SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

GEM HOLDCO, LLC, GEM VENTURES, LTD., GLOBAL EMERGING MARKETS NORTH AMERICA, INC., CHRISTOPHER BROWN, EDWARD TOBIN, and DEMETRIOS DIAKOLIOS,

Plaintiffs,

-against-

CHANGING WORLD TECHNOLOGIES, L.P, CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, JEAN NOELTING, RIDGELINE ENERGY SERVICES, INC., DENNIS DANZIK, BRUCE A. MACFARLANE, TONY KER, RICHARD CARRIGAN, DOUGLAS JOHNSON, and KELLY SLEDZ,

Defendants.

----------X

Index No: 650841/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendants Changing World Technologies, L.P. (CWT), CWT Canada II Limited Partnership (CWT Canada), Resource Recovery Corporation (RRC), Jean Noelting, Ridgeline Energy Services, Inc. (Ridgeline), Dennis Danzik, Bruce A. MacFarlane, Tony Ker, and Richard Carrigan move, pursuant to CPLR 3211, for partial dismissal of the Third Amended Complaint (the TAC).[1] Defendants' motion is granted in part and denied in part for the reasons that follow.[2]

[1] Defendants Douglas Johnson and Kelly Sledz are not part of this motion. On May 19, 2014, Johnson separately filed a motion to dismiss (Seq. 006) for inadequate service and lack of personal jurisdiction. On June 19, 2014, plaintiffs filed a motion (Seq. 005) for an extension of time to serve Sledz. Both motions are scheduled for oral argument on September 11, 2014. The only claim asserted against Johnson and Sledz is the defamation claim. The defamation claim against Johnson and Sledz lacks merit for the same reason it lacks merits against the moving defendants.

I. Background

A. Procedural History

The court assumes familiarly with its decision on the motion to dismiss the first Amended Complaint, which is set forth in an order dated December 24, 2013 (the December Order). *See* Dkt. 120.[3] Because the allegations in the TAC regarding the parties' primary dispute over the subscription requests and how such dispute impacts each side's alleged breach of the SPA have not changed, the court will not discuss those allegations. Instead, the court limits its discussion of the TAC to the two issues raised on this motion: (1) the viability of the new defamation claim; and (2) the viability of the claim for breach of the NDA, a claim upon which the court reserved to allow the contracting party, GEM Ventures (not GEM), to be added as a plaintiff [*see* Dkt. 120 at 16-17].

On January 13, 2014, plaintiffs filed a Second Amended Complaint (the SAC) that added GEM Ventures as a plaintiff on the NDA claim and limited the other claims to those surviving the motion to dismiss. *See* Dkt. 122. At a February 6, 2014 preliminary conference, plaintiffs disclosed their intention to seek leave to amend to add a defamation claim. Defendants agreed to allow the amendment, but reserved their rights to move to dismiss on the merits. *See* Dkt. 135 at 3.

The TAC was filed on February 19, 2014. *See* Dkt. 136. It alleges six causes of action: (1) breach of the SPA against CWT; (2) tortious interference with the SPA against all defendants

---

[2] Since the defamation claim is dismissed in its entirety under CPLR 3211, the court will not address the parties' dispute about whether summary judgment on the defamation can be granted on this record.

[3] All defined terms have the same meaning as in the December Order.

except CWT; (3) breach of the NDA against Ridgeline and Danzik; (4) tortious interference with the NDA against CWT, CWT Canada, RRC, and Noelting; (5) breach of the LOI against Ridgeline; and (6) libel per see against Ridgeline, Danzik, Ker, Noelting, MacFarlane, Johnson, Sledz, and Carrigan. The TAC also adds three of GEM's principles, Christopher Brown, Edward Tobin, and Demetrios Diakolios, as plaintiffs on the defamation claim.

B. The Press Releases

On May 1, 2013, at 9:02 am, plaintiff GEM's parent company (non-party Global Emerging Markets NA, Inc.) (GEM NA) issued a press release, titled "GEM Announces $27 Million Lawsuit Against [Ridgeline] and [CWT]:

> [GEM NA] announced that on April 29, 2013 one of its affiliates, [GEM], amended its complaint in [this] lawsuit against [CWT] to include [Ridgeline] and its CEO, Dennis Danzik, as defendants with respect to certain claims including, variously, Tortious Interference with Contract, Breach of Agreement, and Conspiracy to Commit Torts.
>
> GEM's claim against CWT, now amended to also include Jean Noelting as a defendant, variously include Breach of Agreements, Breach of the Implied Covenant of Good Faith and Fair Dealing, Tortious Interference with Business Relations, Conspiracy to Commit Torts, and Tortious Interference with Contract.
>
> GEM claims damages in excess of $27 million.
>
> The Amended Complaint can be seen at [hyperlink to amended complaint].

Dkt. 166 at 2.[4]

Approximately two hours later, at 11:15 am, defendant Ridgeline responded with a press release of its own, titled "Ridgeline announces $ 140 million dollar lawsuit against [GEM NA]":

---

[4] The contact for GEM NA in the press release is listed as Edward Tobin, one of the new plaintiffs on the defamation claim.

> [Ridgeline] ... today announced that it has engaged legal counsel to file a lawsuit against [GEM NA] and its subsidiary [GEM] for damages greater than [$]140 million.
>
> In addition the action names Christopher Brown, claimed CEO of GEM, as well as counterparts, Edward Tobin and Demetrious Diakolios as defendants. GEM has made claims to have an investment fund worth over a billion dollars.
>
> Ridgeline will pursue civil charges including Fraud, Tortious Interference, and additional claims under the Racketeering in Organized Crime Act, which qualifies for treble damages. Ridgeline will also show that GEM attempted to extort cash payments from Ridgeline, and its current CEO, Dennis M Danzik under threats of GEM releasing negative news on Ridgeline via wire services in the U.S. and Canada.
>
> Ridgeline's claims stem from the fact that GEM and the individual defendants represented that they owned and [CWT] controlled and that GEM had made substantial investment in CWT, when in fact GEM was a small minority shareholder in CWT with less than US$ 800,000.00 invested.
>
> Further progress of the legal action by Ridgeline will also show GEM was involved in an attempt to setup a fraudulent investment in CWT, where GEM would purport to invest a total of US$ 4,000,000, but in fact was arranging a fraud, where the investment would be returned to GEM within [a] few days, without the knowledge of the true owner and seller of CWT, which was CWT Enterprises Canada, Inc.

Id. at 6.[5]

Plaintiffs claim that Ridgeline's press release was defamatory. Defendants move to dismiss the defamation claim, *inter alia*, on the ground that the statements in the press release cannot give rise to defamation liability because they are protected by the fair reporting privilege. For the reasons set forth below, defendants are correct.

---

[5] This press release was signed by "Tony Ker, CEO" "ON BEHALF OF THE BOARD OF DIRECTORS" (capitalization in original).

C. The NDA

As for the NDA claim, defendants make two sets of arguments. *First*, defendants claim that the NDA does not apply to the conduct alleged in the TAC, and in any event, any damages recovered on the claim for breach of the SPA would fully compensate plaintiffs. Ergo, defendants conclude, plaintiffs suffered no further damages on the NDA that are not duplicative of its damages under the SPA. As discussed below, the scope of the NDA cannot be adjudicated on this motion to dismiss nor are defendants' contentions about lack of damages ripe for dismissal. *Second*, defendants argue that even if plaintiffs have stated a claim for breach of the NDA, such claim must be limited to the contracting parties – GEM Ventures and Ridgeline. On this issue, defendants are correct.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such

consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83,.88 (1994).

A. Defamation

"Defamation is the making of a false statement about a person that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society.'" *Frechtman v Gutterman*, 115 AD3d 102, 104 (1st Dept 2014), quoting *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 (1977). "To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm [defamation per se]." *Stepanov v Dow Jones & Co.*, 120 AD3d 28, 41-42 (1st Dept 2014), citing *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). "A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct." *Frechtman*, 115 AD3d at 104, citing *Chiavarelli v Williams*, 256 AD2d 111, 113 (1st Dept 1998). "Whether the contested statements are reasonably susceptible of a defamatory connotation is in the first instance a legal determination for the court. In analyzing the words in order to make that threshold decision, the court must not isolate them, but consider them in context, and give the language a natural reading

rather than strain to read it as mildly as possible at one extreme, or to find defamatory innuendo at the other." *Weiner v Doubleday & Co.*, 74 NY2d 586, 592 (1989).

"Of course, 'only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue.'" *Martin v Daily News L.P.*, 2014 NY Slip Op 05369, 2014 WL 3510973, at *6 (1st Dept July 17, 2014), quoting *Thomas H. v Paul B.*, 18 NY3d 580, 584 (2012); *see Mann v Abel*, 10 NY3d 271, 276 (2008) ("Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation"); *see generally Gross v N.Y. Times Co.*, 82 NY2d 146 (1993).[6] Here, the parties dispute whether Ridgeline's press release contains actionable statements of fact or inactionable expressions of opinion.[7] The court need not resolve this dispute because, as defendants correctly argue, the press release is privileged.

"It is well settled that '[p]ublic policy mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action.'" *Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 (2007), quoting *Toker v Pollak*, 44 NY2d 211, 218 (1978). "When compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege." *Id.*, quoting *Liberman v Gelstein*, 80 NY2d 429 (1992). The

---

[6] In addition, state law defamation claims must not run afoul of the First Amendment. *See Kipper v NYP Holdings Co.*, 12 NY3d 348, 353 (2012), accord N.Y. *Times Co. v Sullivan*, 376 US 254 (1964).

[7] Factors to be considered are: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to '"signal * * * readers or listeners that what is being read or heard is likely to be opinion, not fact."' *Gross*, 82 NY2d at 153.

absolute privilege applies to "statements uttered in the course of a judicial or quasi-judicial proceeding … so long as they are material and pertinent to the questions involved **notwithstanding the motive with which they are made**."[8] *Herzfeld & Stern, Inc. v Beck*, 175 AD2d 689, 691 (1st Dept 1991) (emphasis added); *see generally Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 170-74 (1st Dept 2007). "Moreover, the absolute privilege attaches not only to the hearing stage, but to every step of the proceeding in question **even if it is preliminary and/or investigatory and irrespective of whether formal charges are ever presented**." *Herzfeld*, 175 AD2d at 691(emphasis added); *see Rosenberg*, 8 NY3d at 365; *Nineteen Eighty-Nine, LLC v Icahn Enterprises L.P.*, 99 AD3d 546, 547 (1st Dept 2012). "Whether a statement is at all pertinent to the litigation is determined by an extremely liberal test. A statement made in the course of judicial proceedings is privileged if, by any view or under any circumstances, it may be considered pertinent to the litigation." *Sexter*, 38 AD3d at 173 (citations and quotation marks omitted). Additionally, "[t]he pertinence of a statement made in the course of judicial proceedings is a question of law for the court," and, "[i]n answering that question, any doubts are to be resolved in favor of pertinence." *Id.*

Plaintiffs, however, argue that the *common law* absolute ligation privilege does not apply to Ridgeline's press release because such privilege is inapplicable to out-of-court statements made about a lawsuit.[9] While this is true, section 74 of the New York Civil Rights Law provides

---

[8] Hence, if the absolute privileged applies, it is of no moment that the press release was issued with the intent to cause a decrease in stock price.

[9] Out-of-court statements, however, are protected by the absolute privilege when they are made between the parties, their counsel, or to others involved with the litigation. *See Sexter*, 38 AD3d at 174-75; *but see Frechtman*, 115 AD3d at 107 (releasing statement "to unrelated third parties could affect the availability of the privilege").

for a separate "fair reporting" privilege that covers out-of-court accounts of litigation, such as Ridgeline's press release. *See Lacher v Engel*, 33 AD3d 10, 17 (1st Dept 2006) ("a 'civil action cannot be maintained against any person ... for the publication of a fair and true report of any judicial proceeding."). For this privilege to apply, "the account given must be only 'substantially accurate.'" *Id.*, citing *Holy Spirit Ass'n for Unification of World Christianity v N.Y. Times Co.*, 49 NY2d 63, 67-68 (1979) ("When determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision"); *see generally Long v Marubeni Am. Corp.*, 406 FSupp2d 285, 292-96 (SDNY 2005).

Ridgeline's press release, which was issued to indicate its intended course of action with respect to plaintiffs' first amended complaint discussed in GEM's press release (issued two hours beforehand), does not make any actual untrue statements of fact. Rather, Ridgeline's press release outlines its defenses and its intention to assert counterclaims. *See* Dkt. 166 at 6 ("Ridgeline **will pursue** civil charges including Fraud, Tortious Interference, and additional claims under the Racketeering in Organized Crime Act … and Ridgeline **will also show** that GEM attempted to extort cash payments from Ridgeline") (emphasis added). These are inactionable expressions of future intent. That such defenses include allegations of plaintiffs' fraud does not inherently make the press release actionable. Proving the claims' underlying merit (or lack thereof) is the very point of this lawsuit. That Ridgeline's press release may be false does not matter because Ridgeline's recitation of its accusations is a substantially accurate account of its position in this litigation. Such account is protected by the fair reporting privilege. The fair reporting privilege is not vitiated by the claim that the described allegations have no merit so long as the described allegations actually reflect the defendant's position in the lawsuit.

Nor does it matter that defendants have yet to formally assert their affirmative defenses since plaintiffs amended their complaint three times and defendants moved to dismiss rather than answer. While the instant motion only seeks partial dismissal of the TPC, it is well settled that a defendant is under no obligation to answer any of plaintiff's claims until a partial motion to dismiss is decided. *See Chagnon v Tyson*, 11 AD3d 325 (1st Dept 2004). That more than a year has passed since the press release was issued without counterclaims being filed does not in any way suggest that the intentions expressed in the press release were inaccurate. In any event, since the press release simply provides a substantially accurate outline defendants' defenses, it cannot give rise to defamation liability.[10]

B. Claims Under the NDA

In the December Order, the court held that a claim under the NDA (which is governed by Delaware law) must be asserted by the contracting party: GEM Ventures, not GEM. *See* Dkt. 120 at 16-17. Indeed, GEM did not even exist at the time the NDA was entered into. Moreover, GEM cannot claim that it was validly assigned GEM Ventures' rights under the NDA because section 14 requires Danzik to consent to such an assignment, which he did not do. *See* Dkt. 150 at 104-05.

Moreover, only Danzik is a party to the NDA. Ridgeline is not. While section 6 of the NDA allegedly prohibits Danzik from causing his affiliate companies, such as Ridgeline, from transacting with CWT without GEM [*see* Dkt. 150 at 103-04], the affiliates themselves are not parties to the NDA and thus are not liable for a breach thereunder. Again, as the court noted in

[10] Since plaintiffs cannot maintain a defamation claim based on the the press release, the court will not address the parties' arguments regarding which of the defendants might not have been liable for the content in the press release based on their status as members of Ridgeline's board on May 1, 2013.

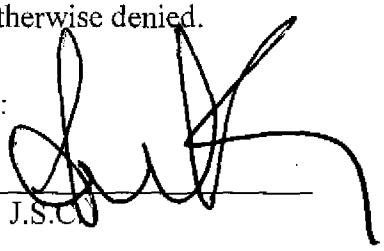
the December Order, "if the parties wanted to bind Ridgeline, they would have expressly done so." Dkt. 120 at 17 n.5.

Finally, defendants make two arguments to support dismissal of plaintiffs' claim for breach of and tortious interference with the NDA. *First*, defendants argue that the NDA does not apply to the SPA. Instead, defendants contend it applies to another previously contemplated but abandoned transaction. This allegation raises a question of fact that cannot be resolved on a motion to dismiss. None of the contracts submitted by defendants conclusively substantiates this argument. *Second*, defendants argue that the NDA claims should be dismissed because any damages sought on those claims are duplicative of the damages recoverable under the SPA. This may well be true. For instance, if GEM prevails on the merits of its SPA claim, "GEM may seek specific performance – which would entail GEM making the balance of its $4 million investment to CWT and receiving the purchase price of approximately $15 million from Ridgeline." Dkt. 120 at 14. This would make GEM whole, possibly precluding any further damages under the NDA. However, the contracting parties are different under each contract. At the motion to dismiss stage, the court will not disallow plaintiff's claim on the ground that another plaintiff's potential recovery might moot the claim. Also, Danzik faces personal liability under the NDA, and a claim thereunder may provide a separate means of enforcing the judgment should it prove difficult to enforce a judgment against the other defendants. Plaintiffs should not be precluded from a potential source of recovery merely because liability for the same alleged bad acts are attributable to multiple defendants. Of course, should GEM prevail on its claims against CWT and Ridgeline and if GEM is made whole, a double recovery against Danzik would be impermissible. Accordingly, it is

ORDERED that the motion by defendants Changing World Technologies, L.P., CWT Canada II Limited Partnership, Resource Recovery Corporation, Jean Noelting, Ridgeline Energy Services, Inc., Dennis Danzik, Bruce A. MacFarlane, Tony Ker, and Richard Carrigan for partial dismissal of the Third Amended Complaint is granted in part as follows: (1) the sixth cause of action (libel per see) is dismissed with prejudice against all defendants except defendants Douglas Johnson and Kelly Sledz; (2) the third cause of action (breach of the NDA) is (a) dismissed with prejudice as against Ridgeline and (b) may only be maintained by GEM Ventures against Danzik; and (3) and the motion is otherwise denied.

Dated: August 28, 2014

ENTER:



J.S.C.