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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

DAVID SHAW and COUNTRY CLUB ADVISOR, LLC,

Plaintiffs,

INDEX No. 012012/09

MOTION DATE: Jan. 11, 2010
Motion Sequence # 001, 002

-against-

CLUB MANAGERS ASSOCIATION OF AMERICA, INC., METROPOLITAN CLUB MANAGERS ASSOCIATION, INC., TODD ZORN, BARRY CHANDLER, RANDALL RUDER, JAMES SINGERLING, BURTON WARD, MICHAEL GALLUZO, ROBERT KASARA, JOSEPH MELUSO and MEG O'CONNOR,

Defendants.

The following papers read on this motion:

Notice of Motion..... XX
Affirmation in Opposition..... X
Memorandum of Law..... XXX
Reply Memorandum of Law..... X

These motions, by Metropolitan Club Managers Association, Inc (MCMA), Todd Zorn, Barry Chandler, Randall Ruder, Burton Ward, Michael Galluzo, Robert Kasara, Joseph

Meluso and Meg O'Connor (collectively the MCMA defendants), and by Club Managers Association of America, Inc. and James Singerling (collectively the CMAA defendants) respectively, to dismiss the complaint pursuant to CPLR 3211(a)(7), are **granted**.

BACKGROUND

The plaintiffs, a provider of consulting services to private country clubs in Nassau, Suffolk and Westchester counties in New York and its founder, seek to recover damages against defendant MCMA, a non profit professional association of country club managers and club consultants, and its national affiliate CMAA, and the individual defendants (James Singerling is the Chief Executive Officer of CMAA. The other individual defendants, members/officers of MCMA, are, for the most part, employees of various private clubs in the New York area),who allegedly conspired to interfere with plaintiffs' ability to provide/market services to private country clubs in the relevant markets and acted to block plaintiffs' innovative cost saving services from succeeding in markets where defendants are active in managing private country clubs and possess market power. Plaintiff David Shaw has been a member of CMAA since in or about December, 1991. Despite the superiority of their methods for providing country club management consulting services, plaintiffs allege they have been prevented by defendants and their co-conspirators, from marketing their services and potential cost savings strategies to country clubs in Nassau, Suffolk and Westchester counties.

Claiming that defendants have conspired to boycott country club consultants who use direct marketing to offer reduced prices and innovative services to various country clubs, plaintiffs assert eleven causes of action in their complaint including: violation of the Donnelly Antitrust Act; violation of General Business Law §§349 and 350; tortious interference with prospective contractual relations/economic advantage; negligence; defamation; breach of implied duty of good faith and fair dealing; negligent misrepresentation; unjust enrichment; ***prima facie*** tort; injurious falsehood and civil conspiracy–all of which the movants claim are deficient.

ANALYSIS

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept as true the facts alleged in the pleadings and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference. (***Kevin Spence & Sons, Inc. v Boar's Head Provisions Co., Inc.***, 5

AD3d 352, 353, 2nd Dept., 2004). The relevant inquiry is whether the complaint states a viable cause of action on its face, giving the plaintiff the benefit of every possible favorable inference. (***Leon v Martinez***, 84 NY2d 83, 87-88, 1994). Allegations consisting of bare legal conclusions, as well as factual claims contradicted by documentary evidence, however, are not entitled to any such consideration. (***Salvatore v Kumar***, 45 AD3d 560, 563, 2nd Dept., 2007, *leave to appeal denied* 10 NY3d 703, 2008).

Plaintiffs' first cause of action derives from § 340 of the General Business Law commonly known as the Donnelly Act. Plaintiffs allege that defendants, and their unnamed co-conspirators, conspired and agreed to prevent plaintiffs' consulting services from being marketed to private country clubs in Nassau, Suffolk and Westchester counties. As a consequence of such alleged anti-competitive conduct, plaintiffs assert that country clubs in the Nassau, Suffolk and Westchester relevant markets have allegedly been deprived of access to a series of innovative club management consulting services to their detriment.

The Donnelly Act, is modeled on the Sherman Act of 1890, 15 U.S.C. §§1-39. It is generally construed in accordance with federal precedent and given a different interpretation only where state policy, differences in the statutory language or the legislative history justify such a result. (***People v Rattenni***, 81 NY2d 166, 171, 1993). The Act [General Business Law § 340(1)] provides:

> Every contract, agreement, arrangement or combination whereby
>
> [1] A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> [2] Competition 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 or whereby
>
> [3] For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with 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 any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

To state a claim under the statute, alleging a monopoly is insufficient. A plaintiff must 1) identify the relevant product market; 2) describe the nature and effects of the purported conspiracy; 3) allege how the impact of that conspiracy restrains trade in the market in question; and 4) show that there is a conspiracy or reciprocal relationship between two or more of legal or economic entities. (***Neri's Land Imp., LLC v J. J. Cassone Bakery, Inc.***, 65 AD3d 1312, 1315, 2nd Dept., 2009; ***Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.***, 34 AD3d 91, 94, 2nd Dept., 2006). The failure to allege any one of these elements is fatal to the claim. (***Watts v Clark Associates Funeral Home***, 234 AD2d 538, 2nd Dept., 1996).

In order to establish standing to bring an antitrust suit, plaintiff must demonstrate that it has sustained an antitrust injury, i.e., an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. (***Daniel v America Bd. of Emergency Medicine***, 428 F3d 408, 438, 2nd Cir., 2005). The Donnelly Act mandates that there be a conspiracy or reciprocal relationship between two or more legal entities before liability can be found. (***Abe's Rooms Inc. v Space Hunters, Inc.***, 38 AD3d 690, 692, 2nd Dept., 2007). Notably, conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act. (***Creative Trading Co., Inc. v Larkin-Pluznick-Larkin, Inc.***, 75 NY2d 830, 831, 1990).

In order to survive a motion to dismiss on a Donnelly Act claim, plaintiffs must allege how the net effect of the alleged violation is to restrain trade in the relevant market and that no reasonable alternate source is available to consumers in the market. The relevant market has been defined as the narrowest market which is wide enough so that products from adjacent areas or producers in the same area cannot compete on substantial parity with those included in the market. (***Lopresti v Massachusetts Mut. Life Ins. Co.***, 5 Misc3d 1006(A) [Sup. Ct. 2004], *aff'd.* 30 AD3d 474, 2nd Dept., 2006).

Even viewing the allegations of the first cause of action in their most favorable light, the pleaded assertions fail to state a viable claim of violation of the Donnelly Act. There is nothing in the relevant factual averments to indicate that defendants' alleged improper conduct was perpetrated through a conspiracy or reciprocal relationship between two or more

entities. There is no allegation in the complaint that the purported conspirators were in competition with plaintiff or with each other. (***Neri's Land Imp., LLC v J.J. Cassone Bakery, Inc.***, ***supra*** *at p. 1315).*

The second, fifth and tenth causes of action alleging violations of General Business Law § § 349 and 350, defamation, and injurious falsehood respectively are all predicated on allegedly false/misleading consumer-oriented representations made by individual defendants including Barry Chandler, Randall Ruder, Burton Ward and Todd Zorn to members of MCMA regarding the nature and character of plaintiffs' private county club management consulting services and purported unethical conduct. For the reasons which follow each of the causes of action is deficient.

With respect to the second cause of action, the court notes that General Business Law § 349, which contemplates an individual consumer who falls prey to misrepresentation by a retailer of consumer goods, prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce, or in the furnishing of any service." To establish a ***prima facie*** claim of deceptive trade practices under the statute, plaintiffs must allege that 1) defendants' deceptive acts were directed at consumers; 2) the acts were misleading in a material way; and the plaintiffs have been injured as a result. (***Lonner v Simon Prop. Group, Inc.***, 57 AD3d 100, 110, 2nd Dept., 2008; ***Gaidon v Guardian Life Ins. Co. of America***, 94 NY2d 330, 344, 1999). Judged against this standard the second cause of action is deficient and must be **dismissed**.

While corporate competitors have standing to bring a claim under this statute, the gravamen of the complaint must be consumer injury or harm to the public interest. (***Gucci America, Inc. v Duty Free Apparel, Ltd.***, 277 F.Supp2d 269, 273, S.D.N.Y. 2003). A commercial claimant under § 349 must allege conduct that has significant ramifications for the public at large in order to properly state a claim. (***Shred -It USA, Inc. v Mobile Data Shred, Inc.***, 228 FSupp.2d 455, 465, S.D.N.Y. 2002, *aff'd* 92 Fed. Appx. 81, 2nd Cir (NY) 2004).

Here, the acts alleged were directed at plaintiffs and at various country clubs, but did not have significant ramifications with respect to the public at large. Plaintiffs complain of the harm to their business–not to the public interest. The claimed conduct, therefore, does not support a cause of action for deceptive trade practices in violation of General Business Law § 349.

Inasmuch as plaintiffs' claim under § 350 of the General Business Law, which prohibits "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service," is not based upon a deceptive of materially misleading advertisement that had an impact on consumers at large which resulted in injury, plaintiffs' § 350 claim is also not viable. (***Andre Strishak & Associates, P.C. v Hewlett Packard Co.,*** 300 AD2d 608, 609, 2nd Dept., 2002).

A plaintiff establishes a ***prima facie*** case of defamation by showing 1) a defamatory statement of fact, 2) regarding the plaintiff 3) communicated to a third party 4) causing special harm or defamation per se. (***Dillon v City of New York***, 261 AD2d 34, 38, 1st Dept., 1999). Whether particular words are susceptible of a defamatory connotation presents a legal question to be resolved by the court in the first instance. (***Weiner v Doubleday & Co., Inc.,*** 74 NY2d 586, 593, 1989, *cert denied* 495 U.S. 930, 1990). The complaint must set forth the particular words allegedly constituting the defamatory statement (CPLR 3016[a]), and must also allege the time when, the place where and the manner in which the false statement was made, as well as specify to whom it was made. (***Epifani v Johnson***, 65 AD3d 224, 233, 2nd Dept., 2009).

A defendant can, however, overcome the ***prima facie*** case by establishing a defense of privilege. A qualified privilege exists for statements made by one person to another upon a subject in which both have an interest. (***Foster v Churchill***, 87 NY2d 744, 751, 1996; ***Liberman v Gelstein***, 80 NY2d 429, 437, 1992). The privilege can be lost where a plaintiff demonstrates that the defendant acted with malice i.e., made the allegedly defamatory statements out of spite or ill will, or with a high degree of awareness of their falsity. (***Foster v Churchill***, ***supra*** at p. 751-752).

The defendants' alleged statements, i.e., that plaintiffs violated the MCMA/CMAA Code of Ethics by distributing marketing materials to various member country clubs, and by utilizing confidential MCMA mailing lists, are reasonably susceptible of defamatory meaning since it is well established that a statement is actionable if it tends to disparage a person in his profession. (***Wasserman v Heller***, 216 AD2d 289, 2nd Dept., 1995; ***Scott v Cooper***, 215 AD2d 368, 369, 2nd Dept., 1995, *leave to appeal dismissed* 86 NY2d 812, 1995). This is not the end of the inquiry, however. Here, defendants counter, and this court agrees, that the statements are protected by qualified privilege. Qualified privilege negates the presumption of implied malice flowing from the allegedly defamatory statements, and places the burden on plaintiff to show actual malice. Mere conclusory allegations or charges, based upon

surmise, conjecture and suspicion, are insufficient to defeat the claim of qualified privilege. (***Paskiewicz v N.A.A.C.P.***, 216 AD2d 550, 551, 2nd Dept., 1995, *leave to appeal denied* 87 NY2d 807, 1996).

There being no basis to conclude that the subject statements were motivated solely by express malice or ill will, the challenged statements are not actionable thereby requiring dismissal of the fifth cause of action.

To state a claim of tortious interference with prospective business advantage, plaintiffs must allege that they had a business relationship with a third party, defendants knew of, and intentionally interfered with, that relationship solely out of malice, or used dishonest, unfair or wrongful means to interfere with the relationship thereby causing injury to the relationship. (***Kirch v Liberty Media Corp.***, 449 F3d 388, 400, 2nd Cir., 2006). Plaintiffs must allege a specific business relationship that they were prevented from entering into by defendants' purported tortious interference. (***Schoettle v Taylor***, 282 AD2d 411, 1st Dept., 2001).

Plaintiffs having failed to allege any specific business relationship they were prevented from entering into by reason of defendants' purported tortious interference, the third cause of action for tortious interference with respective business relations must be **dismissed**.

The negligence alleged in the fourth cause of action relates to defendants' purported breach of duty, ***inter alia***, to not provide selective and biased information concerning club governance, board policies, compensation/benefits, operations, and finances/ economic strategy to the various MCMA and CMAA member country clubs with which the individual defendants were associated, and to exercise reasonable care to avoid foreseeable injury to plaintiff David Shaw, a fellow member of MCMA and CMAA. It is well settled that a duty of reasonable care owed by the tortfeasor to the plaintiff is elemental to any recovery in negligence. (***Pulka v Edelman***, 40 NY2d 781, 782, 1976, *reargument denied* 41 NY2d 901, 1977). None of the allegations of the fourth cause of action constitute a breach by defendants of a duty owed to plaintiffs under the membership agreement. The negligence claim must, therefore, be **dismissed**.

With every contract there is an implied covenant of good faith and fair dealing (***511 West 232nd Owners Corp. v Jennifer Realty Co.***, 98 NY2d 144, 153, 2002), which is breached when a party acts in a manner that deprives the other party of the right to receive

the benefits under their agreements. (***Moran v Erk***,11 NY3d 452, 456, 2008; ***Dalton v Educational Testing Service***, 87 NY2d 384, 389, 1995). The duty is not without limits, however, and no obligation can be implied that would be inconsistent with the terms of the parties' agreement. (***Murphy v American Home Products Corp.***, 58 NY2d 293, 304, 1983).

In order to survive a motion to dismiss such a cause of action, plaintiffs must allege facts that show that defendants sought to prevent performance of the agreement or to withhold its benefits from the plaintiff. (***Aventine Inv. Management, Inc. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 514, 2nd Dept., 1999). It is undisputed that plaintiff David Shaw submitted a membership application to CMAA wherein he agreed to abide by the by-laws and Code of Ethics of the organization.

Plaintiffs' conclusory allegations with respect to selective enforcement of the Code of Ethics provision are insufficient to state a cause of action for violation of the implied covenant of good faith and fair dealing inherent in the Code of Ethics under which defendants MCMA/CMAA and their members operated. The allegations of the complaint do not include factual averments, relative to defendants' attempt to circumvent its duties with respect to plaintiffs' membership in MCMA or CMAA. The sixth cause of action cannot, therefore, be sustained.

In the seventh cause of action alleging negligent misrepresentation, plaintiffs allege that the same individual defendants made oral and written representations to the general managers of various country clubs falsely accusing plaintiffs of distributing market materials to private clubs in violation of the CMAA and MCMA Code of Ethics and utilizing confidential MCMA mailing lists rather than public sources of such data.

In order to state a claim for negligent misrepresentation, as plaintiffs purport to do in the seventh cause of action, the following must be alleged: 1) the existence of a special or privity like relationship imposing a duty on defendants to impart correct information to plaintiffs; 2) that the information was incorrect; and 3) there was reasonable reliance on the information. (***J.A.O. Acquisition Corp. v Stavitsky***, 8 NY3d 144, 148, 2007; *reargument denied* 8 NY3d 939, 2007; ***Silvers v State***, 68 AD3d 668, 1st Dept., 2009). Here, plaintiffs allege that defendants imparted incorrect information to various general managers of private country clubs–not that defendants imparted any incorrect information to plaintiffs. Nor have the plaintiffs alleged the existence of a special relationship between the defendants and either plaintiffs, or those to whom they imparted information, upon which a cause of action for negligent misrepresentation could be predicated. The seventh cause of action, therefore, must

be **dismissed**.

The doctrine of unjust enrichment does not signify a single well defined cause of action. It is a general principle underlying various legal doctrines and remedies. The phrase "unjust enrichment" is used to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. To prevail on a claim of unjust enrichment, plaintiffs must show that defendants were enriched at plaintiffs' expense and, in equity and good conscience, should not retain that which plaintiffs seek to recover. (***Spector v Wendy***, 63 AD3d 820, 822, 2nd Dept., 2009). Here the facts alleged do not make out a ***prima facie*** case that defendants were enriched at plaintiffs' expense merely because plaintiffs paid dues to the defendants' MCMA and CMAA in return for membership in those associations. The eighth cause of action is deficient on its face and must be **dismissed**.

The elements of a cause of action for ***prima facie*** tort are 1) intentional infliction of harm; 2) resulting in special damages; 3) without excuse or justification; 4) by an act or series of acts that would otherwise be lawful. (***Cardo v Board of Managers, Jefferson Village Condo***, 29 AD3d 930, 931, 2nd Dept., 2006). It is not a catch-all alternative for every cause of action which cannot stand on its own legs. (***Freihofer v Hearst Corp.***, 65 NY2d 135, 143, 1985; ***Belsky v Lowenthal***, 62 AD2d 319, 323, 1st Dept., 1978, *aff'd.* 47 NY2d 820, 1979). There is no recovery for ***prima facie*** tort unless malevolence is the sole motive for defendants' otherwise lawful act. (***DeNaro v Rosalia***, 59 AD3d 584, 588, 2nd Dept., 2009).

Here the ninth cause of action for ***prima facie*** tort must be **dismissed** in the absence of any allegation that defendants' sole motivation was disinterested malevolence. Additionally, special damages, which are an essential element of both ***prima facie*** tort and injurious falsehood, must be pleaded with specificity. (***DiSanto v Forsythe***, 258 AD2d 497, 498, 2nd Dept., 1999). General allegations of lost sales or business opportunities from unidentified customers are insufficient. (***Vigoda v DCA Productions Plus, Inc.***, 293 AD2d 265, 266, 1st Dept., 2002). All that plaintiffs have alleged is lost future business income conjectural in identity and speculative in amount.

The tort of trade libel or injurious falsehood consists of knowing publication of false matter derogatory to the plaintiffs' business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to the detriment of the business. The communication must play a material and substantial role in inducing others not to deal with plaintiffs, with the result that special damages in the form

of lost dealings are incurred. (***Waste Distillation Technology, Inc. v Blasland & Bouck Engineers, P.C.***, 136 AD2d 633, 634, 2nd Dept., 1988). As previously noted, special damages are an essential element of a cause of action for injurious falsehood and must be plead with particularity. (***Lesesne v Lesesne***, 292 AD2d 507, 509, 2nd Dept., 2002). In pleading special damages, actual losses must be identified and causally related to the alleged tortuous act. (***L.W.C. Agency, Inc. v St. Paul Fire and Marine Ins. Co.***, 125 AD2d 371, 373, 1st Dept., 1986).

Plaintiffs having failed to sufficiently allege such losses, the injurious falsehood claim must be **dismissed**. General allegations that unnamed country clubs would not retain plaintiffs' services are inadequate as a pleading of special damages *vis a vis* injurious falsehood.

New York does not recognize civil conspiracy to commit a tort as an independent cause of action. (***Ward v City of New York***, 15 AD3d 392, 393, 2nd Dept., 2005). Such a claim stands or falls with the underlying tort. (***Pappas v Passias***, 271 AD2d 420, 421, 2nd Dept., 2000). Here plaintiffs allege that defendants conspired/agreed to implement a group boycott and maliciously interfere with plaintiffs' existing and prospective business relationships. In order to properly plead a conspiracy, however, plaintiffs must do more than assert a bare bones allegation that a conspiracy exists.

The complaint must allege facts to support the existence of a conspiracy. Plaintiffs' allegations of a conspiracy are wholly conclusory as no facts are alleged to support such a charge–plaintiffs merely allege that defendants conspired to prevent them from providing consulting services to private country clubs in Nassau, Suffolk and Westchester counties. Conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act (***Great Atlantic & Pacific Tea Co., Inc. v Town of East Hampton***, 997 FSupp. 340, 352, E.D.N.Y. 1998), or to sustain a claim of civil conspiracy *vis a vis* any of the torts alleged in plaintiffs' complaint.

The eleventh cause of action for civil conspiracy must, therefore, be **dismissed**.

Accordingly, the respective motions of defendants MCMA and CMAA to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(7) are **granted**.

SHAW **Index no. 012012/09**

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated March 10

XXX J.S.C.