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SHORT FORM ORDER

INDEX No. 08-20075

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MG
002 - XMG; CASEDISP

BAUMANN & SONS BUSES, INC., Plaintiff, - against - DANIEL J. GATTO, INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 854, and UNITED BUS CORPORATION, Defendants.	HAMBURGER, MAXSON, YAFFE, et al. Attorneys for Plaintiff 225 Broadhollow Road, Suite 301E Melville, New York 11747Z CARY KANE, LLP Attorney for Defendants Gatto & Local Union 854 1350 Broadway, Suite 815 New York, New York 10018 JEFFREY SAMEL & PARTNERS Attorneys for Defendant United Bus Corporation 150 Broadway, 20th Floor New York, New York 10038

Upon the following papers numbered 1 to 25 read on this motion and cross-motion to dismiss the complaint and counter-claim; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 9 ; Notice of Cross-Motion and supporting papers (002) 10-17 ; Answering Affidavits and supporting papers 18020; Replying Affidavits and supporting papers ; Other 21- Union Mem/Law; 22-23 - Bauman Mem/Law; 24-25 Union Reply Mem/Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, Daniel J. Gatto and International Brotherhood of Teamsters, Local Union No. 854, for an order pursuant to CPLR 3211(a)(1) based upon documentary evidence and CPLR 3211(a)(7) for failure to state a cause of action dismissing the complaint and counter-claim asserted against them, is granted and the complaint is dismissed with prejudice; and it is further

ORDERED that this cross-motion (002) by the defendant, United Bus Corporation, pursuant to CPLR 3211(a)(7) and (g) for an order dismissing the complaint and counter-claim asserted against it, is granted and the complaint is dismissed with prejudice.

This action is premised upon a statement and subsequent publication of a letter to the parents in the Patchogue-Medford Union Free School District, County of Suffolk, State of New York, setting forth allegedly false business practices of the plaintiff, Baumann & Sons Buses, Inc. (Baumann), which

statement and publication the plaintiff claims has irreparably injured its good name, business reputation and standing in the community, resulting in the recision of the award of a school bus transportation contract to the plaintiff and the plaintiff's inability to effectively bid on a request for proposal for a replacement contract to be advertised and awarded July 2008 and to commence September 2008.

On June 16, 2008, at a public meeting of the Board of Education of the Patchogue-Medford Union Free School District (School District), Baumann was awarded a three year school bus transportation contract for the best proposer, pursuant to a request for a proposal which was advertised by the School District on May 9, 2008. This contract was to become effective September 2008. United was the only other transportation contractor to submit a proposal to the School District, and had provided pupil transportation to the School District for 39 years, and had sufficient vehicles and bus drivers available to service the School District in the coming school year. At that time, Baumann was in the position to purchase thirty new buses to service the School District and was prepared to secure other buses and hire drivers, prepare bus routes and other associated tasks to be ready to perform on the first day of school in September 2008.

Daniel J. Gatto (Gatto) is the president of the defendant International Brotherhood of Teamsters, Local Union 854 (Union), a local labor union. United Bus Corporation (United) and Baumann are competing pupil transportation companies on Long Island. The bus drivers and certain other employees are represented by the Union. It is claimed that at the June 16, 2008 meeting, Gatto and the Union organized the bus drivers of United to make statements about Baumann, stating "The school children will be at risk if Baumann is awarded a contract." On June 19, 2008, United, the Union and Gatto allegedly organized the United bus drivers to hand out a letter signed by Gatto and given to the pupils riding on the buses with instructions to give the letter to their parents. The letter stated as follows:

"June 19, 2008

Dear Parent,

My name is Daniel J. Gatto, President of Teamsters Local 854; I have had the privilege of representing the drivers of United Bus Corp. since 1993. United drivers have been transporting children in your district for thirty nine years. Come this September they will no longer be servicing your community, this is a result of Superintendent Mustow's attempt to save money off the backs of your children, but what you don't know is he's not saving money, because United was willing to make concessions in order to keep doing the work. Yes after the superintendent told United to submit a second proposal which United did, cutting its price to keep their people working, the superintendent refused to consider it. Is this the responsible way to spend your money? Shouldn't your children's best interest be the priority in the decision making process? Well some one needs to let the district know that!

United Bus Corp. has had a Union contract for many years, over that time the workers at United have been able to gain benefits such as Retirement and Health coverage for themselves and their families as well as being able to earn a living wage. The new company who will provide your bus service does not have a labor agreement; in fact if one of their workers even mentions the word Union they fire them. This company requires its employees to pay the full cost of the medical coverage, while it pays sub-standard wages, hence, very few workers can afford to get coverage. Would you want to work for any employer like this? They don't care about their own workers, what makes you think they care about your children?

United Bus Corp. has an excellent safety record, much better than the safety record of the new company. As I said many of the workers at United are your neighbors. Don't let the District do this to them, Stand up for your neighbors, come join us at 12:00 noon, on Thursday June 26, 2008 at 241 South Ocean Ave. in Patchogue, to protest the injustice that the

district has perpetrated against your neighbors.

I hope you will find it in your heart to come out in support of our worthy cause, because if we don't stand for something, we will fall for anything.

Very truly yours,
Daniel J. Gatto"

The plaintiff claims that the defendants acted with actual malice and knew the letter and matter contained therein concerning Baumann were false and untrue, or were published with reckless and wanton disregard of whether they were false and untrue, and were intended to damage and impugn the business reputation of plaintiff in the community and amongst the parents of the School District, causing the Board of Education of the School District to rescind the contract it awarded to them. At the June 28, 2008 meeting, the School District rescinded the contract with Baumann and announced it would proceed to advertise a new invitation to bid for the contract. Baumann claims that due to the additional passage of time before the start of the 2008-2009 school year, that it was unable to submit an effective proposal.

Baumann claims that the defendants' false accusations are actionable per se and are a substantial factor in Baumann incurring further financial loss, including lost profits, and has suffered damages in the minimum sum of $4,000,000.00. At a special session of the Board of Education on June 23, 2008, a motion was made and seconded that the Board of Education rescind the Board's award of school bus transportation to Bauman and Sons, Inc. made on June 18, 2008 and rejected all proposals as it was determined to be in the best interest of the District to do so. The Assistant Supervisor of Business was then authorized to prepare and advertise for competitive bidding.

In support of this application, the Union and Gatto have submitted an attorney's affirmation; a copy of the summons and complaint; a copy of the Order to Show Cause and verified petition served by United wherein it sought an order reversing the award of the subject school bus transportation contract to Baumann on the grounds that the School District acted arbitrarily, capriciously and contrary to law in awarding the contract in that Baumann & Sons was not the highest scoring or "best" proposer for the contract and for which a temporary restraining order was signed on June 18, 2008 (Blydenburgh, J.); the notice and bid proposal format from the School District; bus operator and bus inspection system operator profile; bus operator profiles; copy of the minutes from the special meeting held on June 23, 2008; and a copy of a letter dated June 24, 2008 from the Board of Education to counsel for the Union advising all bus transportation proposals were rejected and a competitive bid would be advertised and a request to withdraw the action.

In support of this application, United has submitted an attorney's affirmation; a copy of the complaint; a copy of the transportation proposal submitted by Baumann; bid proposal of Baumann; a copy of the letter with a statement from a parent, Christine McGiluray; and a copy of a letter dated May 20, 2008 to Mr. Ron Baumann from the General Manager of Nesco Bus and Truck Sales, Inc, Paul Daniels, advising Mr. Baumann that there is currently available a sufficient number of school buses in stock to adequately meet the needs of the transportation contract with Patchogue-Medford School District RFP #2008-06 which will be delivered on or about August 10, 2008; and a copy of a letter from Bank of America to Ronald A. Baumann dated February 21, 2008 indicating it is pleased to renew the

availability period for his $2,000,000.00 line of credit which will expire on February 27, 2009.

In opposing the motion and cross motion, the plaintiff has submitted the affidavit of Ronald A. Baumann, President of Baumann & Sons Buses, Inc. and a copy of "Three-Year Averages."

Pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs ***(Leon v. Martinez***, 84 NY2d 83). On such a motion, the court is limited to examining the pleading to determine whether it states a cause of action ***(Guggenheimer v. Ginzburg***, 43 NY2d 268). In examining the sufficiency of the pleading, the court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. State Educ. Dept.,*** 116 AD2d 939). Only affidavits submitted by the plaintiff in support of the causes of action may be considered on a motion of this nature (***Rovello v. Orofino Realty Co.,*** 40 NY2d 633). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v. Martinez***, 84 NY2d 83; ***Thomas McGee v. City of Rensselaer***, 663 NYS2d 949).

It is for the court to decide whether the statements complained of are "reasonably susceptible of a defamatory connotation," thus warranting submission of the issue to the trier of fact. The entire publication, as well as the circumstances of its issuance, must be considered in terms of its effect upon the ordinary reader (***Silsdorf v Levine,*** 59 NY2d 8 [1983]). Whether the statements constitute fact or opinion is a question of law for the court to decide (***Silsdorf v Levine,*** supra, citing ***Rinaldi v Holt, Rinehart & Winston***, 41 NY2d 369).

Although the distinction between fact and opinion may be difficult to draw in some cases, the conclusory statement in defendants' letter concerning the difference in the way the plaintiff and Union run their businesses, and Union's statement that it has a better safety record than Baumann, are clearly set forth as an opinion and as such are entitled to a certain measure of constitutional protection (see, ***Gertz v Robert Welch, Inc.,***418 US 323). "This extraordinary protection of possibly defamatory statements is justified by our commitment to the principle that free and open debate on matters of public concern is not to be discouraged by the spectre of the imposition of libel damages for the expression of a harsh or unpopular opinion. Notwithstanding the importance of protecting this form of expression even to the extent of denying recompense for injury to an individual's reputation, the immunity afforded the expression of opinion obtains only when the facts supporting the opinion are set forth" (***Rinehart & Winston,*** supra). "The purpose of this requirement is to ensure that the reader has the opportunity to assess the basis upon which the opinion was reached in order to draw his own conclusions concerning its validity" (***Silsdorf v Levine,*** supra).

In all defamation cases, the threshold issue which must be determined, as a matter of law, is whether the complained of statements constitute fact or opinion. If they fall within the ambit of "pure opinion." then even if false and libelous, and no matter how perjorative or pernicious they may be, such statements are safeguarded and may not serve as the basis for an action in defamation" (***Parks v Steinbrenner et al,*** 131 AD2d 60 [1987]). There are four factors which should generally be considered in differentiating between fact and opinion in a defamation case. They are as follows: (1) an assessment

of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal to the readers or listeners that what is being read or heard is likely to be opinion, not fact.... So long as an opinion is accompanied by a recitation of the facts upon which it is based it is deemed a 'pure opinion' and is afforded complete immunity even thought the facts do not support the opinion." (***Parks v Steinbrenner et al,*** supra).

In reviewing the publication in its totality, and in applying these four factors to the statements contained in the subject letter, it is determined that the letter of June 18, 2008 is non-actionable pure opinion and involves matters clearly warranting public exposition and is within the sphere of legitimate public concern. The defendants did not claim that Baumann had a bad safety record, just that their own safety record was better. The Union defendants boast that they provide their employees with better benefits and benefits which Baumann does not provide. The plaintiff claims in his complaint that it was awarded the contract for the best proposer or highest scoring bidder. Public safety and the safety of the children riding on the school buses are very important public issues. It is noted that the School District reserved "the right to consider all relevant and reasonable criteria in selecting the successful proposer, which may or may not be expressed in this Specification description" as set forth in the Request for Proposal. It is further noted that the School District determined which of the proposers would be awarded the contract based upon the proposal and all other relevant and reasonable criteria which it received.

The parties were engaged in an active bidding process with the School District for a public transportation contract. Pursuant to N.Y. CLS Civ R §76-a 1.(a) An 'action involving public petition and participation' is an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission. (b) 'Public applicant or permittee' shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission. (c) 'Communication' shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression. (d) 'Government body' shall mean any municipality, the state, and any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.

It is determined that the parties fall within the definitions set forth in N.Y. CLS Civ R §76-a 1 as applicants to a public school district for permission to obtain a public transportation contract with the school district, and that the statements made are communications encompassed by the statute.

"The New York State Legislature enacted special procedural and substantive safeguards to protect the exercise of free speech involving public issues. Chapter 767 of the Laws of 1992 establishes legislative intent to insure a Jefferson democracy by protecting those issues closest to home.... The

legislature declared... it to be the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence,' and that 'the laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern.' SLAPP actions are an 'attempt to privatize public debate-a unilateral effort by one side to transform a public, political dispute into a private, legal adjudication shifting both forum and issues to the disadvantage of the other side. Thus citizens may involve themselves in a city hall zoning dispute, only to find that 'city hall' has become the courtroom' and 'zoning' has become defamation' or interference with business'" (***T.S. Haulers, Inc. v Kaplan et al***, 2001 NY Slip Op 40191U, 2001 NY Misc Lexis 405 [Supreme Court of New York, Suffolk County 2001].

A SLAPP suit or Strategic Lawsuit Against Public Participation is a tactic employed by business and developers who find it an effective means of silencing public opposition to controversial projects. In enacting this statute (chapter 767 of the Laws of 1992), the Legislature stated in its findings and purposes that "The legislature hereby declares it to be the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence. The laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern. The law focuses on retaliatory litigation commenced or maintained for the purpose of intimidating persons who have voiced opinions in public meetings or discussion inimical to those of the person controlling the litigation and is designed to deter such abuses. It facilitates the early dismissal of the SLAPP suit by tightening the legal substantive requirements imposed upon plaintiffs in order to prevail in such a suit and by lowering the procedural hurdles that the defendant in such a suit must clear in order to obtain dismissal of the suit. A retaliating plaintiff in a SLAPP suit who alleges defamation is to be considered a public figure and as such, under established substantive law governing recovery of damages for libel and slander, is not entitled to recover unless there is clear and convincing evidence that the defendant knowingly defamed the plaintiff or acted with reckless disregard for the truth or falsity of the statements. (see ***Duane Reade, Inc. v Patrick Clark et al***, 2004 NY Slip Op 50174U, 2 Misc3d 1007A [Supreme Court of New York, New York County 2004]).

Pursuant to CPLR 3211(g), the burden is upon the plaintiff to establish that its claim has the requisite substantial basis and the plaintiff must establish by clear and convincing evidence a substantial basis in fact and law for its claim.

In the instant action it has been determined that the statements made by the defendants in their letter of June 18, 2008 constitute non-actionable pure opinion, and it is further determined that this action is a SLAPP suit brought in retaliation for the defendants speaking out and voicing their opinions about their qualifications for the contract and competing for that contract.

In that the letter at issue was written by Gatto, president of the Union, and distributed by the defendant bus drivers, it is determined that based upon the foregoing, that the complaint fails to state a cause of action as a matter of law against any of the defendants in that the statements have been found to be non-actionable opinion. It is additionally determined that the defendants did not rescind the transportation contract which was instead rescinded by the School District based upon their own

evaluation and rating of the information submitted by the competing parties, inclusive of their respective safety records and associated information and criteria contained in the proposal submitted by the parties, as well as other relevant material to be considered by the School District in awarding the contract.

Additionally, it is determined that the plaintiff has not demonstrated damages or special damages in that on the date the contract was rescinded the plaintiff claims it was in a position to act pursuant to the contract, but several days later, it claims was no longer able to. The record does not contain any supporting evidence to this effect and the statement that it was no longer able to act is an unsupported, conclusory statement with no articulated basis that "too much time had lapsed."

Accordingly, motion (001) and cross-motion (002) are granted and the complaint is dismissed in its entirety with prejudice.

Dated: April 30, 2010

HON. JOSEPH C. PASTORESSA

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION