

**Imperial Asphalt & Aggregate Distrib. Inc. v Asphalt
Maintenance Servs. Corp.**

2016 NY Slip Op 33140(U)

March 31, 2016

Supreme Court, Westchester County

Docket Number: 69079/15

Judge: Lewis J. Lubell

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publication.

PCP 5/9/16 @ 9:30 a.m.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER

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IMPERIAL ASPHALT AND AGGREGATE
DISTRIBUTOR INCORPORATED and
HENRY G. ONEIL,

Plaintiff,

-against -

ASPHALT MAINTENANCE SERVICES CORP.,
MARK REUSS, ROBERT A. SIEGEL, ESQ.,
and LAW OFFICES OF ROBERT A. SIEGEL,
ESQ.,

Defendants.

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LUBELL, J.

The following papers were considered in connection with motion **Sequence #1** by plaintiffs for an Order enjoining defendants from contacting companies or their representatives to make defamatory and/or falsely injurious statements regarding plaintiffs or otherwise making claims or statements for the purpose of damaging plaintiffs' reputation and/or preventing plaintiffs from obtaining work; and motion **Sequence #2** by the Siegel defendants for an Order pursuant to CPLR 3211(a) (7) dismissing the verified complaint filed against defendants as it fails to state a viable cause of action, and for such other and further relief as this Court may deem just and proper:

PAPERS - SEQUENCE #1	NUMBERED
ORDER TO SHOW CAUSE/AFFIDAVIT/AFFIRMATION/ EXHIBITS A-C	1
AFFIRMATION IN OPPOSITION/EXHIBITS A-G	2
AFFIRMATION IN OPPOSITION	3
AFFIRMATION IN REPLY	4
PLAINTIFF'S AFFIRMATION IN REPLY	5

PAPERS - SEQUENCE #2

NUMBERED

NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS A-C	1
AFFIRMATION IN OPPOSITION	2
AFFIRMATION IN REPLY	3
E-filed papers #10-38	

Plaintiffs, Imperial Asphalt and Aggregate Distributor Incorporated ("Imperial") and its founder, Henry G. Oneil ("Oneil"), commenced this action against Oneil's former employer, defendant Asphalt Maintenance Services Corp. ("Asphalt Maintenance"), its owner and founder, defendant Mark Reuss ("Reuss"), and their attorney, defendants Robert A. Siegel, Esq. and the Law Offices of Robert A. Siegel, Esq. ("Siegel") in connection with, among other things, a May 15, 2015 letter (the "Letter") written by Siegel on behalf of Reuss and Asphalt Maintenance and delivered to Paleen Construction Corp. ("Paleen"), a contractor with which Asphalt Maintenance has done business in the past and with which Imperial alleges it would have done business but for the acts of the defendants herein alleged.

Asphalt Maintenance is a subcontractor engaged in the business of spraying liquid asphalt on roads and other surfaces. This action arises out of Oneil's early 2015 decision not to return to his seasonal position with Asphalt Maintenance so that he could start his own competing business. Most particularly, plaintiffs take issue with the Letter which was written and delivered to Paleen by Seigel on behalf of Asphalt Maintenance and Reuss.

Plaintiffs advance four causes of action as against all defendants: defamation; tortious interference with business relations; "trade libel/injurious falsehood"; and, abuse of process.

Defendant Siegel now moves to dismiss the causes of action as against him for failure to state a cause of action (CPLR 3211[a][7]).

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 as alleged in the complaint and submissions in opposition to the motion, accord [the plaintiff] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.,

20 N.Y.3d 59, 63, 956 N.Y.S.2d 439, 980 N.E.2d 487, quoting Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 754 N.E.2d 184).

Defamation:

In the May 12 letter to Paleen, Seigel expressly advises Paleen of his legal representation of Asphalt Maintenance and Reuss and, to the extent relevant to the defamation cause of action, that defendants have learned that

. . . "O'Neil [sic] a former employee of our clients, has been contacting our clients customers and intentionally interfering with business. It is our position that Mr. O'Neil's [sic] conduct is unlawful and significantly damaging our clients business and reputation. We maintain that Mr. O'Neil [sic] has misappropriated proprietary information and trade secrets and is using that information in an unlawful manner."

As part of the letter's admonition to Paleen that it should not "participate, conspire or otherwise partake, or engage[] in any conduct that unlawfully interferes with the business relations of [defendants'] clients and their customers . . ." or be subject to legal and/or equitable remedies, Paleen is "put . . . on notice that [it] should immediately cease and refrain from engaging in any conduct that enable or participates in conduct that was derived from Mr. O'Neil's [sic] unlawful usurping of our client's customer information and/or other trade secrets."

Qualified Privilege

To the extent that defendant/attorney seeks dismissal based upon qualified privilege (see Front, Inc. v. Khalil, 24 NY3d 713 [2015] [statements made by attorney that are "pertinent to a good faith anticipated litigation" enjoy a qualified privilege] reargument denied 25 NY3d 1036 [2015]), the motion is denied as premature.

A claim of qualified privilege is an affirmative defense to be raised in defendants' answer and "does not lend itself to a preanswer motion to dismiss pursuant to CPLR 3211 (a)" (Demas v. Levitsky, 291 AD2d 653, 661 [2002], lv dismissed 98 NY2d 728

[* 4]

[2002]). Rather, defendants must plead the privilege as an affirmative defense and thereafter move for summary judgment on that defense, supporting the motion with competent evidence establishing a prima facie showing of qualified privilege (see id.).

(Wilcox v. Newark Val. Cent. School Dist., 74 AD3d 1558, 1562 [3d Dept 2010]). Here, Siegel would need to come forward with proof in admissible form establishing that the pre-litigation statements "were pertinent to a good faith anticipated litigation" (Front, Inc. v. Khalil, supra at 720) and, thus, subject to a qualified privilege. Upon such a showing, plaintiffs would have to demonstrate that there are material questions of fact regarding same. By permitting Siegel to now assert that the allegations of the complaint establish a qualified privilege as a matter of law, would be to allow defendant to "'short-circuit that procedure' by 'improperly placing the burden on plaintiff to make competent allegations of [lack of good faith anticipated litigation] in anticipation of the affirmative defense" (id. at 662; see Garcia v. Puccio, 17 AD3d 199, 201 [2005]).

In any event, an examination of the complaint reveals that plaintiffs take note that defendants have not commenced an action against them and, upon recognizing defendants' CPLR 3102(c) pre-action motion for disclosure filed under the caption Asphalt Maintenance Services Corp, et al. v. Imperial Asphalt and Aggregate Distributor Incorporated, et al. (Westchester County Index 69079-2015 [Lubell, J.]), have characterize same in the complaint as a "fishing expedition" designed to "harass and destroy Plaintiff's fledgling business . . ." (Complaint ¶¶ 30-32). Construing these and related allegations contained in the complaint in a light most favorable to plaintiffs, as it must, the Court finds that the complaint states a cause of action against Siegel to the extent that a qualified privilege issue is under consideration.

Statements Characterization as Defamatory

The Court is not persuaded that the defamation cause of action should be dismissed as against Siegel based on Siegel's conclusory, two-line assertion that the complaint should be dismissed because ". . . it is clear on its face that the letter does not rise to the level of defamation. All statements in the letter are couched in opinion and make clear it is the party's position and [are] not presented as fact."

In any event, the Court finds that the statements contained in the Letter are reasonably susceptible of a defamatory connotation

so as to state a cause of action for defamation. As such, "it becomes the jury's function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader" (Mencher v. Chesley, 297 NY 94, 100 [1947]; see also, G.L. v Markowitz, supra at 822-23; James v. Gannett Co., 40 NY2d 415, 419 [1976]).

Tortious Interference with Contract

For the most part, the thrust of this aspect of Siegel's 3211(a)(7) motion seeking to dismiss plaintiffs' tortious interference with contract cause of action is that "there are no allegations in the complaint that suggest that Siegel acted in any capacity other than as an attorney and as such he should be immunized from any liability to [plaintiffs]." Upon according plaintiffs every possible favorable inference, as it must, the Court disagrees. To any further extent, there is no merit to this aspect of the motion.

"Trade Libel/Injurious Falsehood"

Defendant's motion to dismiss plaintiff's third cause of action as above captioned is granted, as unopposed.

Abuse of Process

Whether or not plaintiffs can ultimately prevail on this cause of action (or any other cause of action herein alleged), the Court finds that, upon according plaintiffs every possible favorable inference, plaintiffs have stated a cause of action against Siegel for abuse of process such that the cause of action survives this motion. In short, plaintiffs contend that all defendants, including Siegel, filed the pre-action motion for disclosure with the goal of putting Imperial out of business and punishing a former employee, Oneil, for attempting to open a competing business.

Injunctive Relief

Plaintiffs moved by way of order to show cause seeking a temporary restraining order and preliminary injunction "enjoining defendants from contacting companies or their representatives to make defamatory and/or falsely injurious statement regarding Plaintiffs, or otherwise making claims or statements for the purpose of damaging Plaintiffs' reputation and/or preventing Plaintiffs' from obtaining work."

Upon presentation of the order to show cause to the Court, the Court (DiBella, J.) struck the temporary restraining order.

Now, upon consideration of the fully submitted papers, and especially upon considering that, "[a]bsent extraordinary circumstances, injunctive relief should not be issued in defamation cases (Rombom v. Weberman, 309 AD2d 844, 845 [2d Dept 2003] citing Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Intern. Union, 239 F.3d 172, 177), the Court is not persuaded that a different result should now follow.

Although the Court has found that the complaint adequately states a cause of action for, among other things, defamation, the Court notes that there are "sharp issues of fact" to be decided at trial (Residential Bd. of Managers of the Columbia Condominium v. Alden, 178 AD2d 121, 123 [1st Dept 1991] citing O'Hara v. Corporate Audit Co., 161 A.D.2d 309, 310 [1st Dept 1990]). Under these circumstances, the Court cannot find that there is a likelihood of success on the merits or that the equities lie in favor of movant/plaintiff (and its startup business) and against defendant (which has an established business that is allegedly under unfair attack).

Based upon the foregoing, it is hereby

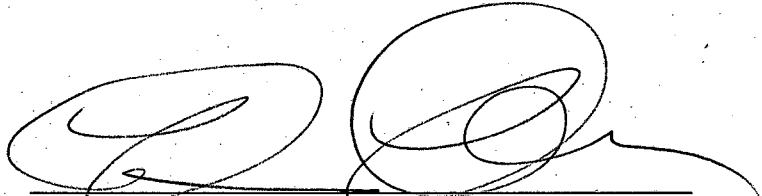
ORDERED, that the motion and cross-motion are denied except to the extent that the Court dismisses the third cause of action for "trade libel/injurious falsehood"; and it is further,

ORDERED, that, defendants shall serve and file their answers so as to be received by April 15, 2016; and it is further,

ORDERED, that, the parties are directed to appear on Monday, May 9, 2016, at 9:30 a.m. in the Preliminary Conference Part, Courtroom 811, Westchester County Supreme Court, 111 Martin Luther King Boulevard, White Plains, New York, prepared to conduct a preliminary conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
March 31, 2016



HON. LEWIS J. LUBELL, J.S.C.

Scott Mandel, Esq.
Office of Erica T. Yitzhak, Esq., PC
Attorney for Plaintiffs
17 Barstow Road, Suite 406
Great Neck, New York 11021

Lisa J. Black, Esq.
Traub Lieberman Straus & Shrewsberry LLP
Attorney for Defs. Asphalt and Reuss
Seven Skyline Drive
Hawthorne, New York 10532

James Edwards, Esq.
Ahmuty, Demers & McManus, Esqs.,
Attorney for Def. Siegel
199 Water Street, 16th Fl.
New York, New York 10038