

**Constantina Bacopoulou P.C. v Carnegie Dental P.C.**

2024 NY Slip Op 34087(U)

November 19, 2024

Supreme Court, New York County

Docket Number: Index No. 650010/2022

Judge: Andrea Masley

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  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

CONSTANTINA BACOPOULOU P.C. d/b/a  
CARNEGIE DENTAL WELLNESS and  
CONSTANTINA BACOPOULOU, DDS,

Plaintiffs,

- v -

CARNEGIE DENTAL P.C., JACK SCHWARTZ, and  
SUSAN SCHWARTZ,

Defendants.

-----X

CARNEGIE DENTAL P.C., JACK SCHWARTZ, and SUSAN  
SCHWARTZ,

Third-Party Plaintiffs,

-against-

VERONICA REBUSTILLO and DIANE KRASNE,

Third-Party Defendants.

-----X

INDEX NO. 650010/2022

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595415/2023

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153, 154, 156

were read on this motion to/for DISMISSAL.

Third-party defendants Veronica Rebutillo and Diane Krasne move pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss the third-party complaint and for sanctions against third-party plaintiffs Carnegie Dental P.C. (Carnegie Dental), Jack Schwartz, and Susan Schwartz (collectively, Schwartz Parties), pursuant to 22 N.Y.C.R.R. 130-1.1 and 130-1.2, including reasonable attorneys' fees, costs, and expenses for filing this motion. The Schwartz Parties cross-move to amend the third-party complaint.

On April 25, 2023, the Schwartz Parties commenced a third-party action against Rebutillo, a hygienist formerly employed by Carnegie Dental, and Krasne, the former office manager for Carnegie Dental. (NYSCEF 97, Third-Party Complaint ¶¶ 4-5.) Rebutillo and Krasne are now employed by plaintiff Carnegie Dental Wellness (Carnegie Wellness), owned by plaintiff Constantina Bacopoulou DDS (together, Bacopoulou Parties). (*Id.*)

The main action involves the sale of the Carnegie Dental, the dental practice owned by the Schwartzes, to Bacopoulou. (*Id.* ¶ 8; see also NYSCEF 93, Summons and Complaint.) In the third-party complaint, the Schwartz Parties allege that, prior to the sale, Bacopoulou insisted that the Schwartzes not disclose the transaction to the Carnegie Dental staff, which at the time, included Rebutillo and Krasne. (*Id.* ¶ 10.) They further allege that when Rebutillo and Krasne learned of the sale they engaged in the following “tortious acts:

- A. Representing to [Bacopoulou] that the Schwartz's were ‘bad mouthing’ her to patients and criticizing her demeanor, clothing, and appearance to patients;
- B. Representing to [Bacopoulou] that the Schwartz's were bad mouthing and disparaging her to other dentists and referral sources;
- C. Representing to [Bacopoulou] that the Schwartz's were telling patients and referral sources that [Bacopoulou] was greedy and not interested in the wellbeing of patients;
- D. Representing to [Bacopoulou] that the Schwartz's were deliberately and intentionally not referring patients to Plaintiff and Carnegie Wellness;
- E. Representing to Plaintiffs that the Schwartz' were directing and advising ‘referring dentists’ to not refer patients to [Bacopoulou] and Carnegie Wellness;
- F. Taking action and steps to undermine the transition to [Bacopoulou] by making the aforementioned representations and by claiming that the Schwartzes said that [Bacopoulou] had ‘mental issues.’” (*Id.*)

The Schwartz Parties further allege that Rebutillo and Krasne made false statements to the Bacopoulou Parties’ attorney, who in turn incorporated those statements into a

September 27, 2021 letter to the Schwartz Parties' attorney, terminating the Professional Services Agreement between the parties. (*Id.* ¶¶ 12-14; NYSCEF 25, September 27, 2021 Letter.) The Schwartz Parties allege claims for tortious interference with prospective business advantage, defamation, and defamation per se.

### Motion to Amend

“[L]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.” (*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks and citations omitted]; see also CPLR 3025 [b].) “[A] proposed amendment that cannot survive a motion to dismiss should not be permitted.” (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], \*2 [Sup Ct, NY County 2021] [internal quotation marks and citations omitted].) “A proposed amended complaint that would be subject to dismissal as a matter of law is, by definition, 'palpably insufficient or clearly devoid of merit' and thus should not be permitted under CPLR 3025.” (*Id.* at 3-4.)

The Schwartz Parties seek to amend the third-party complaint by adding additional allegations to support their existing claims and add a claim for tortious interference with a contract. (NYSCEF 120, Redline Copy of Proposed Amended Third-Party Complaint.) In support of its cross motion, the Schwartz Parties merely assert that there is no prejudice to the third-party defendants because depositions in the third-party action have not taken place, and therefore, the third-parties defendants have time to explore the allegations of the proposed amended complaint and prepare a defense to

the newly proposed claim of tortious interference with contract. While the movant on a motion for leave to amend “need not establish the merit of its proposed new allegations [it must] show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [citations omitted].) The Schwartz Parties make no such showing. The conclusory and sole argument that the third-party defendants would not be prejudiced because discovery is not complete does not satisfy this burden. Thus, the motion is denied.

### Motion to Dismiss Third-Party Complaint

#### *Tortious Interference with Prospective Business Advantage*

In *Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 (2004), the Court of Appeals detailed the pleading differences between claims of “inducing breach of a binding agreement and interfering with a nonbinding ‘economic relation.’” The Court of Appeals explained that

“[b]y saying in [*NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 664 (1996)] that a defendant who induced the breach of a binding contract could be liable ‘even if the defendant was engaged in lawful behavior,’ we implied that the same was not ordinarily true where the plaintiff complained only of ‘interference with prospective contract rights.’ This applies equally if not a fortiori, here, where the franchisees complain of interference not with ‘contract rights’ but only with existing or prospective economic relations. Under *NBT*, where a suit is based on interference with a nonbinding relationship, the plaintiff must show that defendant’s conduct was not ‘lawful’ but ‘more culpable.’ The implication is that, as a general rule, the defendant’s conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be ‘lawful’ and thus insufficiently ‘culpable’ to create liability for interference with prospective contracts or other nonbinding economic relations.” (citations omitted.)

The Court outlined an exception when a plaintiff cannot show that defendant’s conduct amounts to a crime or independent tort – “defendant engages in conduct

‘for the sole purpose of inflicting intentional harm on plaintiffs.’” (*Id.* at 190 [citation omitted].)

Thus, “[t]o state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff’s prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby.” (*Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312, 313 [1st Dept 2004] [citation omitted].) A claim for “intentional interference with prospective economic advantage does not lie absent an allegation that the action complained of was motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations.” (*Entertainment Partners Group v Davis*, 198 AD2d 63, 64 [1st Dept 1993] [citation omitted].)

Here, the Schwartz Parties allege that third-party defendants’ “false and defamatory statements were made with the malicious intention ... to interfere with their business contractual relations, and their prospective economic advantage” and that third-party defendants intended that Bacopoulou “would terminate her business and contractual relationship with Dr. Schwartz, which she did in September 2021.” (NYSCEF 97, Third-Party Complaint ¶18.) As plead, it is not clear whether the Schwartz Parties are seeking to recover damages for interference with the contract between the Schwartz and Bacopoulou Parties or a prospective business advantage, which is what they label their claim. With the different pleading standards, the court cannot determine which would apply as claims for interference with contract and

interference with prospective business advantage are distinct claims. (*Carvel Corp.*, 3 NY3d at 189-190.) It is also unclear what “prospective” business advantage the third-party defendants allegedly interfered with especially when the complaint and third-party complaint allege that Schwartz and Bacopoulou Parties had an existing contractual and business relationship prior to any alleged interference by the third-party defendants. Further, to recover for interference with a prospective advantage, plaintiff must sufficiently allege that a contract or some other business advantage would have been entered into but for defendants' interference. (See *Gebbia v Toronto-Dominion Bank*, 306 AD2d 37, 38 [1st Dept 2003] [citation omitted].) The Schwartz Parties fail to allege such.

The court also notes that this claim is duplicative of the defamation claim as the Schwartz Parties fail to allege new facts and distinct damages apart from the defamation claim. (See *Perez v Violence Intervention Program*, 116 AD3d 601 602 [1st Dept 2014] [dismissing tortious interference with prospective contractual/business relations claim as duplicative of defamation claim as no new facts and no distinct damages apart from the defamation claim were alleged].)

#### *Defamation and Defamation Per Se*

The third-party defendants argue that these claims are time barred by the one-year statute of limitations as the alleged defamatory statements were made in 2021 and the third-party complaint was not filed until 2023. The Schwartz Parties do not dispute the timeframe of the statements, but rather, argue that their defamation claims against the third-party defendants directly relate back to the Schwartz Parties' counterclaims against the Bacopoulou Parties filed on March 4, 2022 in the original action.

The relate back doctrine, codified in CPLR 203, “enables a plaintiff to correct a pleading error--by adding either a new claim or a new party--after the statutory limitations period has expired.” (*Buran v Coupal*, 87 NY2d 173, 177 [1995].) “[W]hen the doctrine would permit the addition of a new party to relate back to an earlier pleading,” three conditions must be satisfied:

“(1) that both claims arose out of the same conduct, transaction or occurrence; (2) the new party is “united in interest” with the original defendant and by reason of that relationship can be charged with such notice of the institution of the action that they will not be prejudiced in defending the action on the merits; and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against them as well.” (*Id.* [citation omitted].)

In their opposition, the Schwartz Parties argue that

“(1) the breach of contract counterclaims brought in the original action and the defamation claims brought in this current third-party action arise from the same conduct, transaction and occurrence whereby Third-Party Defendants through their defamatory remarks caused Dr. Bacopoulou to unlawfully breach a contract with the Third-Party Plaintiffs; (2) that Third-Party Defendants and Dr. Bacopoulou are clearly united in interest against the Schwartz’s and Third-Party Defendants can be charged with notice of the institution of the original action; and (3) knew or should have known an action would be brought against them for their tortious conduct had the Third-Party Plaintiffs been informed of the defamatory statements made by Third-Party Defendants.” (NYSCEF 115, Memo in Opposition at 15.)

This statement provides very little for the court to apply the relate back doctrine. For example, the Schwartz Parties fail to detail how the third-party defendants and the Bacopoulou Parties are united in interest. Just stating such does not make it so. The Schwartz Parties fail to provide any explanation how and why these parties are united in interest beyond this conclusory statement. (*Wallach v R&J Constr. Corp.*, 128 AD3d 566 [1st Dept 2015] [holding that plaintiff must demonstrate that the proposed defendant was united in interest].) Further, the statement that the third-party defendants “knew or

should have known an action would be brought against them” is again nothing more than conclusory. These claims are dismissed as time barred.

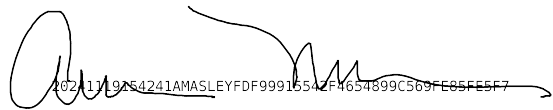
*Sanctions*

The third-party defendants seek sanctions pursuant to Rule 130-1.1 for frivolous conduct. While they argue that the third-party claims are completely devoid of merit, the court does not agree that the filing of the third-party was completely frivolous and that it is devoid of merit.

Accordingly, it is

ORDERED that the motion of third-party defendants Veronica Rebutillo and Diane Krasne to dismiss the third-party complaint is granted and the third-party complaint is dismissed in its entirety as against the third-party defendants, with costs and disbursements to the third-party defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the third-party defendants and denied as to sanctions; and it is further

ORDERED that third-party plaintiffs’ cross-motion to amend the third-party complaint is denied.



11/19/2024  
DATE

\_\_\_\_\_  
ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: