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

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U.S. LABOR PARTY, NATIONAL CAUCUS OF LABOR COMMITTEES, KONSTANDINOS KALIMTGIS, JEFFREY STEINBERG, DAVID GOLDMAN, FREDA HILTY, KAREN JENKINS, ERNEST SCHAPIRO, and PATRICK RUCKERT,

Plaintiffs,

INDEX NUMBER: 11470/79

-against-

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH,

Defendant.

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DONTZIN, J:

The defendant Anti-Defamation League of B'nai B'rith ("ADL") moves for summary judgment pursuant to rule 3212 of the CPLR. A brief recitation of the facts is essential for an understanding of the issues involved. Plaintiffs are the U.S. Labor Party ("USLP") a national political party headquartered in New York City; the National Caucus of Labor Committees ("NCLC") an unincorporated political association headquartered with the USLP and seven individuals all of whom are members of USLP. Three of the individual plaintiffs Kalimtgis ("Kalimtgis") Jeffrey Steinberg ("Steinberg") and David Goldman ("Goldman") are asserted to be the authors of Dope, Inc. Britain's Opium War Against The U.S. ("Dope Inc.") a recently published book compiled by a USLP "investigating team".

The USLP has run candidates for public office, including the United States Presidency, it has published its own periodicals, including a paper entitled "National Solidarity"

has issued press releases, passed out literature in public places, organized demonstrations and in general availed itself of almost all public forums in order to disseminate its views on a host of subjects, ranging the gambit of national and international issues.

A.D.L. is a not for profit corporation, organized pursuant to the laws of the District of Columbia. It has numerous regional offices that function under the supervisory control of its national headquarters which is located in the City of New York. It's alleged avowed purpose during its 45 years of existence has been the elimination of defamation and discrimination against Jews and other religious and ethnic groups and the fostering and understanding among people.

To accomplish its purpose A.D.L. over the years has apparently engaged in a variety of activities including:

(a) Investigation, research and legal action relating to the discrimination, prejudice and defamation of minority groups, including Jews, as well as becoming involved in situations affecting freedom of religion, equality of opportunity and access to public facilities.

(b) The preparation of policy, statements and reports for distribution through the mass media and its own official institutional publications.

(c) The development of community and educational programs, in cooperation with other institutions in America and abroad concerning attitudes towards minority groups.

The law suit arises out of an allegation that A.D.L. in published communications labeled the defendants as anti-semitic. The complaint which contains eight causes of action which are founded in libel, slander, invasion of privacy, and assault, is based upon a number of publications of alleged defamatory statements by the A.D.L. and other alleged communications between the A.D.L., its agents or employees and plaintiffs.

Viewing the complaint liberally, it is fair to say with the exception of the third, fifth and sixth causes of action, all the others assert claims of libel and slander. The third and fifth causes of action charges A.D.L. with invading plaintiff's privacy through various means, and the sixth cause of action alleges the assault on individual members of U.S.L.P. The plaintiff seeks compensatory damages in the amount of $11,010,000 and punitive damages in the amount of $15,000,000.

A.D.L.'s answer contains a general denial and pleads several affirmative defenses. For purposes of brevity and to squarely meet the issues presented by this motion the court will consider only those affirmative defenses which claim:

(1) that the alleged defamation statement is protected by the First Amendment guarantees of free speech and freedom of press under the Constitution of the United States, and (2) that plaintiffs are public figures and to the extent that any of the statements concerning plaintiffs were published by A.D.L., such statements were made without malice, constituted fair comment and were therefore privileged and protected by the Constitution of the United States.

With respect to the causes of action for alleged invasion of privacy, A.D.L. denies the allegation, alleges that it has done nothing more than to keep itself reasonably informed as to the public appearances and positions of plaintiffs and the plaintiffs have alleged no claim for invasion of privacy under New York law.

As to the cause of action for assault, A.D.L. alleges it had no involvement whatsoever in instigating or perpetrating the alleged attacks and that the complaint fails to state a cause of action for this tort.

The questions presented by this motion for summary judgment are:

(1) Whether the USLP, NCLS and the individual plaintiffs can be considered "public figures" so as to require the implementation of the "actual malice" rule, and whether ADL's statements that plaintiffs are anti-semitic constitutes "fair comment".

(2) Whether New York courts recognize plaintiffs' invasion of privacy action and whether plaintiffs have sufficiently alleged this cause of action.

(3) Whether plaintiffs have asserted sufficient evidentiary facts against ADL to sustain its cause of action for assault and battery.

(4) Whether plaintiffs have alleged the essential elements to sustain its claim that ADL interfered with plaintiffs' business relations.

Discussion of Law

1 (a) "Public Figures"

In the landmark case of New York Times Co. v. Sullivan 376 U.S. 254, (1964) the Supreme Court of the United States established the rule that the federal constitutional guaranty of freedom of speech and press "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not". 376 U.S. 254, at 279-80 (emphasis added).

A more restrictive rule, compelling critics of official conduct to in effect guarantee the truth of their statements, and as practical matter, be put to the expensive test of adducing legal proof of the truth of the statements, would amount to self censorship and dampen the vigor and limit

the variety of public debate.

The New York Times rule was extended to include individuals who thrust themselves into the vortex of discussions of public concern. Curtis Publishing Co. v Butts, 388 U.S. 130, (1967); See also Kiuteck v Schimmel 27 A.D. 2d 837, (Appellate Division, 2d Dept, 1967). However, the Supreme Court refused to extend The New York Times rule to include private individuals in Gertz v Robert Welch 418 U.S. 323, and held, that a private individual should not be constitutionally required to prove actual malice in order to recover in a defamation action, even if the alleged libel occurred in the context of a discussion of a matter of public concern.

As a general rule authors and public organizations are considered public figures; at least, in regard to those areas of public controversy or concern in which they have participated. Thus, since the USLP and NCLC are public political organizations actively engaged in publishing articles, magazines and books, they should, on this ground alone, be considered "public figures".

Similarly, the individual plaintiffs may also be considered to be public figures. Plaintiffs, Kalimtgis, Goldman and Steinberg were authors of the book "Dope, Inc.". All are members of the USLP. All engaged in activities to publicize the book and its views concerning the international drug trade on radio, college campuses and in the USLP publication "New

Solidarity". In addition, plaintiffs, Ruckert and Schapiro were USLP candidates for public office.

This view is supported by a review of cases interpreting the Curtis Publishing Co. v Butts and Gertz v Robert Welch decisions. In Guitar v Westinghouse Electric Corp. 396 F. Supp 1052, (D.C. N.Y., 1975) the court held that the plaintiff, a free lance writer, was a "public figure" and could not recover from the defendants for their broadcast of an allegedly libelous review of a book, written by the plaintiff since she had presented no evidence giving rise to an issue of fact as to whether malice actually existed. In Hotchner v Castillo-Puche 404 F.Supp 1041, (D.C. N.Y. 1975), although denying defendants motion for summary judgment, because there was an issue of fact as to the existence of actual malice, the court held that the plaintiff was a public figure by being the author of a book about Ernest Hemingway, which the defendant allegedly defamed in a separate book.

In Church of Scientology of California v Siegelman 475 F. Supp 950 (D.C. S.D.N.Y. 1979) the court, although denying defendant's motion for summary judgment because there was an issue of fact as to the defendant's state of mind, which might have constituted actual malice, held that a religious organization was a public figure. In Friends of Animals v Associated Fur Manufacturers 46 N.Y. 2d 1065, (1979), the Court of Appeals, reinstated the trial court's granting of summary judgment, since there was no issue of fact as to the defendant's

actual malice, and held that the Friends of Animals, an organization dedicated to the humane treatment of animals, is a public organization.

Other cases in New York holding persons to be public figures within The New York Times rule are James v Gannett 40 N.Y. 2d 415 (1976) - a belly dancer who welcomed publicity concerning her performances; Cohen v National Broadcasting Co., Inc. 67 A.D. 2d 140 (1st Dept 1979) - producer and television exhibitor portrayed by actors in film; Lera v Gannett 47 A.D. 2d 797 (4th Dept. 1975) - chiropractors who presented unsolicited views on a television broadcast; Chapadeau v Utica Observer - Dispatch 38 N.Y. 2d 196 (1975) - article written about school teacher who was arrested for possession of heroin.

An examination of the voluminous documents, too extensive to list here, submitted to the Court by the parties to this law suit attest to the myriad of public activities engaged in by USLP and NCLC and the wide range of national and international issues upon which they have taken written public positions.

The plaintiffs continual availment of public forums to disseminate their political and philosophical beliefs, through a myriad of mediums, including their own periodicals, press releases, organized demonstrations, leaflet distribution in the streets, and political candidates running for office is persuasive evidence to consider them public figures. Indeed, it is fair to conclude from these activities that they are

self proclaimed public figures. In short, the totality of plaintiffs' activities bring them within the ambit of The New York Times v Sullivan rule as public figures.

By calling attention to themselves by speech and publication they exposed themselves to challenge, and even to ridicule or denunciation. As political public figures expounding views on a wide array of public issues, plaintiffs cannot be so sensitive as to flutter at each and every criticism they receive. Their complaint and grievance must be considered in the context of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks." New York Times v Sullivan (supra) p. 270.

1 (b) Actual Malice

As public figures, plaintiffs must prove with convincing clarity that ADL's publication of statements that plaintiffs are anti-semitic was false and made with "actual malice"; i.e. with knowledge that the publication was false or with reckless disregard of whether or not it was false. "Actual malice" is a subjective awareness of probable falsity. Gertz v Robert Welch (supra) at p. 335 (N.6) "Recklessness" is demonstrated, when it is shown that a statement is made with a "high degree of awareness of its probable falsity" Garrison v Louisiana, 379 US, 64, 74. S. Ct (1964) or where the party making the statement, "in fact entertained serious doubts as to [its'] truth". St. Armant v Thompson 390 US 727, 731 S.Ct

(1961), Accord, James v Gannet Co. 42 NY 2d, 424-425; Schwartz v Time, Inc. 71 Misc 2d 769, 771-772 (S. Ct. N.Y. Co. 1972)

Plaintiffs here have the burden of proving actual malice. Cepeda v Cowles Magazines and Broadcasting Inc. 392 F. 2d 417 (9th Cir) cert. denied 393 US 840 (1968). In other words plaintiffs must show intent to inflict harm through falsehood or a reckless disregard for the truth in doing so. In light of the First Amendment protection involved, there must be an affirmative demonstration through evidentiary facts from which a party's probable knowledge of the requisite falsity may be sustained. Thompson v Evening Star Newspaper Co. 394 F. 2d 774, 776 (D.C. Cir.) cert. denied 393 US 884 (1968). Silbowitz v Lepper, 32 A.D. 2d 520 (1st Dept 1969); Garfinkel v Twenty-First Century Publishing Co. 30 A.D. 2d 787 (1st Dept. 1968), Cepeda v Cowles Magazines and Broadcasting, Inc. supra

1 (c) "Fair Comment"

In Julian v American Business Consultants 2 N.Y. 2d 1, 137 NE 2d 155 N.Y.S. 2d 1 (1956), the court recognized that "[i]n furtherance of the preservation of the right to write freely, the law of libel recognizes fair comment as a complete defense to a charge of a libelous publication". 2 NY 2d at p. 7. See also Rinaldi v Holt, Rinehardt and Winston, Inc. 42 N.Y. 2d 369, cert. denied 434 US 969 (1977) where the Court of Appeals in granting defendant's motion for summary judgment, in a defamation action brought by a New York Supreme Court Judge, held that,

"Plaintiff may not recover from defendants for simply expressing their opinion of his judicial performance no matter how unreasonable, extreme, or erroneous these opinions might be". 42 N.Y. 2d at 380, 381. However, the comment must be free from active malice and ill-will and must be an honest expression of opinion, based on at least an inference from facts truly stated. Guitar v Westinghouse Electric Corp. 396 F.Supp 1052, Grower v New York, 23 AD 2d 507 aff'd. 19 NY 2d 625.

Fair comment has long been and still is a complete defense in libel and defamation actions in New York; Hoppener v Dunkirk Printing Co. 254 N.Y. 95 (Criticism of a high school coach and his team was fair comment); Cheatum v Wehle, 5 N.Y. 2d 585 (Criticism of former State Conservation Commissioner for causing death of birds protected as fair comment); Cole Fisher Rogow, Inc. v Carl Ally, Inc. 25 N.Y. 2d 943 (Criticism of advertisement was protected as fair comment); Noblett v Massena Observer Publishing Co. 24 Misc. 2d 969 (Sup Ct. St. Lawrence Co. 1960) (Fair comment to criticize a politician for "throwing a monkey wrench" into his party); Buckley v Vidal, 327 F. Supp. 1051 (S.D.N.Y. 1971) (Fair comment to describe a book as pornographic)

Upon consideration of the voluminous evidence presented to the court, it is clear that the A.D.L.'s characterization of plaintiffs as anti-semitic constitute fair comment. Plaintiffs have continuously expressed highly critical views about prominent Jewish figures, families and organizations, such as A.D.L. and B'Nai B'rith and have connected them with

plaintiffs' critical views on Zionism, Zionists, Mid-East-foreign policy and international monetary policies. Plaintiffs have linked prominent Jews and Jewish organizations both in this country and abroad with the rise of Hitler, Nazis and Fascism, the international drug trade, and a myriad of purported conspiracies that have bedeviled the United States and the world at large, including a conspiracy to assassinate the U.S.L.P. leader, Lyndon LaRouche.

At a minimum, under the fair comment doctrine, the facts of this case reasonably give rise to an inference upon which the A.D.L. can form an honest opinion that the plaintiffs are anti-semitic. Gower v New York (supra); Guitar v Westinghouse, supra.

Finally, by attacking B'nai B'rith and the Anti-defamation League, plaintiffs have thrust themselves into the public forum and thereby have invited a response in kind from those whom it attacked; Buckley v Vidal 327 F. Supp 1054; Shenkman v O'Malley 2 A.D. 2d 567, 574-577.

There has been no showing here of actual malice, no showing that the A.D.L. did not honestly hold the opinion it expressed which was based upon plaintiffs' own activities and publications. The A.D.L. did no more than act in accordance with its historic and organizational purpose; that is,

to express its opinion and concerns when anti-semitism appeared and to identify and confront it as such. Indeed, in the light of the world's experience with anti-semitism prior to and during World War II, to say nothing of the history of anti-semitism over the past hundreds of years, it was reasonable for A.D.L. to point to what it perceived to be the anti-semitic overtones in plaintiffs' public activities and statements. It is only through public expression, protected so zealously by the First Amendment, that the clandestine work of bigotry and intolerances, which florishes when comment is suppressed, can be exposed to the full light of public scrutiny and dealt with appropriately.

Summary judgment is appropriate in defamation and libel actions. Indeed, until recently, it has clearly been the rule and not the exception, See the Holy Spirit Association for Unification of the World v Harper & Roe Publishers, Inc. (Sup. Ct New York Co., August 16, 1978; Greenfield, J:) Guitar v Westinghouse Electric Corp., supra; Rinaldi v Holt, Reinhardt & Winston, supra. This was so in order to avoid the "chilling effect" on freedom of speech and the press which could be caused by protracted litigation. Washington Post v Keogh 355 F. 2d 965; Schwartz v Time, Inc. supra; Sutton v DeRiggi 48 App Div 2d 912; McGowan v McDermott 47 App Div 2d 657, aff'd 38 New York 2d 953.

While some recent Supreme Court cases, relied upon by plaintiffs, may be viewed as eroding the "chilling effect" rule, (See Herbert v Lando 441, US 153; Walston v Readers Digest Assoc. 443 US 157; Hutchinson v Proxmire 443 US 111), these cases have not established an iron clad rule as to when summary judgment should be granted in a defamation case - and pre-discovery summary judgment is still viable if plaintiffs' claims are frivolous and without merit.

Recently a more neutral approach has been taken regarding summary judgment in libel actions (See Nader v de Toledano 408 A. 2d 31, 50 (DC 1979) cert. denied - US - , S.Ct. 1028 (1980). The Second Circuit in Yamouyannis v Consumers Union of United States 619 F. 2d 932 (1980) following Nader v de Toledano held... "we think this neutral approach correctly states the rule as it is presently enforced: neither grant [sic] nor denial of a motion for summary judgment is to be preferred. Defamation actions, for procedural purposes, such as discovery... or for summary judgment, are to be treated no differently from other actions..." (at p. 940) Notwithstanding this holding, it appears that the requirement in libel actions that plaintiff must prove "actual malice" with "convincing clarity" imposes a greater burden of proof than any other civil actions. A review of the papers and exhibits before this court reveals no facts upon which a jury could find with clear and convincing clarity that the defendant acted with actual malice. The only proof plaintiffs offer as to

actual malice is that confined to their bald and conclusory allegations in their complaint as well as in their affidavits and exhibits submitted in opposition to the motion. No persuasive evidentiary facts have been offered to sustain plaintiffs' claim of libel. Such evidence as is offered will not support the claim that the A.D.L. was reckless as to the truth or falsity of its publication.

Plaintiffs urge that summary judgment not be granted because they have not had discovery and charge that this proceeding was brought by the A.D.L. specifically for the purpose of preventing discovery. New York courts in the past have consistently, in appropriate cases, held that absence of discovery is not a bar to granting of summary judgment before discovery. Frink v McEldowney, 29 NY 2d 720 (1974); Kruteck v Schimmel, 27 AD 2d 837, (Second Dept); Vinci v Gannett Co., Misc. 2d 146 (Sup. Ct Monroe Co. 1972) The basis for so holding, where a plaintiff produces no probative evidence to raise a triable issue, is that the mere hope that an examination will uncover or add something to the case, or raise an issue as to the defendants' credibility is mere speculation and conjecture - that this is not sufficient to resist summary judgment. Schwartz v Time, Inc. (supra)

As already pointed out plaintiffs have failed to raise any triable issue on the questions of "public figures", 'fair comment" and "actual malice" heretofore discussed. Given

the absolute paucity of evidentiary facts on these issues, it is difficult if not impossible to perceive how any discovery will materially change the present posture of this case. Clearly, this is a situation beyond the pale of the rationale in the Supreme Court's opinion in Lando, W lston and Proxmire which plaintiffs urge constitute a material shift in the Court's thinking on the granting of pre-discovery summary judgment.

2. Invasion of Right of Privacy

Plaintiffs, allege that the defendant have gathered information about them, followed, shadowed, investigated and infiltrated plaintiffs, and that such actions should constitute an invasion of privacy. New York does not recognize a common law right of invasion of privacy, as many jurisdictions do, and any invasion of right of privacy must be brought within the statutory provisions of Sections 50 and 51 of the Civil Rights Law, which deal with commercial appropriation. Wojtuwicz v Delacorte Press, 43 N.Y. 2d 858, 374 N.E. 2d 129, 403 N.Y.S. 2d 218 (1978); Cohen v Hallmark Cards, 45 N.Y. 2d 493, 382 N.E. 2d 1145, 410 N.Y.S. 2d 282, (1978); Roe v Roe, 93 Misc 2d 201, 400 N.Y.S. 2d 668 (Supreme Court, New York County, 1977)

Plaintiffs strongly rely upon Birnbaum v U.S. 436 F. Supp 967 (1977), aff'd 588 F 2d 319 (1978) where the court held that: "The evidence is overwhelming that New York would recognize the common law right of privacy sufficiently to compensate for the kind of intrusion by the government into private mails represented by the instant case." 436 F Supp at

978. Plaintiffs contend that since this was an intrusion case, and did not deal with appropriation, it should be persuasive evidence upon the court to recognize their claim of action for intrusion. Assuming, arguendo, that the New York courts will recognize such a common law right of privacy, for the type of activity complained of in Birnbaum, that case is distinguishable from the instant case.

In Birnbaum the plaintiffs had their mail intercepted, opened and copied by the C.I.A., a goverment organization. Surely, this highly objectionable governmental activity cannot be comparable to the extremely less intrusive action of the defendants, a non-governmental organization, in gathering information about plaintiffs, as part of its regular investigatory practices and activities concerning anti-semitism. Further, the Birnbaum court, despite the invidious nature of the governmental acts, relied on common law copyright and constitutional principles as being depositive in its favorable ruling for plaintiff.

Further, it seems clear that despite Birnbaum, the New York courts will not recognize a common law right of privacy. Wojtuwicz v Delacorte Press, supra, was decided in the interim between the District Court ruling in Birnbaum and the Court of Appeals ruling of that case, and although Wojtuwicz dealt with the issue of appropriation, the New York Court of Appeals firmly held that there is no common law right of privacy in New York. Again, in Cohn v N.B.C 67 A.D. 2d 140 (1st Dept 1979) the court, in a ruling after Birnbaum, in considering

the invasion of privacy issue did so under sections 50 and 51 of the Civil Rights Law which was controlling.

Due to the politically active and public nature of the plaintiffs' organization and the fact that much information can be gathered against them from mere observation and a reading of their own disseminated literature and materials it is unlikely that the defendant's conduct in gathering information against the plaintiffs would constitute illegal or tortious activity.

Finally, Nader v General Motors Corporation 25 N.Y. 2d 560 (1970) seems to clearly be dispositive of this issue. There the court held:

"It should be emphasized that the mere gathering of information about a particular individual does not give rise to a cause of action under this theory. Privacy is invaded only if the information sought is of a confidential nature and the defendant's conduct was unreasonably intrusive. Just as a common-law copyright is lost when the material is published, so too, there can be no invasion of privacy where the information sought is open to public view or has been voluntarily revealed to others." (p. 567)

Justice Brietel, in a concurring opinion, made crystal clear as to the law in this State on this issue with the following language: "In this State thus far there has been no recognition of a common law of privacy, but only that which derives from a statute of rather limited scope [citing Civil Rights Law §§50 and 51]"(p. 573)

Assuming plaintiffs' common law right of privacy is recognized the reiteration of the bare allegations and vague generalities in their complaint are not sufficient to defeat defendant's motion for summary judgment. "The burden upon a party opposing a motion for summary judgment is not met merely by a repetition, or incorporation by reference of the allegations contained in pleadings or bills of particular verified or unverified." Indig v Finkelstein, 23 N.Y. 2d 728, 2d 61 (1968); Holdridge v Town of Burlington, 32 A.D. 581, (3rd Dept, 1969). Further, "A mere hope or belief does not constitute an evidentiary basis warranting denial of a motion. (citation omitted) There must be shown something genuine and of substance which demonstrates the existence of a triable issue of ultimate fact". Bachrach v Furbon Fabriken Bayer A.G. 42 A.D. 2d 514 (1st Dept 1973)

A fair reading of plaintiffs' papers reveal that they contain no more than conclusory allegations, with no supporting facts to raise a triable issue.

3. Assault and Battery

Plaintiffs, in their sixth cause of action, contend that certain individuals, acting as agents of the A.D.L., had caused tortious acts to be committed upon U.S.L.P. members constituting an assault and battery.

Plaintiffs allege an A.D.L. National Commission Member, Arthur Shott ("Shott") did in fact become active

'in the background' of an organization called Interfaith Coalition Against Nazis ("ICAN")." Then they go on to allege that "one Percy Wheeler ("Wheeler"), acting on behalf of ICAN and defendant A.D.L., and within his authority, as a member, agent and employee of ICAN and on information on behalf [at] the instigation and direction, explicit or implicit, of A.D.L. and its agent, Shott, assaulted plaintiffs Jenkins and Hilty" (compl. para. 46) A.D.L. has flatly denied these allegations. It is therefore incumbent upon plaintiffs to present evidentiary facts to support this allegation in order to raise a triable issue. Indig v Finkelstein, supra At best, plaintiffs have presented sketchy, circumstantial evidence, concerning their allegations. They have tried to fit together an incongruous jig saw puzzle based upon coincidence and the mere fact that the A.D.L. offered to provide legal assistance to one of the alleged tortfeasors. This hardly provides the factual connection necessary to demonstrate A.D.L.'s responsibility for the assault on plaintiffs Freda Hilty and Karen Jenkins.

Similarly, the agency theory upon which plaintiffs seek to implicate A.D.L. for verbal assaults against the authors of Dope, Inc. which allegedly occurred at Brandeis University, as alleged in plaintiffs' fourth cause of action and realleged in compl. ¶47, do not raise a triable issue. Bachrach v Farbenfabriken - supra. The extension of summary judgment to tort cases was specifically designed to remove nebulous claims at early stages of litigation. Donlon v Pugliese 27 AD 2d 786 (3rd Dept 1967)

4. Tortious Interference With Plaintiffs Business "Relations"

In the fourth cause of action plaintiffs allege tortious interference with the distribution of the book Dope, Inc Plaintiffs contend that the libelous statements uttered by the A.D.L., concerning plaintiffs' anti-semitism, injured the plaintiffs monetarily in the sales of their book Dope, Inc. Plaintiffs also assert that such activity constitutes interference with their business relations. Such an allegation can rest upon either of two theories: first, that such acts are the result of intentional interference with plaintiffs' prospective economic advantage; secondly, that such acts form the basis of a prima facie tort.

In Somers v Kaufman, 59 A.D. 2d 843 (1st Dept 1977) the court outlined the essential elements of both these theories.

For the plaintiffs to recover on the theory of interference with an economic advantage, plaintiff must prove that the defendants intended to inflict injury by unlawful means. Plaintiffs must show actual malice in the same manner as is required in their defamation action."[T]he motive for interference must be malicious" 32 N.Y. Jur. §41 at 197; Rudoff v Huntington Symphony Orchestra, 91 Misc 2d 264, 265. See also, Nifty Foods Corp. v Great Atlantic and Pacific Tea Co. 614 F 2d 832 (1980). Plaintiffs have failed to sustain their burden on this issue as has been previously pointed out above.

An action based on prima facie tort has several prerequisite elements that must be established for the cause of action to be upheld: (1) infliction of intentional harm; (2) resulting in damages; (3) without justification; and (4) by an act or series of acts that would otherwise be lawful. Somers v Kaufman, supra See Church of Scientology of California v Siegelman 475 F. Supp 950 (1979).

If plaintiffs cannot raise a triable issue that the alleged defamatory statements were made with actual malice under the New York Times v Sullivan rule, it is strained reasoning to assume that such remarks were made with the intent to inflict economic harm upon plaintiffs. Plaintiffs claim a two-million dollar loss in the sale of Dope, Inc. arising from the alleged defamatory statements. However, plaintiffs have failed to provide evidentiary facts to demonstrate with the requisite degree of certainty that the losses claimed resulted from A.D.L.'s conduct. On the contrary, plaintiffs in their publication "New Solidarity" claim great success in the sale of the book.

Accordingly, for the reasons expressed above, the motion for summary judgment is granted in all respects as to all causes of action. The complaint is dismissed. Settle Judgment.

Dated: October 17th, 1980

J. S. C.