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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**
**PRESENT: HON. MARYLIN G. DIAMOND PART 48**
*Justice*



RONALD BRUCE POSNER,

Plaintiff,

-against-

RUSSELL T. LEWIS and DAVID LEWIS,

Defendants.

INDEX NO. 103496/09



MOTION SEQ. NO. 001

Cross-Motion: [] Yes [X] No

**Upon the foregoing papers, it is ordered that:** The plaintiff, Ronald Posner, was a school teacher employed in Westchester County by the Pelham Union Free School District (the "District"). He taught fourth graders at the Siwanoy Elementary School. Mr. Posner is married to Erin Lewis. The complaint alleges that four days after the birth of their daughter in March, 2008, the plaintiff was confronted by his father-in-law, defendant Russell T. Lewis, who accused him of having an extramarital affair and demanded that he immediately move out of the house where Mr. Posner and his wife resided. According to the complaint, Mr. Lewis warned him to "go quietly" or he would "make trouble" for the plaintiff. The plaintiff also claims that his father-in-law, who is alleged to be a wealthy and powerful member of the local community, explicitly threatened to go to the Pelham Board of Education and attempt to negatively impact the plaintiff's upcoming tenure review. The plaintiff did, in fact, vacate the premises and, in addition, was thereafter served with legal papers indicating that his wife had commenced divorce proceedings against him. The plaintiff claims that Russell Lewis subsequently demanded that plaintiff relinquish all of his parental rights to his new daughter and never see her again, a demand which the plaintiff turned down.

The complaint alleges that Russell Lewis and his son, defendant David Lewis, thereafter undertook a deliberate campaign to obtain damaging personal information about the plaintiff and pass it on to the District in order to induce the District to reject the plaintiff's application for tenure. According to the plaintiff, the defendants retained a private investigator to examine the hard drives of a computer that was located in the Posner residence and used by the plaintiff and his wife. On April 14, 2008, David Lewis wrote a letter to the District and to the New York State Department of Education in which he accused the plaintiff of having an affair with the mother of two of his students. He pointed out that the woman was also a substitute teacher at the school. David Lewis followed up with a second letter to the District which apparently included a copy of a report prepared by the defendants' private investigator. In both letters, the plaintiff was accused of being morally unfit to be a teacher. The letters demanded that the District investigate the allegations and take appropriate action. Significantly, neither letter disclosed the fact that David Lewis was the plaintiff's brother-in-law or even suggested that he had a personal motive in disclosing the information about the plaintiff. Instead, the letters identified Mr. Lewis as a private citizen. In any event, in May, 2008, the plaintiff was informed by the Superintendent that the District Board had denied his application for tenure. Not long after, on June 2, 2008, the plaintiff resigned his position as a school teacher. This lawsuit then followed.

The complaint herein asserts causes of action for tortious interference with a prospective contractual relation and for prima facie tort. The defendants have now moved to dismiss the complaint in its entirety, pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

**Discussion**

On a motion to dismiss for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit into any cognizable legal theory. *See Leon v. Martinez*, 84 NY2d 83, 88 (1994). As to the plaintiff's cause of action for tortious interference with a prospective contractual relation, a tort also known as interference with prospective advantage, the elements are (1) the defendant knew of a proposed contract between the plaintiff and another party, (2) the defendant intentionally interfered with the proposed contract, (3) the proposed contract would have been entered into but for the defendant's interference, (4) the interference was done by wrongful means, and (5) the plaintiff suffered damages as a result. *See Carvel Corp. v. Noonan*, 3 NY3d 182, 189-91 (2004); *Snyder v. Sony Music Entertainment, Inc.*, 252 AD2d 294, 300 (1st Dept. 1999). Wrongful means can include the use of physical violence, fraud, misrepresentation, civil or criminal actions, or economic pressure, but something more than mere persuasion is required. *See Snyder v. Sony Music Entertainment, Inc.*, 252 AD2d at 300. However, in some cases, the New York Courts have recognized that liability may attach even in the absence of wrongful means if a defendant's "sole purpose" was to inflict harm. *See Carvel Corp. v. Noonan*, 3 NY3d at 190; *Snyder v. Sony Music Entertainment, Inc.*, 252 AD2d at 300.

As to the plaintiff's cause of action for prima facie tort, the elements are (1) intentional infliction of harm, (2) resulting in special damages, (3) without an excuse or justification, (4) by an act or series of acts which would otherwise be lawful. *See, e.g., Golub v. Esquire Publishing Inc.*, 124 AD2d 528, 529 (1st Dept. 1986). In order to properly plead a cause of action for prima facie tort, it is necessary to allege that the action complained of was solely motivated by malice or "disinterested malevolence." *Id.*

In moving to dismiss both causes of action, the defendants, relying on *Brandt v. Winchell*, 3 NY2d 628 (1958), first argue that any communications they had with the District and/or the Department of Education concerning Posner's moral fitness to be a teacher are absolutely privileged. In *Brandt*, the Court of Appeals dismissed the plaintiff's prima facie tort claim, holding that a person who exposes offenses against the public should be granted immunity from civil suit at the hands of the one exposed, regardless of his or her motives in exposing the wrongdoing. *Id* at 635. In this respect, the defendants argue that both the District and the public had an interest in information which would reflect on the plaintiff's moral fitness as a teacher and that they therefore had every right to disseminate this information to the educational authorities. They contend that even if their primary motive in bringing the plaintiff's personal shortcomings to light was to harm him professionally out of personal malice and vindictiveness, the public importance of the information, as well as the District's alleged interest in receiving it, precludes a finding that the sole purpose of their actions was to harm the plaintiff. *See, e.g., ATI, Inc. v. Ruder & Finn, Inc.*, 42 NY2d 454, 460 (1977); *Snyder v. Sony Music Entertainment, Inc.*, 252 AD2d at 300; *SRW Assoc. v. Bellport Beach Property Owners*, 129 AD2d 328, 332 (2nd Dept. 1987).

The problem with the defendants' argument is that at this stage of the litigation, on a pre-answer motion to dismiss, the court is unable to conclude, as a matter of law, that the information they communicated to the District was in the public interest and/or in the interest of the District such that its disclosure should be protected. Moreover, the defendants ignore the plaintiff's allegations that they did more than merely provide the District with information about him but, rather, that they actively sought punitive action against him such as the denial of tenure. Indeed, the complaint alleges that David Lewis had multiple telephone conversations with officials of the District, including the Superintendent, in which he demanded to know what steps were being taken in response to the investigation and whether the plaintiff would face disciplinary action. In his first letter to the District, David Lewis demanded that the plaintiff's teaching license be revoked. In his subsequent letter, he demanded that the strongest of disciplinary

measures be taken.

Contrary to the defendants' contention, the mere fact that the District may have used the information they provided as a basis for denying the plaintiff's application for tenure does not, by itself, mean that the disclosure of the information was in the interest of the District or the public. It is entirely possible that the District would have viewed the affair as a private matter were it not for the allegedly repeated efforts of David Lewis to ensure that the plaintiff faced harsh disciplinary action and/or the denial of his tenure application. Indeed, the complaint specifically alleges that the defendants' actions, including the pressure and influence they asserted, were the sole reason why the tenure application was denied. In the absence of any evidence showing that the plaintiff violated any of the District's rules, regulations or policies governing the type of conduct at issue herein, the court is unable to assess the relevance to a tenure application and interest to the public of information about a school teacher's private, adulterous affair with a substitute teacher. Absent discovery, it would thus be inappropriate for the court to dismiss the complaint. *See Park Knoll Associates v. Schmidt*, 59 NY2d 205, 209 (1983) *Garson v. Hendlin*, 141 AD2d 55, 59-63 (2nd Dept. 1988).

The defendants also argue that their conduct is protected by the First Amendment pursuant to the *Noerr-Pennington* doctrine. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 US 127 (1961) and *Mine Workers v. Pennington*, 381 US 657 (1965). This doctrine provides that parties may not be held subject to liability for petitioning the government or a government agency. *See, e.g., I.G. Second Partners , L.P. v. Duane Reade*, 17 AD3d 206, 208 (1st Dept. 2005); *Concourse Nursing Home v. Engelstein*, 278 AD2d 35 (1st Dept. 2000); *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 268 AD2d 101, 108-110 (2nd Dept 2000). The defendants, however, have failed to show that the *Noerr-Pennington* doctrine is applicable where, as here, it is far from clear that the information communicated to the government was of bona fide interest governmental interest and where, as here, the motivation for such communications was vindictive and arose from personal animus unrelated to any apparent actual concern about the operation of government. Indeed, David Lewis was not a resident of the District nor did he have children in the Siwanoy Elementary School.

Finally, the defendants also argue that the complaint should be dismissed as against Russell Lewis because it does not allege that he undertook any actionable conduct. It is true that the complaint alleges that it was only David Lewis who wrote the two letters at issue and who communicated with the District about the plaintiff and/or the status of his tenure. Nevertheless, the complaint does allege that Russell Lewis threatened to "make trouble" for the plaintiff and go to the Pelham Board of Education after learning about plaintiff's adulterous conduct and that he thereafter conspired with his son to inform the plaintiff's employer about this conduct for the purpose of denying plaintiff tenure. At this early stage of the litigation, the plaintiff should be permitted to ascertain through discovery the extent, if any, to which each of the two defendants pursued their alleged scheme to have his tenure application denied.

Thus, the court finds that the complaint is sufficient to state causes of action for tortious interference with a prospective contractual relation and prima facie tort. The defendants' motion to dismiss must therefore be denied. The defendants shall serve an answer to the complaint within 20 days of service upon them of a copy of this order with notice of entry.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on November 23, 2009 at 10:00 a.m. for a preliminary conference.

ENTER ORDER

**Dated:** 10/28/09

MGD

**MARYLIN G. DIAMOND, *J.S.C.***

**Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION**