

**Horsepower Elec. & Maintenance Corp. v Gilbane  
Bldg. Co.**

2020 NY Slip Op 33487(U)

October 19, 2020

Supreme Court, Kings County

Docket Number: 528125/2019

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
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 HORSEPOWER ELECTRIC & MAINTENANCE CORP.,  
 Plaintiff,

Decision and Order

Index No. 528125/2019

-against-

GILBANE BUILDING COMPANY, BNY TOWER  
 ASSOCIATES LLC, and TRAVELERS CASUALTY AND  
 SURETY COMPANY OF AMERICA,  
 Defendants,

October 19, 2020

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 PRESENT: HON. LEON RUCHELSMAN

The defendant BNY Tower Associates LLC has moved pursuant to CPLR §3211 seeking to dismiss the ninth and tenth causes of action of the complaint. The plaintiff has cross-moved seeking to amend the complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff is a subcontractor hired by defendant Gilbane the project manager at a construction site. The defendant BNY is the owner of the property and hired Gilbane as construction manager for the construction of a sixteen story building at the Brooklyn Navy Yard in Kings County. The plaintiff commenced this lawsuit alleging various causes of action resulting from a delayed start, accelerated work and extra payments incurred and that defendants made it difficult for plaintiff to complete the work in a professional and timely manner. Specifically, the

plaintiff alleges that its performance was extended repeatedly and was required to accelerate its work. This caused the plaintiff to necessarily increase its costs that it did not foresee when it sought to bid for the project. The ninth cause of action alleges that BNY tortiously interfered with the contract between the plaintiff and Gilbane by ordering Gilbane to refuse to allow the plaintiff to remediate any purported defects, by hiring another subcontractor to remediate the work and by improperly backcharging the plaintiff for the work performed by the replacement subcontractor. The tenth cause of action is for defamation and alleges that BNY made defamatory statements against the plaintiff. BNY has now moved seeking to dismiss those causes of action on the grounds they fail to state any cause of action. The plaintiff opposes the motion and also seeks to amend the complaint to supplement those two causes of action. The defendant opposes that motion arguing the supplements proposed still fail to raise any viable claims.

#### Conclusions of Law

"[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" (see, e.g. AG Capital Funding Partners, LP v.

State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled, the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the plaintiff must specifically allege that 'but for' the defendant's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018]). The defendant asserts that even considering the proposed amended complaint the plaintiff has failed to allege any tortious interference because none of the activities allegedly engaged by Gilbane at the urging of BNY constituted a breach of the subcontract agreement.

Thus, the court must examine the subcontract agreement.

Section 9.4 of the agreement as amended by section 12.1 of the rider to the agreement provides that if the subcontractor engages in or violates one of nine enumerated conditions then the construction manager must notify the subcontractor within seventy two hours. After such seventy two hours have passed the construction manager may avail itself of one or all of five distinct remedies enumerated in the agreement. Thus, if the subcontractor fails "in any respect to prosecute the work timely" (see, Trade Contractor Agreement, ¶9.4(2)) then the construction manager can replace the subcontractor, deduct corrective costs or terminate the agreement. The plaintiff counters that various provisions of the subcontract agreement including the rider specifically afford the plaintiff with an opportunity to remediate before any of the enumerated remedies are available. The court need not reach the question whether the agreement and the rider provided the right to remediate. First, even if no such right existed in the agreement or rider Gilbane surely provided the plaintiff with the right to remediate. Emails from John LaRowe dated from early February to the plaintiff demonstrate that Gilbane afforded the plaintiff an opportunity to cure any outstanding issues. Moreover, the plaintiff argues the deficiencies alleged were all timely resolved making any further enforcement of the seventy two hour notice improper. Second, the plaintiff maintains there was no basis to issue the seventy

two hour notice in the first place since the plaintiff had not failed in any of the nine enumerated conditions. Indeed, in an undated letter in response to the seventy two hour notice (included within the Motion to Dismiss, Exhibit B) the plaintiff pointed out many of the complaints contained in the seventy two hour notice were resolved and that in any event the issues were not really the fault of the plaintiff. Thus, there are significant questions of fact whether it was appropriate to serve plaintiff with such seventy two hour notice and after it had been served whether all the issues contained therein were resolved. The entire question of tortious interference hinges on these questions. Since there are questions of fact, a motion to dismiss is improper. Therefore, the motion seeking to dismiss the ninth count of the complaint is denied. The motion seeking to amend the ninth cause of action as noted in the proposed amended complaint is granted.

Turning to the defamation action, to establish a cause of action for defamation, the party must allege that there was a "[1] false statement, [2] published without privilege or authorization to a third party, [3] constituting fault as judged by, at a minimum, a negligence standard, and [4] it must either cause special harm or constitute defamation per se'" (Epifani v. Johnson, 65 AD3d 224, 882 NYS2d 234 [2d Dept., 2009]). Further, to successfully plead defamation the complaint must provide the


time, place and manner of the defamation (Buffolino v. Long Island Savings Bank FSB, 126 AD2d 510, 510 NYS2d 628 [2d Dept., 1987]). Further, the defamation cannot be non-actionable opinion (Colantonio v. Mercy Medical Center, 73 AD3d 966, 901 NYS2d 370 [2d Dept., 2010]). The first four paragraphs of the proposed amended complaint (see, Proposed Amended Complaint, ¶181, a-d) do not allege any specific statements by BNY at all. They all concern statements made by anonymous people to Joel Weber a principal of the plaintiff that BNY was not happy with Horsepower or was having issues with Horsepower. The specific defamatory statements are not explicated nor is the manner in which those statements were allegedly made. Further, all the statements are nothing more than opinions about Horsepower and is not actionable as defamation. This would remain true even if the names of the individuals were revealed. However, the last statement (Proposed Amended Complaint, ¶181, e) contains a statement made by a BNY official to a Department of Buildings inspector that "Horsepower's installation was not to code" (id). This statement contains all the elements of defamation and is specific and detailed. While further discovery will shed additional light on the circumstances of the basis for that statement and other relevant information, it cannot be conclude that as a matter of law the plaintiff has failed to plead defamation concerning this one statement. Therefore, the motion seeking to amend the

complaint is granted to the extent ¶181(e) of the proposed amended complaint now comprises the cause of action for defamation. The motion seeking to dismiss the tenth cause of action is granted except as to ¶181(e) of the new amended complaint.

So ordered.

ENTER

DATED: October 19, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC