set forth a counterclaim alleging both libel and slander.

In *Ostrowe v Lee*, 256 NY 36 [1931], it is stated that "[m]any things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and perpetuates the scandal."

"Defamation has long been recognized to arise from the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society. The elements are a false statement, published without a 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" (*Dillon v City of New York et al*, 261 AD2d 34, 704 NYS2d 1 [1<sup>st</sup> Dept 1999]).

In order to establish a prima facie cause of action for defamation, it is necessary to prove (1) a defamatory statement of fact; (2) regarding the plaintiff [here the defendant]; (3) that the statement was published or broadcast to a third party by the defendant [here the plaintiff]; and (4) that the statement caused the plaintiff [here the defendant] to suffer damages (*San Sung Korean Methodist Church of New York v Professional USA Construction Corp., et al*, 2004 NY Slip Op 50740U, 4 Misc3d 1006A, 791 NYS2d 873 [Sup. Ct. Queens County 2004]). It is fundamental that a libelous statement is generally one that is written or printed, and a slanderous statement is one that is uttered orally (*Kelly and Labarbera v Vikse, et al*, 2004 NY Slip Op 51875U, 7 Misc 3d 1011A, 801 NYS2d 235 [Sup. Ct. Suffolk County 2004]) citing *Ostrowe v Lee*, supra).

"Whether particular words are reasonably susceptible of a defamatory meaning is to be resolved by a court in the first instance. The court must look at the content of the entire communication, its tone and apparent purpose, to determine whether a reasonable person would consider it as conveying facts about a plaintiff" (*Kamalian v Reader's Digest Association, Inc.*, 29 AD3d 527, 814 NYS2d 261 [2<sup>nd</sup> Dept 2006]). A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based or does not imply that it is based upon undisclosed facts; truth is a complete defense to a libel action (*Kamalian v Reader's Digest Association, Inc.*, supra).

As to those statements which Dulfon claims are defamatory and which were made to the personnel of the Town and the CA, the Court finds that the statements challenged are not reasonably susceptible of a defamatory meaning but rather constitute pure opinion, which is accompanied by a recitation of the facts upon which the opinion is based and does not imply that it is based upon undisclosed facts (*Kamalian v Reader's Digest Association, Inc.*, supra; see also *Steinhilber v Alphonse*, 68 NY2d 282, 508 NYS2d 901 [1986]). Markey filed a complaint with the Town and CA, as evidenced by his letter of October 21, 2004. Further, Dulfon testified that he met with representatives from the CA with the Markeys present and as a result of that meeting, Dulfon was fined \$500 each for three violations of the Town Code.

Accordingly, summary judgment is granted, as a matter of law, dismissing that part of the third counterclaim based upon statements made to the Town and CA and supported by Markey's letter of October 21, 2004 and the record of the meeting with the Town as the statements are deemed to be nonactionable opinion supported by a recitation of the facts upon which the opinion is based.

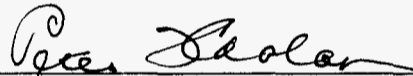
Dulfon claims that Markey referred to Dulfon as a liar, a cheat, and a fraud, and stated that Dulfon did not know how to do this job. It cannot be determined as a matter of law from the record presented that the alleged defamatory statements concerning whether or not Dulfon

engaged in fraudulent and illegal activity are substantially true. There are factual issues concerning whether Markey directed the work performed, whether Dulfon used his own drawings or the architect's plans, and whether it was his determination or Markey's determination which plans were to be used, and who was responsible for obtaining additional plans for the changes made to the plans submitted to the Town Building Department with the permit. There are also factual issues concerning whether or not there was a basis for change work orders and whether the workmanship was of poor quality creating numerous alleged problems which Markey claims required correction, and which claims Dulfon disputes.

The plaintiffs, in moving to dismiss this third cause of action, have not produced any documentation concerning fraudulent or illegal activity on the part of Dulfon to demonstrate the truth of the statements, if Markey did make them. Markey testified that he never made statements to John Ciminelli or Christopher Scala that Dulfon was dishonest but he has not submitted any statements from them to support his position. He further testified that he did not have to state that Dulfon was dishonest, as it was pretty clear. He also stated that he made no statement that Dulfon was a cheat. Markey has not established prima facie entitlement to summary judgment dismissing this part of the third counterclaim on the issue that he did not make these statements, that they were based on truth, or that there was fraudulent or illegal activity on the part of Dulfon.

Accordingly, summary judgment and dismissal of that part of the third counterclaim, based upon the alleged statements that Dulfon is a liar, a cheat and a fraud, and that he does not know his job, is denied.

Dated: July 21, 2008



\_\_\_\_\_  
J.S.C.

\_\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION