

**Online Phone Store, Inc. v Better Bus. Bur. of  
Metropolitan N.Y., Inc.**

2011 NY Slip Op 32719(U)

October 24, 2011

Supreme Court, New York County

Docket Number: 104689/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

ONLINE PHONE STORE, INC. d/b/a FACTORY  
OUTLET STORE,  
Plaintiff,  
-v-  
BETTER BUSINESS BUREAU OF METROPOLITAN  
NEW YORK, INC.,  
Defendant.

INDEX No. 104689/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. No. 001  
MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 3, 4  
Answering Affidavits- Exhibits 2  
Replying Affidavits 5

CROSS-MOTION: \_\_\_\_\_ YES  NO

**FILED**

Upon the foregoing papers, it is ordered that this motion is:

OCT 24 2011

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION IN NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/14/11

Donna M. Mills  
DONNA M. MILLS, J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

-----X  
ONLINE PHONE STORE, INC. d/b/a FACTORY  
OUTLET STORE,

Plaintiff,

Index No.: 104689/11

-against-

BETTER BUSINESS BUREAU OF METROPOLITAN  
NEW YORK, INC.,

Defendant.  
-----X

**FILED**

**OCT 24 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

**MILLS, J.:**

In this action, plaintiff Online Phone Store, Inc. d/b/a Factory Outlet Store, alleges causes of action for defamation, trade libel, and seeks an injunction to direct defendant Better Business Bureau of Metropolitan New York, Inc., to remove the rating from its website which it issued to plaintiff. Defendant moves, pursuant to CPLR 3211 (a) (7), and argues that the complaint must be dismissed, because plaintiff fails to state a cause of action upon which relief may be granted. Defendant also moves, pursuant to CPLR 3211 (a) (1), on the basis of documentary evidence defendant contends establishes that its rating process is not defamatory.

**FACTUAL ALLEGATIONS**

Plaintiff is an online retailer of consumer products. Defendant is a non-profit corporation which seeks to promote relationships between businesses and customers by rating businesses and publishing the ratings online for the benefit of potential customers. Businesses are rated on a letter scale system, between the highest score of an "A+" and the lowest score of a "F". Defendant maintains that it derives the ratings by a formula sensitive to the number of complaints which it receives against a company, and the severity of the complaints. A business can be

accredited by defendant through an application process and by the payment of dues. Defendant contends that complaints against accredited and unaccredited businesses are treated alike, and that no preferential advantage is given to an accredited business.

After conducting a review of plaintiff's business, defendant issued it a rating of "D-", and subsequently an "F". Plaintiff argues that the rating which it received from defendant was motivated by malice, and conveys to the public that plaintiff is dishonest in its business dealings and incompetent in its service. Plaintiff alleges that its reputation has been severely damaged, and that as a result of the rating, it has lost sales and revenue.

Defendant maintains that the ratings and statements made regarding plaintiff on its website are not defamatory because they are protected by two privileges, the common interest privilege, which protects the rating system for public policy reasons, and the fair comment privilege, which protects statements of opinion based upon facts. Defendant contends that while the privileges do not protect statements that are made with a malicious intent, plaintiff has failed to demonstrate that its negative rating was a result of malice.

### DISCUSSION

The Court of Appeals has held that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (citations omitted).

The amended complaint alleges causes of action for defamation and trade libel. Defamation is defined as "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 . . . .” *Foster v Churchill*, 87 NY2d 744, 751 (1996) (citations omitted). The elements of defamation “are a false statement, published without 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*, 261 AD2d 34, 37-38 (1st Dept 1999) (citations omitted).

“Trade libel is the knowing publication of false and derogatory material regarding another's business, that is calculated to prevent others from doing business with the defamed party or otherwise interferes with its business relationships. The party alleging trade libel *must* establish that the publication of the false material was a substantial factor in inducing others not to have business dealings with it.” *Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 1003 (Sup Ct, New York County 2005), citing *Waste Distillation Tech., Inc. v Blasland & Bouck Engineers, P.C.*, 136 AD2d 633, 634 (2d Dept 1998); see also *Banco Popular N. Am. v Lieberman*, 75AD3d 460, 462 (1st Dept 2010) (“facts so published must cause special damages in the form of actual lost dealings”).

Here, plaintiff has set forth sufficient factual allegations to support its causes of action for defamation and trade libel. Plaintiff alleges that the rating which it received from defendant is based upon false statements, implies that defendant is a dishonest and untrustworthy company, and remains published online and negatively persuades potential customers.

Defendant contends that its statements and rating concerning plaintiff's business are not defamatory because they are protected by the common interest and fair comment privileges. The common interest privilege is based upon public policy concerns and allows the communication of

true information to persons who share a common interest in the subject matter. In order to defeat this privilege, plaintiff must demonstrate that the alleged statement is false and motivated by malice. *See Trim-A-Way Figure Contouring, Ltd. v National Better Bus. Bur., Inc.*, 37 AD2d 43, 45 (1st Dept 1971).

With regard to the fair comment privilege which protects statements of opinion based upon facts, the court has held that “[n]o comment or criticism, otherwise libelous, is fair or just comment on a matter of public interest if it be made through actual ill will and malice. By actual malice is meant personal spite or ill will, or culpable recklessness or negligence.” *Wehringer v Newman*, 60 AD2d 385, 391 (1st Dept 1978) (citations omitted).

Here, plaintiff alleges that malice was an underlying factor in determining the rating. Plaintiff contends that defendant intentionally gave its business a low rating, because plaintiff was not accredited by defendant and did not pay the required accreditation fee. Plaintiff references various investigations conducted in other states which have disclosed how better business organizations have given lower ratings to businesses which do not pay accreditation fees.

In addition, while defendant’s online review of plaintiff’s business states that defendant did not have sufficient background information to determine how long plaintiff has been conducting business, plaintiff contends that it has been in constant contact with three specific employees of defendant and has fully responded to various inquiries. Plaintiff also alleges that it has fewer unresolved complaints than other businesses graded by defendant who were given a better rating. Therefore, based upon the allegations which are discussed in its amended complaint, plaintiff has satisfied its pleading burden for malice.

Defendant contends that plaintiff has failed to specifically identify the alleged special damages it has suffered in order to succeed on its cause of action for trade libel. The Court of Appeals has held that "special damage must be fully and accurately stated. If the special damage was a loss of customers \* \* \* the persons who ceased to be customers, or who refused to purchase, must be named \* \* \* [If] they are not named, no cause of action is stated." *Drug Research Corp. v Curtis Publ. Co.*, 7 NY2d 435, 440-441 (1960). The amended complaint states;

26. Numerous potential customers and actual customers of Factory Outlet have refused to purchase products from Factory Outlet as a direct result of the BBB report. By way of example, on May 7, 2011 Factory Outlet received an e-mail from a potential customer named [yimmoe@comcast.net](mailto:yimmoe@comcast.net) stating "[a]re you aware of how poor you [sic] BBB rating is? I was going to purchase from your site but not now." On May 11, 2011, Factory Outlet's customer Samuel Savage contacted Factory Outlet, stated that he has reviewed the BBB report and demanded a full refund of \$35.99 noting that based on the BBB report, he should have known not to do business with Factory Outlet. On January 25, 2011, Factory Outlet customer Scott Davidson demanded a full refund of his purchase price based on the BBB report.

27. Factory Outlet sales representatives have received numerous phone calls from prospective customers similarly stating that they will not purchase from Factory Outlet because of its poor BBB rating.

Therefore, plaintiff has sufficiently plead special damages in the form of lost customers which it has identified.

Defendant also contends that the complaint should be dismissed based upon documentary evidence, specifically exhibits B and C of the affirmation of Brendon D. O'Brien, Esq. Exhibit B is a copy of a page from defendant's website which is entitled "What are BBB ratings?" and describes the letter grading system. Exhibit C is entitled "BBB RATINGS SYSTEM", which is also a page from the website which discusses the sixteen elements used in

the grading process.

“In order to prevail on a CPLR 3211 (a) (1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff’s . . . allegations.” *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005). Here, while exhibits B and C outline the rating system, the documents fail to provide specific information regarding the calculation of plaintiff’s rating and do not fully address the allegations that plaintiff received a lower rating due to its failure to become accredited.

In conclusion, because plaintiff has set forth sufficient factual allegations regarding its causes of action against defendant, defendant’s motion to dismiss the complaint is denied.

**CONCLUSION and ORDER**

Accordingly, it is

ORDERED that defendant Better Business Bureau of Metropolitan New York Inc.’s motion to dismiss is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 10/14/11

**FILED**

**OCT 24 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

ENTER:

*J. S. C.*  
J.S.C.

**DO NOT WRITE IN THESE SPACES**