| **Dowd v Pain Specialists of Am., LLC** |
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| 2021 NY Slip Op 31466(U) |
| April 30, 2021 |
| Supreme Court, New York County |
| Docket Number: 161985/2018 |
| Judge: Phillip Hom |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. PHILLIP HOM **PART** IAS MOTION 2

*Justice*

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TIMOTHY DOWD,

Plaintiff,

- v -

PAIN SPECIALISTS OF AMERICA, LLC,PSA ASSOCIATES HOLDINGS, LLC,COMMONVIEW CAPITAL LLC,SCOTT BUDOFF, TOM PERLMUTTER, ANDREW BARNETT

Defendant.

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**INDEX NO.** 161985/2018

**MOTION DATE** April 15, 2021

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISSAL.

Defendants move to dismiss Plaintiff's Amended Complaint, with prejudice, under CPLR §3211(a)(1) based upon documentary evidence and for failure to state a cause of action under CPLR §3211(a)(7).

Upon the foregoing documents, and after having heard oral argument on the record on April 15, 2021, Defendants' motion to dismiss Plaintiff Timothy Dowd ("Dr. Dowd's" ) Amended Complaint is decided as follows:

It is ORDERED that the motion to dismiss the first cause of action for fraud and fraudulent inducement is denied; and

It is ORDERED that the motion to dismiss the second cause of action for defamation is denied; and

It is ORDERED that the third cause of action for tortious interference is dismissed.

*The Parties*

According to the Amended Complaint, Plaintiff Dr. Dowd is a medical doctor, Board-certified in Pediatrics, Anesthesiology, and Critical Care Medicine, with many years of experience in the field and as an executive of various organizations in the healthcare industry, including a stint as Chief Executive Officer at Defendant Pain Specialists of America, LLC ("PSA"). (NYSCEF No. 41 at ¶14). PSA is a management services organization providing patient-focused support services to comprehensive pain management practices. Defendant CommonView Capital, LLC ("CommonView") invests in North American Companies (*id*. at ¶ 17) and owns/controls in whole or in part PSA (*id*. at ¶ 15) and Defendant PSA Associate Holdings, LLC (*id*. at ¶16). Defendants Scott Budoff ("Budoff") and Tom Perlmutter ("Perlmutter") are cofounders and Managing Partners of CommonView and PSA. (*id* at ¶¶17-19). Defendant Andrew Barnett ("Barnett") is an Operating Partner at CommonView and the Chief Executive Officer and Chairman of the Board of PSA. (*id* at ¶ 20).

*Attorney's Affirmation*

Initially, Plaintiff opposes Defendants' motion to dismiss arguing that Defendants' attorney David Grech's Affirmation should not be considered because he does not have personal knowledge of the relevant facts and is without evidentiary value. However, even if such an affirmation is without evidentiary value, the affirmation may serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, such as the December 15, 2017 email from Dr. Dowd and his May 2, 2018 letter to Budoff. (*Zuckerman v. New York*, 49 NYS2d 557 [1980]).

*Fraud and Fraudulent Inducement*

Dr. Dowd's first cause of action is against all corporate Defendants, Budoff and Perlmutter, alleging they fraudulently induced him to accept a position with PSA. Dr. Dowd alleges he relied on false statements in PSA's Chief Executive Officer's Position Description (the "Position Description"). These alleged false statements described PSA's highly collaborative environment, commitment to excellent standards of medical care and patient safety and particular CEO responsibilities including creating a culture of integrity, excellence and ethical standards.

In addition to the Position Description, Dr. Dowd alleges that for more than a year he was fraudulently induced to accept the position of Chief Executive Officer at PSA by fraudulent promises made by Budoff and Perlmutter, the principals of Commonview Capital and majority owners of PSA (NYSCEF No. 41 at ¶ 28). Dr. Dowd alleges Budoff and Perlmutter's false statements occurred in phone conversations, emails and in person, specifically at a lunch meeting in Manhattan on August 16, 2016 (*id* at ¶¶36-40) and at a restaurant in Tarrytown, New York on June 29, 2017 (*id* at ¶¶42-49).

It is well settled that a legally cognizable claim of fraudulent inducement must be "based on a misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result" (*Connaughton v Chipotle Mexican Grill, Inc.,* 135 AD3d 535, 537 [1st Dept 2016]). When a party moves to dismiss a complaint under CPLR §3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*African Diaspora Mar. Corp. v Golden Gate Yacht Club,* 109 AD3d 204 [1st Dept 2013]). Although bare legal

conclusions are not presumed to be true on a motion to dismiss under CPLR §3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144 [2002]).

Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*Philips S. Beach, LLC v ZC Specialty Ins. Co.,* 55 AD3d 493 [1st Dept 2008]; *African Diaspora Mar. Corp. v Golden gate Yacht Club, supra* at 211). The Court finds that Plaintiff has sufficiently pled a cause of action for fraud and fraudulent inducement. The misrepresentations alleged address the nature of the role offered to Dr. Dowd including compliance requirements and "adherence to high standards of integrity and ethical behavior" not a nebulous expression of hope of future expectations (*eg. Laduzinski v Alvarez & Marsal Taxand LLC,* 132 AD3d 164 [1st Dept 2015]).

Defendants' argument that Dr. Dowd should not have relied on the Position Description's "nonactionable puffery" is unavailing because Dr. Dowd alleges it was drafted by Budoff and Perlmutter or by one of their agents at their request and its representations were reinforced by Budoff and Perlmutter. Corporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it (*Marine Midland Bank v. John E. Russo Produce Co*., 50 NY2d 31 [1980]). The Amended Complaint alleges facts demonstrating Budoff and Perlmutter personally participated in the alleged fraud and had actual knowledge of it. The Amended Complaint sufficiently pleads that Dr. Dowd relied on the alleged misrepresentations (NYSCEF No. 41 at ¶59) and that he was harmed because of such reliance (*id*. at ¶89).

Accordingly, it is ORDERED that the branch of Defendants' motion to dismiss the first cause of action for fraud and fraudulent inducement is denied.

*Defamation*

Dr. Dowd's second cause of action is for defamation against all Defendants. In order to establish a cause of action for defamation, a plaintiff must establish a false statement of fact concerning the plaintiff which was published to a third party that either causes special harm to the plaintiff or is defamatory *per se* and which was published with constitutional malice, gross irresponsibility or negligence *(Chapadeau v Utica Observer-Dispatch, Inc.*, 38 NY2d 196, 198-199 [1975]).

The alleged defamatory statements are in a December 22, 2017 Barnett letter that was copied to seven people, including three attorneys for the parties, Budoff, Perlmutter and two-non-party physicians who worked for PSA. This letter was written in response to a December 15, 2017 letter that Dr. Dowd wrote to Barnett and copied to Budoff, Perlmutter and the two non-party physicians. In the December 22, 2017 letter, Barnett alleges that Dr. Dowd had engaged in criminal conduct and several instances involving unwanted physical contact with male and female staff members, as well as trying to extort a better severance package (NYSCEF 41 at ¶91 and Exhibit 4). Dr. Dowd alleges that the defamatory language published on December 22, 2017 "has had a lasting and injurious Impact on [his] career" (*id* at ¶108), and "it took [him] over a year to find a new position that was appropriate for his experience and areas of practice" (*id* at ¶109).

Defendants argue Barnett's letter falls under a common interest privilege to defamation where members of an organization discuss matters of concern to the organization. Even

assuming for arguments sake that the common interest privilege applies in this case, an exception to the privilege is when the alleged defamatory statements are made with malice, showing a reckless disregard for the truth. Dr. Dowd has listed twelve allegedly defamatory statements (*id.* at ¶91), arguing many of them were unresponsive to his December 15, 2017 letter, *(id.* at ¶95) where a fact finder may find they were made with malice, defeating the qualified privilege.

Accordingly, the Court denies Defendants' motion to dismiss the second cause of action for defamation.

*Tortious Interference*

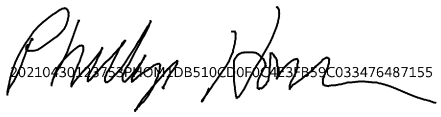
The third cause of action alleges tortious interference against all Defendants. To establish a claim for tortious interference with prospective economic advantage, a party must establish that (i) it had a business relationship with a third party; (ii) the defendant knew of that relationship and intentionally interfered with it; (iii) the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (iv) the defendant's interference caused injury to the relationship with the third party. (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2009] citing *Carvel Corp v. Noonan*, 3 NY3d 182, 189, 785 NYS2d 359, 361-62, 818 NE2d 1100, 1102-03 [2004]; *NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 NY2d 614, 641 NYS2d 581, 664 NE2d 492 [1996]; *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 NYS2d 628, 406 NE2d 445 [1980].)

Even liberally construing the Amended Complaint (*see e.g. Leon v Martinez,* 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; CPLR §3026), and accepting as true the facts alleged in the Amended Complaint and any submissions in opposition to the dismissal motion, the Amended Complaint does not allege any facts demonstrating that the Defendants

intentionally interfered with Dr. Dowd's relationship with the car lessor or by stopping payments years later, acted out of malice or used improper or illegal means. Also, in order to hold a corporate officer or director liable for tortious interference, Plaintiff would have to allege they acted for their own personal, rather than for the corporate interests. (*Hoag v Chancellor*, 246 AD2d 224 [1st Dept 1998]). There are no allegations in the Amended Complaint that the individual Defendants acted outside the scope of their employment, therefore, the Court dismisses the cause of action for tortious interference.

In accordance with the foregoing, Defendants shall serve and file their answer within thirty days from the date of this Decision and Order.

The foregoing constitutes the Decision and Order of this Court.




4/30/2021
DATE

PHILLIP HOM, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |