SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

PETER GORDON *et al.*, **Plaintiffs,** **v.** **FOREST HILLS NEIGHBORHOOD ALLIANCE, INC. *et al.*,** **Defendants.**	**Case No. 2016 CA 006397 B** **Judge Steven M. Wellner** **Calendar 14**

ORDER

Before the Court is Defendants' Special Motion To Dismiss, filed October 24, 2016 (the "Special Motion") and Plaintiffs' Renewed Motion For Targeted Discovery And An Evidentiary Hearing (the "Renewed Motion).[1] For the reasons stated below, the Special Motion is granted and the Renewed Motion is denied.[2]

I. BACKGROUND

Plaintiffs Peter Gordon and John Gordon ("Plaintiffs") bring this action against Jane Solomon and Forest Hills Neighborhood Alliance, Inc. ("Defendants"), for fraudulent misrepresentation to a third person and tortious interference with a contract. On November 17, 2016, Plaintiffs filed their Second Amended Complaint ("the Complaint"). In the Complaint, Plaintiffs assert the following:

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[1] Defendants' Special Motion To Dismiss Second Amended Complaint, filed on March 14, 2017, renewed their Special Motion To Dismiss to encompass Plaintiffs' Second Amended Complaint.

[2] As explained below, granting Plaintiff's requests for discovery would not result in a different outcome.

Plaintiffs inherited their mother's home located at 3020 Albemarle Street, NW, in the Forest Hills neighborhood ("the Gordon home") after her death in November 2014. Compl. ¶ 22. In February 2015, Plaintiffs entered into a contract with Long & Foster Real Estate, Inc., ("Long & Foster") to sell the Gordon home. *Id.* at ¶ 24. On or about March 18, 2015, Plaintiffs received an offer to purchase the Gordon home for $1,550,000 from Ewell Storm and Ashley Pehrson. Mr. Storm and Ms. Pehrson subsequently withdrew their offer after they learned the home might be designated a historic landmark. *Id.* at ¶ 49.

In May 2015, Jane Solomon submitted a petition in the name of the Forest Hills Neighborhood Alliance, Inc. ("the Alliance") to the Historic Preservation Review Board ("HPRB"), asking HPRB to designate the Gordon home a historic landmark under the Historic Landmark and Historic District Protection Act ("the Act"), D.C. Code § 6-1101 *et seq.* *Id.* at ¶ 15, 34. On July 23, 2015, HPRB held a hearing to consider the petition. *Id.* at ¶ 36. HPRB voted 3-2 to designate the Gordon home a historic landmark. *Id.*

In August 2015, Plaintiffs received a second offer from Mr. Storm and Ms. Pehrson to purchase the Gordon home for $1,200,000. *Id.* at ¶ 50. Mr. Storm and Ms. Pehrson stated they lowered their offer because the Gordon home had been designated as historic landmark. *Id.*

Plaintiffs seek relief against: Jane Solomon for fraudulent misrepresentation to a third person in Count 1; Jane Solomon for tortious interference with a contract in Count 2; in the alternative, the Alliance for fraudulent misrepresentation to a third person in Count 3; and in the alternative, the Alliance for tortious interference with a contract in Count 4.

In their Special Motion, Defendants argue Plaintiffs' Complaint should be dismissed under D.C. Code § 16-5501 *et seq.*, the D.C. Anti-SLAPP Act of 2010. Defendants also request reasonable attorney's fees and costs under D.C. Code § 16-5504(a).

On November, 23, 2016, Plaintiffs filed an Opposition To Defendants' Special Motion To Dismiss And To Defendants' Rule 12(b)(6) Motion To Dismiss ("Opposition").[3] In the Opposition, Plaintiffs assert that Defendants were not engaged in protected conduct and that Plaintiffs can show they are likely to succeed on the merits under D.C. Code § 16-5502(b).

Plaintiffs filed an Opposition To Defendants' Motion To Dismiss Second Amended Complaint ("Special Opposition") on April 4, 2017.

II. D.C. ANTI-SLAPP ACT

Defendants brought the Special Motion To Dismiss under the District of Columbia Anti-SLAPP Act. D.C. Code §§ 16-5501 *et seq.* Similar to anti-SLAPP statutes enacted in nearly 30 states, the D.C. Anti-SLAPP Act protects speakers against "strategic lawsuits against public participation" ("SLAPPs"). These are lawsuits "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014). The D.C. Anti-SLAPP Act's Special Motion To Dismiss provision allows defendants to quickly resolve lawsuits filed "as a weapon to chill or silence speech" without the usual burden, costs, and delays of litigation. *Id.*; *see also Boley v. Atl. Monthly Group*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013) (applying D.C. law).

A Special Motion To Dismiss under the D.C. Anti-SLAPP Act is resolved in a two-step process. First, the defendant must "make a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502 (b). Second, if the moving party makes such a showing, the motion "shall be granted unless the non-moving party demonstrates that the claim is likely to succeed on the merits." *Id.* The Court evaluates the claim's likelihood of success by inquiring "whether a jury properly

[3] Plaintiffs' Motion to Dismiss was addressed in the Order issued May 18, 2017.

instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016).

III. ANALYSIS

A. Prima Facie Showing of Protected Activity

Defendants argue the suit at issue arises from an act in furtherance of their right of advocacy on issues of public interest. Spec. Mot. at 5. The Act defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" to include:

> (A) Any written or oral statement made:
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> > (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
> >
> > (ii) In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501 (1). The Act defines an "[i]ssue of public interest" as "an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." D.C. Code § 16-5501 (3).

Defendants' statements are covered by D.C. Code § 16-5501 (1)(B) because they are "expressive conduct that involves petitioning the government...in connection with an issue of public interest." D.C. Code § 16-5501 (1)(B). Plaintiffs assert in their Opposition that Ms. Solomon does not meet her *prima facie* burden under the anti-SLAPP statute because she was not authorized by the Alliance to file a nominating petition. *See* Pl. Opp. 12. Regardless of whether Ms. Solomon filed the petition on her own behalf or on behalf of the Alliance, Ms.

Solomon satisfied her *prima facie* burden under the anti-SLAPP statute. The anti-SLAPP statute protects a speaker's conduct; it does not inquire into whether the speaker was authorized to speak or not. *See generally*, D.C. Code § 16-5501. The statements made by Ms. Solomon on the landmark application were contained in a petition filed with the HPRB, a government agency created by the District of Columbia's Preservation Act. The Preservation Act specifically declares that it is a "matter of public policy that the protection, enhancement, and perpetuation of properties of historical, cultural, and esthetic merit are in the interests of the health, prosperity, and welfare of the people of the District of Columbia." D.C. Code § 6-1101(a). Based on the stated purpose of the Preservation Act, the expressive conduct was made in connection with an issue of public interest. Therefore, Ms. Solomon's conduct is protected by the anti-SLAPP statute.

With regard to the Alliance, in their Opposition and Second Opposition, Plaintiffs contend that the Alliance did not engage in conduct protected by D.C. Code § 16-5501 because Ms. Solomon was not authorized to act on behalf of the Alliance and the Alliance did not show that it was capable of acting. Opposition, 19. If the Alliance in fact did not engage in expressive conduct protected by the statute, then the Alliance would have merely been a bystander and not subject to liability.

However, in their Second Amended Complaint, Plaintiffs are pleading claims in the alternative, arguing that if Ms. Solomon did not engage in expressive conduct as a separate individual, then Ms. Solomon spoke on behalf of the Alliance. Based on its claim, the Alliance would only potentially be liable for engaging in expressive conduct because Ms. Solomon acted as an agent of the Alliance. In Count 3, since Plaintiffs are operating under the presumption that Ms. Solomon did not act as a separate individual, then the Alliance's act of authorizing Ms.

Solomon's submission is also protected. Based on the same reasoning as above, the statute does not limit who can act, but rather protects certain acts and expressions. Plaintiffs also argue that the Alliance was not a functioning corporation. Regardless of whether the Alliance was a functioning corporation or not, the conduct is what the anti-SLAPP statute protects. Therefore, the expressive conduct engaged in by the Alliance is protected under the anti-SLAPP statute.

B. Likelihood of Success on the Merits

Because Defendants' statements are protected under the D.C. Anti-SLAPP Act, the burden shifts to Plaintiff "to demonstrate[] that the claim is likely to succeed on the merits." D.C. Code § 16-5502 (b). The District of Columbia Court of Appeals has construed this standard in the context of the D.C. Anti-SLAPP Act to require that the plaintiff present evidence – not simply allegation – and that the evidence must be legally sufficient to permit a jury properly instructed on the applicable constitutional standards to reasonably find in the plaintiff's favor. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1234.

In their Special Motion, Defendants contend Plaintiffs cannot prove a likelihood of success on the merits for their fraudulent misrepresentation or tortious interference claims.

1. Fraudulent Misrepresentation

In order to prevail on a fraudulent misrepresentation claim, a plaintiff must show that a defendant "(1) made a false representation of or willfully omitted a material fact; (2) had knowledge of the misrepresentation or willful omission; (3) intended to induce [another] to rely on the misrepresentation or willful omission; (4) the other person acted in reliance on that misrepresentation or willful omission; and (5) suffered damages as a result of [that] reliance." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1130 (D.C. 2015) (citing *Schiff v. American Ass'n*

of Retired Persons, 697 A.2d 1193, 1198 (D.C. 1997)). Therefore, Plaintiffs in this case must show that they are likely to succeed under that standard.

Plaintiffs allege that Ms. Solomon made a series of false representations when she signed and submitted the landmark applications. These allegedly false representations include: "(a) that the Alliance was a functioning corporation able to take action; (b) that the Alliance did take action and decided to nominate the Gordon home as a historic landmark; (c) that Ms. Solomon was authorized to act or speak on behalf of the Alliance; and (d) that the Alliance had standing or was qualified to submit a petition to HBRB." Compl. ¶ 63-65, 68.

As far as the third requirement of a fraudulent misrepresentation claim – that the person "intended to induce [another] to rely on the misrepresentation or willful omission" – the Plaintiffs have not shown that Ms. Solomon intended to induce the Gordons into relying on her alleged misrepresentations.[4] Plaintiffs argue that Ms. Solomon knew that by submitting the landmark application to HPRB, that HPRB would send a copy of the application to the Gordons, ultimately causing the Gordons to rely on any alleged misrepresentations contained within the application. Compl. ¶ 67. By receiving a copy of the application from HPRB, the Gordons contend that Ms. Solomon intended to induce them into inaction, specifically intending to cause them not to challenge the standing of the Alliance or Ms. Solomon's assertion of authority on behalf of the Alliance. *Id.* Plaintiffs further contend that but for Ms. Solomon's alleged misrepresentations, they would have challenged the standing of the Alliance and Ms. Solomon's assertion of authority.[5] *Id.* Plaintiffs fail to show, however, how Ms. Solomon intended to

[4] Plaintiffs "indirect fraud" claim, where Plaintiffs rely on the Restatement (Second) of Torts § 533 and New York case law was discussed in this Court's prior Summary Judgment Order.
[5] It is worth noting that the D.C. Code contains a provision where HPRB may challenge a nominating organization's status by requesting "a copy of an organization's bylaws or other

induce the Gordons into inaction. Merely receiving a copy of the application from HPRB, without more, would not be sufficient to show that Ms. Solomon intended to induce Plaintiffs to rely on the alleged misrepresentations contained within the application. Instead, if any alleged misrepresentations were made by Ms. Solomon, they were intended to induce HPRB into taking action by designating the Gordon home as a historic landmark. *See* Compl. ¶ 67.

As far as the fourth requirement – that the "other person acted in reliance on that misrepresentation" – Plaintiffs allege that they acted in reliance on Ms. Solomon's representations. Compl. ¶ 66-67. Plaintiffs contend that when Ms. Solomon submitted the landmark application, they relied on her alleged misrepresentations in the application, thus causing them not to challenge the standing of the Alliance or Ms. Solomon's authority to act on behalf of the Alliance.[6] While it is uncontested that the Gordons did not challenge the standing of the Alliance or Ms. Solomon's authority to act on behalf of the Alliance, Plaintiffs do not state sufficient reasons for not challenging the authority of the Alliance or Ms. Solomon. Even if Plaintiffs had challenged the application, they fail to show that the Alliance or Ms. Solomon made the alleged misrepresentation to them because the application was submitted to HPRB.

With regard to the Alliance, Plaintiffs allege that the Alliance acted fraudulently when it submitted the landmark application because it did not have standing to submit the nominating petition. Opp. at 21. Plaintiffs specifically claim that the Alliance knew it was not a functioning Historic Preservations Organization as defined under 10C DCMR § 9901. However, similar to Ms. Solomon's alleged representations to HPRB, the mere fact that the Gordons received a copy

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establishment papers if needed to confirm its eligibility as an applicant." Plaintiffs do not allege that HPRB did so in this case.

[6] It is worth noting that the D.C. Code contains a provision where HPRB may challenge a nominating organization's status by requesting "a copy of an organization's bylaws or other establishment papers if needed to confirm its eligibility as an applicant." Plaintiffs do not allege that HPRB did so in this case.

of the application does not show that the Alliance intended the Gordons to rely on it or show that the Gordons did rely on it.

2. Tortious Interference With A Contract

Plaintiffs allege that Ms. Solomon, or in the alternative the Alliance, is liable for tortious interference with a contact between Plaintiffs and Long & Foster for the following reasons: Plaintiffs and Long & Foster executed a contract in February 2015 in which Long & Foster agreed to help Plaintiffs sell their home. Compl. ¶ 71. Ms. Solomon knew about the contract and intended to interfere with the contract by intending to prevent any sale of the Gordon home until the home was designated a historical landmark. *Id.* at ¶ 72-73. Ms. Solomon interfered with the contract because the possibility of a historic landmark designation scared off a *bona fide* buyer. *Id.* at 74. As a result of Ms. Solomon's petition filing, the Gordons were forced to pull the home off the market because potential buyers withdrew their interest when they discovered the pending landmark designation. *Id.* at ¶ 77. Ms. Solomon's interference was the actual and proximate cause of losses suffered by Plaintiffs. *Id.* at ¶ 75. Taking their house off the market caused the Gordons pecuniary loss in the amount of $26,000 in legal fees from opposing the landmark application, and $350,000 in lost value on the house. *Id.*

To prevail on a claim of tortious interference with a contract, a plaintiff must establish: "(1) the existence of a contract, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of the contract's breach, and (4) damages resulting from the breach. *Murray v. Wells Fargo Home Mortgage*, 953 A.2d 308 (D.C. 2008). Interference is actionable when it "induc[es] or otherwise caus[es] the third person not to perform" and it "need not cause an actual breach of the business relationship but instead may cause 'merely a failure of

performance' by one of the parties." *Id.* (quoting *Oneyeoziri v. Spivok*, 44 A.3d 279, 286-87 (D.C. 2012)).

The facts alleged by the Plaintiffs do not show a likelihood of success on the merits on their tortious interference claim. Plaintiffs allege their contract with Long & Foster was interfered with after potential buyers withdrew their interest upon learning about the landmark application filed by Ms. Solomon and the Alliance because Long & Foster advised them to take their house off of the market. Plaintiffs contend these actions amount to tortious interference because the Gordons' reasonable expectation of being able to sell their home was interfered with. Compl. ¶ 75. While Plaintiffs are correct that an actual breach is not required to make out a case of tortious interference, their interpretation of the case law is too broad. *See* Opp. 20. Plaintiffs argue that any interference with the relationship of two parties to a contract amounts to tortious interference with the contract. *Id.* Rather, to prevail on the claim, Plaintiffs must show that Defendants' actions caused either the Gordons or Long & Foster to fail to perform. Plaintiffs have not shown that they are likely to meet this burden. While Plaintiffs allege that they took their house off of the market after Ms. Solomon allegedly scared off an interested buyer, this only occurred after the Gordons consulted with their real estate agent. *See* Compl. ¶ 76. Thus, the effects of Ms. Solomon and the Alliance's actions, while potentially influencing the value of the Gordon house, did not force the Gordons to have to take their house off of the market. Instead, the Gordons and their real estate agent decided to take the home off of the market for an undisclosed reason. Therefore, Plaintiffs have failed to show a likelihood of success on their claim of tortious interference.

In their Renewed Motion, Plaintiffs seek targeted discovery of evidence pertaining to the status of the Alliance as a functioning corporation, as well as evidence relating to Ms. Solomon's

state of mind. Because the conclusion above is reached notwithstanding the Alliance's status and Ms. Solomon's state of mind, the Renewed Motion is denied as moot.

IV. ATTORNEY'S FEES

Under the D.C. Anti-SLAPP Act, the "court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504 (a).

In *Doe v. Burke*, the Court of Appeals faced the question of whether a defendant who prevails on a special motion to quash a subpoena under § 16-5503 of the D.C. Anti-SLAPP Act is entitled to attorney's fees under D.C. Code § 16-5504 (a). 133 A.3d 569 (D.C. 2016). The Court of Appeals, through an analysis of the statute and its legislative history, concluded that "a successful movant under § 16-5503 is entitled to reasonable attorney's fees in the ordinary course – *i.e.*, presumptively – unless special circumstances in the case make a fee award unjust." *Id.* at 571.

Because D.C. Code § 16-5504 (a) reads "§ 16-5502 or § 16-5503," this Court finds that the Court of Appeals' decision in *Doe* giving successful defendants on a special motion to quash a presumption of attorney's fees applies with equal force to defendants who are successful on a special motion to dismiss. Accordingly, because Defendants have been successful in their Special Motion To Dismiss and no special circumstances exist in this case, Defendants are entitled to reasonable attorney's fees.

V. CONCLUSION

For the reasons stated above, and considering the record as a whole, it is therefore **ORDERED** that Defendants' Special Motion To Dismiss is **GRANTED**, and the case is

DISMISSED WITH PREJUDICE. It is further **ORDERED** that Defendant **SHALL FILE** a motion for attorney's fees and costs under the Anti-SLAPP Act by **October 30, 2017**.

It is further **ORDERED** that Plaintiffs' Motion For Targeted Discovery is **DENIED AS MOOT**.

DATED: October 10, 2017

Steven M. Wellner
Associate Judge

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