

**Rockwell Capital Partners, Inc. v HempAmericana, Inc.**

2018 NY Slip Op 32279(U)

September 14, 2018

Supreme Court, New York County

Docket Number: 160529/2017

Judge: Robert D. Kalish

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

*Justice*

-----X

ROCKWELL CAPITAL PARTNERS, INC. and NORTHBRIDGE  
FINANCIAL, INC.,

Plaintiffs,

- v -

HEMPAMERICANA, INC., DERWIN WALLACE and INVESTOR  
WEBCAST, LLC,

Defendants.

INDEX NO. 160529/2017

MOTION DATE 09/05/2018

MOTION SEQ. NO. 001

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 12

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ORDERED that the instant motion by Defendant HempAmericana, Inc. to dismiss the complaint in its entirety, pursuant to CPLR 3212 (a) (7), is granted for the reasons stated herein:

**BACKGROUND**

The instant action arises out of the following statement made on behalf of Defendant HempAmericana, Inc. (“HempAmericana”) by its CEO non-party Salvador Rosillo in response to the question, “What’s your Operational and Investor Relations Strategy to increase your stock price?”:

“We suffered a severe dip in stock price during the first quarter of 2017 due to a toxic deal we completed with Rockwell/Northbridge Financial to help pay for our first extraction machine. We cannot go back in time to erase the damage, but in the month of August, we’ve already seen nearly a 100% increase in share price. We believe that the successful completion of one or multiple deals will really drive the stock price and begin to evangelize the market place.

We have already allocated a portion of our recently raised capital to help us better tell our story to the marketplace, we will continue to budget for that as

we grow. Without any toxic or dilutive instruments on our balance sheet, we feel there should be limited resistance as the value of our company appreciates.”

(Complaint ¶ 61.) Rosillo issued the above statement during an interview with Cannainvestor Magazine, and said statement was subsequently published by Defendant Investor Webcast, LLC in the August/September and October 2017 issues of Cannainvestor Magazine.<sup>1</sup>

Plaintiffs Rockwell Capital Partners, Inc. (“Rockwell”) and Northbridge Financial, Inc. (“Northbridge”) now bring the instant lawsuit because they assert, in sum and substance, “the use of the words ‘toxic deal’ was intended to suggest Plaintiffs intentionally engaged in misconduct and to make Plaintiffs look like crooks.” (Complaint ¶ 73.)

To understand Rosillo’s statement and why Plaintiffs argue that it defames them, it is necessary to understand the businesses of the parties and the relationships between them. HempAmericana is a publicly traded Delaware corporation, with its principal place of business in Manhattan, which “researches, develops and sells products made of industrial hemp.” (Complaint ¶ 5; HempAmericana Inc., <http://hempamericana.net/> [accessed September 14, 2018].) Plaintiffs Rockwell Capital Partners, Inc. (“Rockwell”) and Northbridge Financial, Inc. (“Northbridge”) are Delaware corporations with principal places of business in Delaware. (Complaint ¶¶ 3-4.)<sup>2</sup>

The relationship between HempAmericana and Plaintiffs appears to have begun around January 2017, and, in sum and substance, can be described as Rockwell providing capital that HempAmericana used to purchase its first “extraction machine.” This funding appears to have occurred through two transactions occurring first in January and then in May. The transactions themselves were, however, rather complex and involved Rockwell “purchasing” certain of HempAmericana’s accounts payable and then Rockwell suing

---

<sup>1</sup> The Complaint alleges that Defendant Investor Webcast and Defendant Derwin A. Wallace – the founder and editor-in-chief of Cannainvestor Magazine – “failed to check the factual accuracy of the published false statements.” (Complaint ¶ 67.) Defendants Investor Webcast and Wallace (collectively, “Cannainvestor Defendants”), however, are not parties to the instant motion, but the Cannainvestor Defendants have filed an answer in this action (NYSCEF Document No. 10).

<sup>2</sup> Rockwell’s principal place of business is in Wilmington, Delaware, and Northbridge’s is Newark, Delaware. (Complaint ¶¶ 3-4.) HempAmericana states, on information and belief, that Rockwell and Northbridge are “substantially owned and controlled” by the same individual, Samuel Oshana. (Memo in Supp. at 4.)

HempAmericana “seeking repayment of the liabilities Rockwell assumed for HempAmericana.” (Complaint ¶ 26.) HempAmericana would then enter into a court-approved settlement with Rockwell, wherein the lawsuits were resolved by HempAmericana issuing shares of its stock to Rockwell.<sup>3</sup>

In essence, Plaintiffs allege that it was defamatory for Rosillo to characterize these transactions as a “a toxic deal” because, they assert, “HempAmericana voluntarily entered into the transactions with Rockwell and greatly benefitted from them.” (Complaint ¶ 39.) In particular, Plaintiffs assert that these transactions “allowed [HempAmericana] to pay its accounts payable, acquire and keep its extraction machine and avoid bankruptcy.” (Complaint ¶ 40.) Moreover, Plaintiffs allege that Rockwell advised HempAmericana of the potentially dilutive effect of the transactions and that “HempAmericana specifically acknowledged that it had been warned of, and understood, the risks of the transaction, and the potentially dilutive effects.” (Complaint ¶ 1.) Plaintiffs assert that, notwithstanding its awareness of the risks, HempAmericana’s board of directors concluded that “such transaction is in the best interests of the Company,” and that this was acknowledged in the January 24, 2017 settlement agreement. (Complaint ¶ 23.)<sup>4</sup>

Accordingly, based on Rosillo’s statement published in Cannainvestor magazine, Plaintiffs allege the following causes of action: (1) libel/libel per se; (2) slander/slander per se; (3) injurious falsehood; and (4) prima facie tort; and (5) “injunctive/declaratory relief.”

## DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Peery v United Capital Corp.*, 84 AD3d 1201,

---

<sup>3</sup> The nature of the judicial involvement in these transactions is unclear. The complaint never mentions the judge or the jurisdiction that “approved” of these settlements, and there is no explanation for why a court would be involved with a transaction between two businesses absent extenuating circumstances. The only hint as to the jurisdiction is the following statement: “A review of public records in the Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida would have shown that the published statements were false.” (Complaint ¶ 68.) In addition, in the two transactions between Rockwell and HempAmericana, Rockwell would file a complaint and the court would approve of the settlement on, literally, the next day.

<sup>4</sup> In addition, Plaintiffs assert that Northbridge never had any business dealings with HempAmericana. (Complaint ¶¶ 42, 64.)

1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

Defamation must be pled with sufficient particularity to withstand a motion to dismiss. Pursuant to CPLR 3016 (a), "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." (*See also Three Amigos SJJ Rest., Inc. v CBS News Inc.*, 132 AD3d 82, 92 n 1 [1st Dept 2015].)

"Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance." (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985].) "The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." (*Id.*)

### **I. Plaintiff's First and Second Causes of Action for Libel and Slander Are Dismissed.**

Defamation is "the making of a false statement that '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, and to deprive him of their friendly intercourse in society.'" (*Manfredonia v Weiss*, 37 AD3d 286, 286 [1st Dept 2007], quoting *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211-212 [1926].) An action for defamation seeks to compensate the plaintiff for the injury to his or her reputation caused by the defendant's written expression, which is libel, or by the latter's oral expression, which is slander. (*Intellect Art Multimedia, Inc. v Milewski*, 24 Misc 3d 1248(A) [Sup Ct, NY County 2009] [Gische, J.]; *Idema v Wager*, 120 F Supp 2d 361, 365 [SDNY 2000], *affd*, 29 Fed Appx 676 [2d Cir 2002].)

To state a claim for defamation, a plaintiff must allege: (1) a false statement that is (2) published to a third party (3) without privilege or authorization (4) constituting fault as judged by, at a minimum, a negligence standard and that (5) causes harm, unless the statement constitutes defamation per se (in which case damages are presumed). (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].) There are four categories of statements that constitute libel / slander per se: “(1) statements charging plaintiff with a serious crime; (2) statements that tend to injure plaintiff in her trade, business or profession; (3) statements that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman.” (*Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept 1996].)

“Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue.” (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]; *Gross v New York Times Co.*, 82 NY2d 146, 152–53 [1993] [“Since falsity is a necessary element of a defamation cause of action and only ‘facts’ are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action.” [internal quotation marks omitted].) However, “[w]hile a pure opinion cannot be the subject of a defamation claim, an opinion that “implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, ... is a ‘mixed opinion’ and is actionable.” (*Davis v Boenheim*, 24 NY3d 262, 269 [2014], quoting *Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986].)

“A ‘pure opinion’ is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be ‘pure opinion’ if it does not imply that it is based upon undisclosed facts.” (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986].) “The actionable element of a ‘mixed opinion’ is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.” (*Id.* at 290.)

As the Court of Appeals notes, “[d]istinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task.” (*Brian v Richardson*, 87 NY2d 46, 51 [1995].) This difficult task is further complicated by “the principal duty of the courts to reconcile the individual's interest in guarding his good name with cherished First Amendment considerations.” (*Frank v Natl. Broadcasting Co., Inc.*, 119 AD2d 252, 256 [2d Dept 1986].)

To determine if a statement is a protected “pure opinion” or unprotected “mixed opinion” implying defamatory facts, a court must conduct the following four-factor analysis:

“(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 readers or listeners that what is being read or heard is likely to be opinion, not fact.”

(*Steinhilber v Alphonse*, 68 NY2d 283, 292 [1986] [internal quotation marks omitted].) In conducting such analysis, the courts are admonished to avoid “the hypertechnical parsing of written and spoken words for the purpose of identifying possible facts that might form the basis of a sustainable libel action.” (*Gross v New York Times Co.*, 82 NY2d 146, 156 [1993] [internal quotation marks and emendation omitted], quoting *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 256 [1991].) The “core goal” behind such an “exercise” is “to protect the individual’s historic right to vindicate reputation without impairing our cherished constitutional guarantee of free speech or casting a pall over citizens’ ability to engage in robust debate through the print and broadcast media.” (Id. [internal quotation marks omitted].)

In the instant case, Plaintiffs complain that Rosillo’s “use of the phrase ‘toxic deal’ clearly ascribes conduct to Plaintiffs and the tenor of the statement plainly suggests that Plaintiffs engaged in unethical, dishonest and fraudulent business practices.” (Memo in Opp. at 7.) Contrary to Plaintiffs’ claims, there is nothing in the two paragraphs that actually refers to the Defendants other than that the “toxic deal” was with them. Moreover, the word “toxic” is used in reference to statements about HempAmericana’s share price and balance sheet. Rosillo here is merely expressing his opinion that the share price suffered a “severe dip” in 2017 because of this deal with Rockwell/Northbridge—which he describes as being “toxic” for the share price—and later implies that the deal created a “toxic or dilutive instrument” on HempAmericana’s balance sheet.

Plaintiffs Rockwell and Northbridge appear to agree that the deal they made with HempAmericana did have a dilutive impact on share price—and in fact they

warned HempAmericana that the deal had the potential to dilute its share price, among other consequences. (Complaint ¶ 16 [reproducing letter, dated January 19, 2017 and signed by Rosillo, warning of the potential dilutive effect of the transaction].) They however assert, in sum and substance, that the deal with HempAmericana provided the latter with the necessary capital to survive and grow. To this end, Rosillo appears to acknowledge that this “toxic deal” was critical to HempAmericana’s growth in that it allowed HempAmericana to purchase its first extraction machine.

In sum and substance, by using the phrase “toxic deal” Rosillo was expressing his opinion, as CEO, that HempAmericana’s share price had experienced a “severe dip” in the recent past due to a deal it made with Northbridge/Rockwell that had a very dilutive impact on the share price, but was necessary for the company’s growth in that it allowed HempAmericana to purchase its first extraction machine. With the pain of that “toxic deal” now past, Rosillo further opined that he expected the share price to appreciate, noting that “we’ve already seen nearly a 100% increase in share price.”

Reading this statement in the context of a Cannabis industry trade publication intended to be read by potential investors and in response to the question about Rosillo’s strategy to increase HempAmericana’s stock price, the phrase “toxic deal” is merely Rosillo’s “rhetorical hyperbole” in expressing his opinion about the dilutive effect that the Rockwell deal had on HempAmericana’s share price and balance sheet and his pitching HempAmericana to potential investors as a growing company. (*See Gross v New York Times Co.*, 82 NY2d 146, 155 [1993] [noting that “it has already been held that assertions that a person is guilty of ‘blackmail,’ ‘fraud,’ ‘bribery’ and ‘corruption’ could, in certain contexts, be understood as mere, nonactionable ‘rhetorical hyperbole’ or ‘vigorous epithets’”] [internal emendation omitted].)

Although Rockwell and Northbridge may feel that Rosillo unfairly describes them as being part of a “toxic deal,” this Court would surely have to strain its reading to find that such a term implied certain facts, unknown to Rosillo’s audience, supporting a conclusion that Plaintiffs “engaged in misconduct” and were “crooks.” Those are simply not reasonable inferences to be drawn from Rosillo’s statement. (*See Jacobus v Trump*, 55 Misc 3d 470, 484 [Sup Ct, NY County 2017] [Jaffe, J.] [“[T]hat others may infer a defamatory meaning from the statements does not render the inference reasonable under these circumstances.”], *affd*, 156 AD3d 452 [1st Dept 2017], lv to appeal denied, 31 NY3d 903 [2018].)

That Rosillo and Plaintiffs may differ in opinion about whether the underlying transactions between Rockwell and HempAmericana were good or bad for the latter is just that—a difference of opinion—and not a basis for bringing a defamation action.

Moreover, that Rosillo inaccurately referred to Northbridge as being part of the “toxic deal” did not defame Northbridge because, as this Court finds, the allegedly defamatory facts implied by the use of the term “toxic deal” cannot be reasonably inferred by an average reader reading the statement as a whole in the given context.

Accordingly, the first and second causes of action for libel and slander, respectively, are dismissed.

## II. Plaintiffs’ Third Cause of Action for Injurious Falsehood Is Dismissed.

“The tort of trade libel or injurious falsehood requires the knowing publication of false and derogatory facts about the plaintiff’s business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment.” (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010].) “In addition, the facts so published must cause special damages, in the form of actual lost dealings.” (*Id.*)

As a preliminary matter, this Court has already found that a fair reading of Rosillo’s use of the term “toxic deal” in the context of the Cannainvestor Magazine article does not provide a basis for the average reader to infer defamatory facts supporting a conclusion that Plaintiffs “engaged in misconduct” or were “crooks.” As such, there is no basis for this Court to find that Rosillo’s statement implied “derogatory facts about the plaintiff’s business of a kind calculated to prevent others from dealing.” (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010].) To reiterate, the only facts Rosillo expressed about Plaintiffs were that they were parties to a deal with HempAmericana that had caused the dilution of HempAmericana’s share price.

In addition, Plaintiffs fail to allege special damages. “Special damages consist of ‘the loss of something having economic or pecuniary value’ which ‘must flow directly from the injury to reputation caused by the defamation, not from the effects of defamation.’” (*Matherson v Marchello*, 100 AD2d 233, 235 [2d Dept 1984] quoting Restatement, Torts 2d, § 575, comment b and Sack, Libel, Slander

and Related Problems, VII 2.2, 345–346.) “When loss of business is claimed, the persons who ceased to be customers must be named and the losses itemized.” (Id.)

Here, in opposition to the instant motion, Plaintiffs allege that the subject statement “caused harm to their reputations and significant concern among their prospective business clients and partners, satisfying the requisite pleading requirements for special damages.” (Memo in Opp. at 13; Complaint ¶ 91.) This generalized and conclusory statement of damage to reputation and “significant concern” among customers is—not withstanding Plaintiffs’ own opinion—wholly insufficient to plead a cause of action for injurious falsehood. (*Gonzalez v Vil. Taxi Corp.*, 155 AD3d 696, 702 [2d Dept 2017] [“General allegations of lost sales from unidentified lost customers are insufficient to establish injurious falsehood as a basis for damages.” [internal emendation omitted]; *DiSanto v Forsyth*, 258 AD2d 497, 498 [2d Dept 1999].)

Accordingly, the third cause of action for injurious falsehood is dismissed.

### III. Plaintiff’s Fourth Cause of Action for Prima Facie Tort Is Dismissed.

The elements for prima facie tort are: “(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful.” (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142–43 [1985].) “A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages.” (Id.)

Here, this Court has already found that the use of the term “toxic deal” would be construed by the average reader as an explanation for the prior dip in share price and that Plaintiffs’ assertions that the term implied they “engaged in misconduct” and were “crooks” are simply not reasonable inferences. In addition, Plaintiffs have not asserted any facts to suggest that Rosillo, on behalf of HempAmericana, intended to inflict harm on them. As such, this Court finds that Plaintiffs have failed to allege sufficient facts to establish the intent element for prima facie tort.

In addition, this Court also finds that Plaintiffs have failed to establish special damages. Here, Plaintiffs allege that the subject statement “caused damage to Plaintiffs’ reputations and caused concerns among their prospective business clients and partners.” (Complaint ¶ 95.) This generalized and conclusory statement is insufficient to satisfy the special damages element. (*Gonzalez v Vil. Taxi Corp.*,

155 AD3d 696, 702 [2d Dept 2017]; *DiSanto v Forsyth*, 258 AD2d 497, 498 [2d Dept 1999].)

Accordingly, the fourth cause of action for prima facie tort is dismissed.

**IV. Plaintiffs' Fifth Cause of Action for "Injunctive/Declaratory Relief" Is Dismissed.**

Plaintiff argues that it "will suffer irreparable injury if Defendants . . . are not enjoined from publishing, or causing to be published, future defamatory statements to any person or entity regarding Plaintiffs' business, employees, and/or dealings." However, this Court has already found that the sole statement complained of was not defamatory.

Accordingly, the fifth cause of action seeking "injunctive/declaratory" relief is dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Defendant HempAmericana, Inc. to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (7), is granted, and the complaint is dismissed as against Defendant HempAmericana, Inc., with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the remaining parties are to appear before this Court for a preliminary conference on December 4, 2018 at 9:30 AM.

The foregoing constitutes the decision and order of the Court.

9/14/2018

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

ROBERT D. KALISH, J.S.C.  
HON. ROBERT D. KALISH  
NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE