SHORT FORM ORDER

INDEX NO.: 607027-17

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 3-21-19
SUBMITTED: 3-22-19
MOTION NO.: 003-MG
004-XMD

FRANK PICCOLI AND PATRICK L. DEACETIS,

Plaintiffs,

-against-

CERRA, INC. AND AL CERRA,

Defendants.

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Upon the following papers read on this motion to dismiss and cross-motion to amend; Notice of Motion and supporting papers 82-99; Notice of Cross Motion and supporting papers 102-115; Answering Affidavits and supporting papers 116-117; Replying Affidavits and supporting papers 120-124; it is,

ORDERED that the motion by the plaintiffs for an order dismissing the defendants' fifth, sixth, and seventh counterclaims is granted; and it is further

ORDERED that the cross motion by the defendants for leave to amend their answer is denied.

On May 5, 2014, the defendant Al Cerra, the president of the defendant Cerra, Inc., entered into an agreement with the plaintiff Frank Piccoli, the president of Empire Sand & Stone Corporation ("Empire"), to purchase three pieces of construction equipment (the "Cerra contract"). The purchase price was $325,000, payable over 36 months at 5% interest beginning on June 15, 2014. The defendants defaulted by failing to make the payment due on May 15, 2015, and every payment thereafter. Empire went out of business and assigned the Cerra contract to the plaintiffs, Piccoli and Patrick Deacetis, who commenced this action to recover $230,803.77 due on thereon. The defendants moved to dismiss the complaint for lack of jurisdiction. That motion was denied on the record on December 13, 2017. The defendants then

answered the complaint and asserted several counterclaims against the plaintiffs. The plaintiffs replied to the counterclaims. They now move to dismiss the fifth, sixth, and seventh counterclaims pursuant to CPLR 3211 (a) (1) and (7). The defendants cross move for leave to amend their answer.

Preliminarily, the court notes that a motion to dismiss is a pre-answer device that must be made before service of a responsive pleading "is required" (**CPLR** 3211 [e]; **Higgit, Practice Commentaries**, McKinney's Cons Laws of NY, CPLR C3211:48 at 83). A responsive pleading includes, inter alia, a reply to a counterclaim (**Id.**). A motion to dismiss for failure to state a cause of action (**CPLR** 3211 [a] [7]) may be made at any time, notwithstanding the service of an responsive pleading (**CPLR** 3211 [e]; **Higgit**, *supra* C3211:49). A motion to dismiss based on documentary evidence (**CPLR** 3211 [a] [1]), however, must be made within the time to respond or raised in the responsive pleading, otherwise it is waived (**CPLR** 3211 [e]; **Higgit**, *supra* C3211:10 at 25). The plaintiffs moved to dismiss the fifth, sixth, and seventh counterclaims after serving their reply. Since they assert documentary evidence as an affirmative defense in the reply, they have not waived it as a defense.

When, as here a motion based on CPLR 3211 is made after service of the responsive pleading, the court can treat the motion as one for summary judgment, a power expressly conferred on it by CPLR 3211(c) (**Higgit**, *supra* C3211:48 at 84). CPLR 3211(c) empowers the court to treat a motion to dismiss as a motion for summary judgment after adequate notice to the parties. Notice is not required, however, when the parties have laid bare their proof and deliberately charted a summary judgment course (**Higgit**, *supra* C3211:43 at 74), as they have in this case. Accordingly, the court will treat the motion as one for summary judgment.

The seventh counterclaim for malicious prosecution is based on the following facts: In 2015, an entity known as F and M Equipment, Ltd, d/b/a Edward Ehrbar, f/k/a Edward Ehrbar, Inc. ("Ehrbar"), commenced an action against Empire, Piccoli, and Deacetis in the Supreme Court, Nassau County (the "Nassau County Action"), to recover for unpaid repairs to the equipment that is the subject of this action. Empire and Piccoli counterclaimed against Ehrbar and a related entity, Conklin Contracting, Inc., f/k/a Edward Ehrbar, Inc. ("Conklin"), claiming that the Cerras stopped making payments on the equipment because the repairs were defective. Therefore, Ehrbar and Conklin were liable for the unpaid purchase price. Conklin impleaded Cerra, Inc., as the purchaser of the equipment. Shortly thereafter, Conklin discontinued its claim against Cerra, Inc. The defendants contend that the plaintiffs were the catalyst for Conklin impleading Cerra, Inc., in the Nassau County Action, which was resolved in Cerra, Inc.'s favor.

The elements of the tort of malicious prosecution of a civil action are (1) the prosecution of a civil action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6)

causing special injury (*see* **347 Central Park Assocs, LLC v Pine Top Assocs., LLC**, 144 AD3d 785). A plaintiff must prove an entire lack of probable cause in the prior proceeding (**Id.**). In view of the fact that the Cerra, Inc., was the one who purchased the equipment, it cannot be said that Conklin's claim against Cerra, Inc., was entirely without probable cause. Moreover, the defendants fail to allege special injury, which requires them to suffer some concrete harm that is considerably more cumbersome than the physical, psychological, or financial demands of defending a lawsuit (**Ortiz v Todres & Co., LLP**, US Dist Ct, SDNY, Mar. 30, 2018, Schofield, J. [2018 WL 1626140] , n 1, *citing* **Engel v CBS, Inc.**, 93 NY2d 195, 205). The defendants merely seek to recover Cerra Inc.'s legal costs in connection with the Nassau County Action. Accordingly, the seventh counterclaim is dismissed.

The fifth and sixth counterclaims allege that Piccoli contacted the defendants' customers and made false and defamatory statements to them. Specifically, the defendants allege that Piccoli contacted Impact Environmental, Inc. ("Impact") in December 2016 and advised it that materials and equipment used by the defendants were stolen from Piccoli. The defendants allege that Piccoli repeated this false and defamatory statement to other customers and that Impact and other customers terminated their contracts with Cerra, Inc. The plaintiffs contend that these counterclaims should be dismissed because they fail to meet the specificity requirements of CPLR 3016 (a) and because the defendants fail to allege special damages.

Contrary to the plaintiff's contention, it is not necessary to allege special damages when, as here, the statements constitute slander per se, i.e., they tend to injury another in his trade, business, or profession (**Epifani v Johnson**, 65 AD3d 224, 233-234). However, the complaint must set forth the particular words allegedly constituting the defamation (**CPLR** 3016 [a]), and the time when, the place where, and the manner in which the false statement was made, as well as to whom it was made (**Id.** at 233, *citing* **Dillon v City of New York**, 261 AD2d 34, 38). Except for Impact, the defendants have failed to satisfy these requirements.

In support of their defamation claim against Impact, the defendants rely on an affidavit by Impact's president, Nathan Kalenich, dated January 24, 2019. They contend that Kalenich states in his affidavit that, on December 16, 2016, Piccoli e-mailed the owner of Impact, Richard Parrish, falsely alleging that Al Cerra was using stolen equipment and that, as a result, Impact terminated its contract with Cerra, Inc. The defendants have not produced an affidavit by Parrish, nor have they produced the December 16, 2016, e-mail from Piccoli to Parrish. Moreover, the Kalenich affidavit does not support the defendants' contention that Piccoli told Parrish that Cerra was using stolen equipment. The relevant portions of the Kalenich affidavit are as follows:

> "Late April of 2015 Frank [Piccoli] started contacting me and stated that Al Cerra told him that he was no longer going to pay him his monthly payments for equipment Al purchased from Frank. Frank stated Al owed him hundreds of thousands of dollars for equipment purchased. Frank stated that the money Impact Materials owed to Al Cerra was technically Frank's money because

> Frank's unpaid equipment was being used at Impact Materials yard in Lyndhurst NJ.
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> * * *
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> "On December 16, 2016, Frank reached out to Rich Parrish, owner of Impact Environmental with a list of equipment that Al had that "was actually" Franks and listing options for Al Cerra to pay, and if Al did not agree to pay, Frank was going to get a court order to take any money due to Al Cerra and seize the funds.
>
> "Rich forwarded the email to me and followed up with a phone call asking what was going on? I explained that according to Al the equipment that he bought from Frank, the machines were supposed to be free of liens and encumbrances, and that in fact Frank and Frank's company owed vendors a considerable amount of money. Al stated he was sued by a company Frank and Frank's company owed money for repairs. Al also showed me UCC liens that Frank and his company had showing blanket liens on all equipment etc owned by Franks company. Al also said none of the equipment in question from Frank was being used at Impact materials site in Lyndhurst.
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> "After talking with Rich, he stated that "this was a mess and didn't want to be involved in any of this." I agreed. All partners agreed and I stated to Al that I didn't want any trouble. I didn't want equipment to be stolen, I didn't want issues. And I didn't want two grown men fist fighting in my yard over money."

The Kalenich affidavit reveals that, contrary to the defendants' contention, Piccoli never said to Parrish that Cerra's equipment was stolen. The only person to use the word "stolen" was Kalenich himself. The alleged defamatory statement was, therefore, not uttered by Piccoli. Accordingly, fifth and sixth counterclaims are dismissed.

In view of the foregoing, the defendants' cross motion for leave to amend their answer is denied. Any remaining discovery issues may be raised at the parties' next conference with the court.

Dated: May 23, 2019

J.S.C.