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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

NICHOLAS LETTIRE and
LETTIRE CONSTRUCTION CORP.,
Plaintiff,

-against-

CONSTRUCTION & GENERAL BUILDING LABORERS' LOCAL 79, MIKE PROHASKA, VICTOR RIZZO, KENNETH BRACACCIO, JOHN NORBURY, JOE CESTARO, JOSE ANDINO, ANTHONY VITA, CARL CULLY, GEORGE ZECCA, ANTHONY WILLIAMS, LUIS MONTALVO and RAYMOND PEREZ,
Defendants.

INDEX NO.	153982/2015
MOTION DATE	07-13-16
MOTION SEQ. NO.	001
MOTION CAL. NO.	

Amended order

The following papers, numbered 1 to 9 were read on this motion to/for: Dismiss pursuant to CPLR §3211[a],[7]:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits .. .	1 - 5
Answering Affidavits — Exhibits ____cross motion ____	6 - 8
Replying Affidavits ____	9

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants' motion pursuant to CPLR §3211[a] [7] and CPLR §327, is granted and this action is dismissed.

Plaintiff, Nicholas Lettire, is chief executive officer and president of Lettire Construction Corp., a construction company and general contractor that has offices and headquarters in East Harlem. The individually named defendants are members, and/or part of the executive board of defendant, Construction and General Building Laborers Local 79 (hereinafter individually referred to as "Local 79").

Plaintiffs allege that on March 17, 2015, the defendants testified, made and published blatantly false and defamatory statements on signs, leaflets and other materials disseminated at a Community Board 11 Meeting held in the Children's Aid Building in East Harlem, and posted them on Local 79's website. The materials have a picture of plaintiff with the stamp "wage thief," state that he had been cited by the New York City Department of Housing Preservation and Development ("NYCHPD") eight times for failure to comply with labor laws, and that plaintiff withheld more than 5 million dollars (Complaint Exh. C).

It is plaintiffs' contention that defendants actions were directed at persuading and preventing Community Board 11 from approving NYCHPD's request for continued funding on a project that has Lettire Construction Corp. as the general contractor. Plaintiffs allege that the defendants efforts were unsuccessful and Community Board 11 approved the funding. Plaintiffs' claim that defendants' actions relying on inflamatory language, distortions and untruths, were directed at Lettire Construction Corp. because it is a non-union employer.

Plaintiffs commenced this action on April 22, 2015, asserting four causes of action for defamation/slander, tortious interference with business relations, tortious interference with a contract and deceptive acts and practices under General Business Law §349. Plaintiffs have stated that they agree to withdraw the second, third and fourth causes of action and seek to proceed solely on the claims for defamation/slander.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Defendants' argument that plaintiffs' assertions in the complaint concerning flyers and defamatory remarks made during 2011, and concerning an alleged 2012 smear campaign, flyers and remarks, are time barred have merit. An action to recover damages for either defamation or libel has a one year statue of limitations measured from the date of publication of the statements (see CPLR §215[3] and Blair v. Meth, 112 A.D. 3d 769, 977 N.Y.S. 2d 318 [2nd Dept.. 2013]). This action was commenced on April 22, 2015, more than one year after the statements were allegedly published and the allegations referring to 2011 and 2012, are time-barred, severed and dismissed.

Defendants' motion seeks an Order pursuant to CPLR §3211[a][7], dismissing the complaint for failure to state a cause of action.

Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

Defendants argue that federal law preempts plaintiffs' defamation and libel claims, which are subject to the National Labor Relations Act ("NRLA")§§7 and 8, placing them within the exclusive and primary jurisdiction of the National Labor Relations Board ("NLRB"). Defendants claim that the statements and leaflets were opinions subject to the protections of free speech under both the the U.S. Constitution and New York Law. It is defendants' contention that their statements were true, relying on government publications and articles found in the New York Times, and that the plaintiffs concede they underpaid workers, but that it was only about $3,500.00. Defendants argue that plaintiffs do not address any utterance or state damages with specificity.

NRLA §§7 and 8 create a presumptive preemption on state regulations and causes of action, regulating "concerted activities" and "unfair labor practices." NRLA §§7 and 8, are applied to labor disputes and activities of labor unions. NRLA §§7 and 8, are used to avoid attempts to prevent labor unions from engaging in concerted activities, or from taking other action for "mutual aid or protection" of employees (Hoesten v. Best, 34 A.D. 3d 143, 821 N.Y.S. 2d 40 [1st Dept., 2006]). The application of the NRLA §§7 and 8 preemption, is applied broadly to include union actions for some "arguably job related reason," or "criticism of professional competence and honesty," avoiding state law defamation claims unless there is a showing of actual malice or reckless disregard of truth (Santiago v. United Federation of Teachers, Local 2 American Federation of Teachers, AFL-CIO, 39 A.D. 3d 284, 833 N.Y.S. 2d 80 [1st Dept., 2007] and Hoesten v. Best, 34 A.D. 3d 143, supra).

Defendants have demonstrated that the claims of defamation and libel stemming from the flyers and the statements on March 17, 2015 before the Community Board 11, were related to labor disputes. Plaintiffs have asserted in their opposition papers that the defendants' statements were a result of the non-hiring of union employees, that is sufficient to be classified as a "labor dispute." The Community Board 11 meeting is considered a public hearing (600 West 115 Street Corp. v. Von Gutfleld, 80 N.Y. 2d 130, 603 N.E. 2d 930, 589 N.Y.S. 2d 825 [1992]).

In the context of NRLA, it is recognized that labor disputes, "are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions" (Wolf Street Supermarkets, Inc. v. McPartland, 108 A.D. 2d 25, 487 N.Y.S. 2d 442 [4th Dept., 1985]). Language at either a public hearing or involving a trade union dispute is considered in the context of the social setting and generally expected to be unreasonable or vituperative due to the heated nature of the disputes (Guerrero v. Carva, 10 A.D. 3d 105, 779 N.Y.S. 2d 12 [1st Dept., 2004] citing to Steinhilber v. Alphonse, 68 N.Y. 2d 283, 501 N.E. 2d 550, 508 N.Y.S. 2d 901 [1986] and 600 West 115 Street Corp. v. Von Gutfleld, 80 N.Y. 2d 130, supra).

Plaintiffs admit they were compelled to pay underpaid employee claims, but now claim that defendants exaggerated the amounts. The failure to pay employees the full

amount of wages owed, is wage theft. Defendants have provided documentation that would demonstrate at least some truth to the accusations, which is a defense to defamation (Goldberg v. Levine, 97 A.D. 3d 725, 949 N.Y.S. 2d 692 [2nd Dept., 2012]). Defendants actions did not prevent plaintiffs from obtaining approval at the March 17, 2015 Community Board 11 meeting and plaintiff has not specified damages. Defendants actions and statements at the March 17, 2015 Community Board 11 meeting are not malicious, and are subject to the presumptive preemption under NRLA §§7 and 8.

Defendants argue that this action was brought as a Strategic Lawsuit Against Public Participation ("SLAPP") suit, to prevent them from reporting, commenting, challenging or opposing the application for funding on a project utilizing plaintiffs as general contractor, and should be dismissed.

Civil Rights Law §§70-a and 76-a, are known as the "anti-SLAPP statutes," and are applied to citizens that are facing legal action resulting from participation or petitioning in a public forum. The anti-SLAPP statutes are narrowly construed, they require that the defendants establish a direct challenge to an application or permission, and the action is materially related to their efforts, "to report on, comment on, rule on, challenge or oppose such application or permission." (Guerrero v. Carva, 10 A.D. 3d 105, 779 N.Y.S. 2d 12 [1st Dept., 2004]). The anti-SLAPP statutes have a higher standard of proof to avoid dismissal of the action. The burden is on the plaintiff to demonstrate that the cause of action for defamation, "has a substantial basis in fact and law" and was made "with actual malice" or reckless disregard of the truth (Hariri v. Amper, 51 A.D. 3d 146, 854 N.Y.S. 2d 126 [1st Dept., 2008] and Intl. Shoppes v. At the Airport, 131 A.D. 3d 926, 16 N.Y.S. 3d 72 [2nd Dept., 2015]).

Plaintiff's application to the Community Board 11 for approval of NYCHPD's request for continued funding on a project that has Lettire Construction Corp. as the general contractor, are part of a public forum and the defendants' were participants. The "content, tone and purpose" of defendants communications can be construed "as opinion and advocacy," sufficient to warrant dismissal of this action as a SLAPP suit (see 600 West 115th Street Corp. v. Von Guttfeld, 80 N.Y. 2 130, supra]). Plaintiffs have not met the higher standard, or that there is a basis in law and fact to find that defendants statements were malicious. Defendants have stated a basis to dismiss plaintiff's claims pursuant to Civil Rights Law §§70-a and 76-a.

Accordingly, it is ORDERED that defendants motion pursuant to CPLR §3211[a] [7], to dismiss this case, is granted, and it is further,

ORDERED that plaintiff's' second, third and fourth causes of action for tortious interference with business relations, tortious interference with a contract, and deceptive acts and practices under General Business Law §349 are withdrawn, and it is further,

ORDERED, that the plaintiffs's first cause of action for defamation/libel asserted against the defendants is dismissed, and it is further,

ORDERED, that this action is dismissed in its entirety, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J S C

MANUEL J. MENDEZ,
J.S.C.

Dated: September 20, 2016

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE