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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1317-21**

**SYNERGY MICROWAVE
CORPORATION, COHPHASE
LLC, ULRICH ROHDE, and
AJAY PODDAR,**

Plaintiffs-Appellants,

v.

**INSTITUTE OF ELECTRICAL
AND ELECTRONICS
ENGINEERS, AARON
PARTRIDGE, DANA WEINSTEIN,
NAZANIN BASSIRI-GHARB,
and JOHN VIG,**

Defendants-Respondents,

and

CRAIG NELSON,

Defendant.

Submitted November 28, 2022 – Decided January 5, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3482-20.

Alston & Bird LLP, attorneys for appellants (Karl Geercken and Steven L. Penaro, on the briefs).

Dorsey & Whitney LLP, attorneys for respondents (Bruce R. Ewing, on the brief).

PER CURIAM

Plaintiffs appeal from the Rule 4:6-2 dismissal of their claims alleging breach of contract, tortious interference with contract, and trade disparagement/trade libel against defendants. We affirm.

Because the complaint was dismissed prior to the filing of any responsive pleadings or discovery, we rely on the allegations set forth in the complaint.

Plaintiff Dr. Ulrich Rohde is the Chairman of plaintiff Synergy Microwave Corporation and the owner of plaintiff CohPhase LLC. Plaintiff Dr. Ajay Poddar is Synergy's Chief Scientist. Synergy and CohPhase are companies that design and manufacture radio frequency and microwave components, including synthesizers and oscillators.

Defendant Institute of Electrical and Electronics Engineers, Inc. (IEEE) is a technical professional organization for the advancement of technology with more than 350,000 members located in more than 160 countries. According to plaintiffs, IEEE produces over thirty percent of the world's literature in the

electrical and electronics engineering and computer science fields. It also sponsors thousands of conferences around the world.

The individual defendants held various leadership positions with IEEE and specifically were involved with the 2018 International Frequency Control Symposium (Symposium), the catalyst of this dispute.

Drs. Rohde and Poddar are "longstanding members" of IEEE and have volunteered in various IEEE leadership roles, contributed to publications and symposia, and otherwise participated in IEEE activities.

In June of 2017, Drs. Rohde and Poddar were invited to serve on the Technical Program Committee (Committee) for the Symposium. They discussed potential article topics for the Symposium with the Chair and other committee members and offered to make suggestions to the group regarding potential article topics.

Thereafter, Drs. Rohde and Poddar submitted two preliminary drafts of article topics to the Committee "for the primary purpose of ensuring that sufficient material would be available for presentation at the 2018 symposium." One of the articles (Preliminary Draft) spawned the issue in this appeal. Plaintiffs contend it "was submitted for use as a discussion prompt by the [Committee] to determine whether there was interest in Dr. Rohde and Dr.

Poddar preparing a publishable formal paper to be presented at the 2018 [Symposium]." The subject of the Preliminary Draft derived from work being done at Synergy.

Plaintiffs allege they "never intended for the Preliminary Draft to be published in any way and [d]efendants were or should have been aware of such." They contend that if an article topic is selected by the Committee, then the "authors prepare final, publishable articles for presentation at the [Symposium] and later for publication, consistent with IEEE publication requirements."

The Committee discussed the Preliminary Draft at a meeting in February 2018. Although invited, Drs. Rohde and Poddar were unable to attend. The Preliminary Draft was rejected but plaintiffs allege they did not receive "any substantive feedback" as to why.

However, on February 23, 2018, the General Chair of the Symposium emailed Drs. Rohde and Poddar to inform them that when the Preliminary Draft was submitted to an automated process as required under the IEEE operating manual, it revealed the paper contained "previously published material." In short, the Preliminary Draft contained verbatim portions of another publication.

Dr. Poddar emailed the Chair, apologizing for the "allegedly unclear citation of the source of that background material and reiterat[ing] that the final

article . . . would have adhered to all of the requirements established by IEEE for published papers, including those governing proper attribution of material prepared by others." The Chair did not respond.

Dr. Rohde also called the Symposium Vice President, who agreed to speak with the Chair. Although Dr. Rohde did not hear anything further, he and Dr. Poddar assumed the issue was resolved, and "[r]elying on this," they "made several personal and business decisions."

Later in 2018, when Dr. Poddar was being considered for an IEEE award, he asked two IEEE members who had supported him for the award the previous year to again do so, but the members told him they would not support the nomination because they were aware of a plagiarism investigation. Plaintiffs contend neither of these members had access to such confidential investigation information. Therefore, they allege "an individual privy to confidential information about the plagiarism investigation broke IEEE rules and leaked information about the pending investigation . . . knowing that the effect of doing so would be to effectively preclude Dr. Poddar from being nominated for IEEE awards, causing substantial harm to his reputation."

In October 2018, Dr. Poddar contacted the IEEE Intellectual Property Rights (IPR) Office regarding the plagiarism investigation mentioned by the

other members. Thereafter, the IPR office informed plaintiffs that an IEEE committee "had found 'Level 1' plagiarism" as defined under the Publication Services and Products Board (PSPB) Manual. The email also stated that the PSPB Chair had imposed a three-year publication ban on Drs. Rohde and Poddar.

In June 2019, Drs. Rohde and Poddar filed an Ethics Complaint with the IEEE, alleging five violations of Manual provisions. The contentions were repeated in the Law Division complaint. Plaintiffs also outlined the harm they sustained resulting from the IEEE's actions, which they also reiterated in the complaint.

Plaintiffs contended that because the IEEE did not comply with its own confidentiality requirements, other members became aware of the plagiarism allegations. Plaintiffs alleged that due to this breach, they "suffered severe enough damage to their reputation in the professional community that it impacted decisions relating to whether they would be nominated for awards for their renowned achievements and career accomplishments."

Plaintiffs further alleged they suffered reputational harm because of the plagiarism allegations and the publication ban. They contend to have "suffer[ed] reduced exposure to the industry through publication, resulting in harm to their

reputations as well as a decreased ability to promote themselves and their products and services." Plaintiffs stated that several of their works that were accepted or slated for publication through IEEE were withdrawn from publication and IEEE cancelled several speaking engagements for Drs. Rohde and Poddar.

Plaintiffs further asserted they were harmed by having to delay product and service launches, which would have gained exposure through IEEE publications and speaking events, and therefore they suffered "substantial losses in potential sales, increased promotion costs, and a hampered ability to recoup costs already incurred." In referring to a specific product that was not launched, plaintiffs stated they expected its 2019 sales to be at least \$2.5 million and sales in years two to five to be at least \$15 million per year. They projected a loss of "at least \$17.5 million" in sales.

As a result of the plagiarism investigation, IEEE withdrew from publication several research papers written by Synergy employees, which in turn prevented a planned launch of additional products. Speaking and presentation engagements were cancelled.

Plaintiffs also alleged competitive harm because of their loss of promotional ability. They also contended they suffered increased patent

prosecution costs and a delay in pending patent applications because "[t]he ability to provide patent examiners with published papers authored by inventors on the topic of patent applications under examination has the effect of speeding patent application examination and allowance with less interaction required with the examiner, resulting in lower patent prosecution costs and quicker patent issuance."

In the suit filed in the Law Division, plaintiffs asserted causes of action against defendants for tortious interference with prospective business advantage (Count I), tortious interference with contract (Count II), breach of contract (Count III), and trade disparagement/trade libel (Count IV). Plaintiffs requested a permanent injunction to enjoin defendants from "[r]epresenting by any means . . . that any of [p]laintiffs have committed plagiarism in connection with any of the works discussed hereinabove."

Defendants moved to dismiss the complaint under Rule 4:6-2(e). In a July 21, 2021 oral decision and accompanying order, the court granted the motion as to Counts II, III, and IV, dismissing those claims with prejudice. Plaintiffs subsequently dismissed Count I.

In an extensive decision, the judge first considered the parties' choice of law dispute. Plaintiffs contended New Jersey law governed all of the claims.

Defendants asserted New York law governed the breach of contract and tortious interference with a contract claims. Relying on the PSPB Manual and the internal affairs doctrine, the court concluded that New York law applied to the breach of contract claims against IEEE and tortious interference with a contract claims against the individual defendants.

The court found that New York Civil Practice Law and Rules Article 78 governed the particular breach of contract claim asserted here. Since that statute contained a four-month statute of limitations, the claim was time-barred.

In addition, the court noted defendants' assertion that there was no valid contract between IEEE and plaintiffs. Plaintiffs contended there was an implied contract created by the policies and procedures in the PSPB Manual and when Drs. Rohde and Poddar became members, they agreed to be bound by the manual.

In applying New York law, the judge stated there were no grounds for an implied contract. The PSPB Manual referred to its contents as "guidelines"; the Manual applied to all IEEE publications, and to members and non-members. Therefore, the court dismissed the breach of contract claim under both the New York Article 78 statute of limitations and because there was no valid contract.

The court also dismissed the tortious interference with a contract claim using a similar analysis. Because there was no contract between plaintiffs and the individual defendants, plaintiffs could not sustain the cause of action. Plaintiffs also asserted defendants interfered with unspecified agreements between plaintiffs and third parties. The court found this claim was governed by New Jersey law and noted plaintiffs had to demonstrate that defendants intentionally and maliciously interfered with a specific contract they had knowledge of. The court found the complaint did not contain allegations that defendants were aware of any specific contracts plaintiffs had with third parties nor any details regarding any breaches or failure to perform by third parties. Therefore, the court found plaintiffs could not sustain a claim for tortious interference with a contract regarding any third-party contract.

The court next considered plaintiffs' claim for trade disparagement/trade libel. The allegations were that defendants "published false allegations concerning [p]laintiffs' actions, reputation, credentials, truthfulness, integrity and loyalty, at least by initiating, facilitating, conducting and sanctioning . . . flawed plagiarism investigations." Defendants argued the cause of action was labeled as trade disparagement and trade libel instead of defamation because any defamation claim was time-barred.

The judge noted that a cause of action for trade libel is applicable to a statement that is injurious to a plaintiff's business but does not reflect on either the plaintiff's person or property. It is only disparagement if the statement reflects on the quality of the plaintiff's product. The court found that the complaint at issue did not allege that defendants "said anything about any products or services supplied or sold by Drs. Rohde and Poddar, nor is there any allegation that any [d]efendant said anything at all about Synergy or CohPhase." Therefore, plaintiffs could not assert claims for trade libel or disparagement.

In addition, plaintiffs did not plead special damages with specificity as required to support trade libel and disparagement. The judge stated:

The [c]omplaint here does not plead what [p]laintiffs' sales were before and after the publication of the statements at issue about the plagiarism in which Drs. Rohde and Poddar allegedly engaged, or facts showing how any loss of sales was attributable to the publication of the findings of plagiarism, or any facts at all about who would supposedly have purchased anything from [p]laintiffs had the findings of plagiarism not been disseminated.

The court dismissed the two remaining claims without prejudice. Thereafter, plaintiffs voluntarily dismissed those claims and filed this appeal.

Our review of a Rule 4:6-2(e) motion to dismiss for failure to state a claim upon which relief can be granted is de novo. Baskin v. P.C. Richard & Son,

LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). We "must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). To determine the adequacy of a pleading, we must determine "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

A Rule 4:6-2(e) dismissal is typically without prejudice, but "a dismissal with prejudice is 'mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted,'" Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022) (quoting Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987)), or if discovery will not give rise to the claim. Ibid. (citing Dimitrakopoulos, 237 N.J. at 107).

On appeal, plaintiffs contend the trial court erred in dismissing their breach of contract, tortious interference with contract and trade disparagement/trade libel claims. We are unpersuaded.

The parties and the court extensively discussed the proper choice of law to apply to plaintiffs' contractual claims. We find an analysis unnecessary. Ultimately, after considering the choice of law issue, the court concluded there was no contract between plaintiffs and IEEE. Therefore, plaintiffs could not sustain their causes of action grounded in a contract claim under either New Jersey or New York law. We agree.

Plaintiffs assert that Drs. Rohde and Poddar had a valid contractual relationship with IEEE because they "paid membership dues to the IEEE for the IEEE to provide it with certain services (publishing and networking) and protections (confidentiality of works submitted for publishing)," and they "agreed in turn to be bound by the bylaws, policies, procedures, customs, practices, and norms established by the IEEE, including the PSPB Manual."

"The rights accorded to members of an association traditionally have been analyzed either in terms of property interests—that is, some interest in the assets of the organization . . . or in terms of contract rights—that is, reciprocal rights and duties laid down in the constitution and bylaws." Higgins v. Am. Soc. of Clinical Pathologists, 51 N.J. 191, 199 (1968). Under certain circumstances, our courts have found that the bylaws of a voluntary association may constitute a contract between the members. See Height v. Democratic Women's Luncheon

Club of N.J., Inc., 131 N.J. Eq. 450, 452 (Ch. 1942); see also Calabrese v. Policemen's Benevolent Ass'n, Loc. No. 76, Inc., 157 N.J Super. 139, 147 (App. Div. 1978) ("The constitution and by-laws of a voluntary association become part of the contract entered into by a member when he joined such association.").

However, corporate bylaws and express memberships are not the dispute before this court. The PSPB Manual provided "guidelines." It stated:

The Manual contains only those items that directly affect the operations of PSPB and the decisions of PSPB on matters delegated to it by the IEEE Board of Directors, including guidelines for publication services and products of IEEE and its organizational units. These guidelines amplify the requirements of IEEE Policies, particularly the IEEE Principles of Ethical Publishing.

Moreover, the guidelines applied to all IEEE publications and were not limited to only its members. The "IEEE Principles of Ethical Publishing" state that

[a]uthors of IEEE publications, whether members of IEEE or otherwise, are expected to accept the basic definitions and guidelines of honest and proper behavior addressed by the requirements and guidelines in this manual. Fair and reasonable credit should be given to related technical work by others, and any reproduction of the work of others should be done with proper crediting and within acceptable norms for citation. These guidelines should be interpreted as providing direction for authors intending to publish their work in IEEE publications.

In addition, the Manual was subject to "continuous[]" IEEE alteration and updating. This is not the feature of a legally binding agreement, but more in the style of a handbook.

Plaintiff has not established the existence of a valid contract between plaintiffs and IEEE, as required under both New York and New Jersey law. See EnviroFinance Grp., LLC v. Env't Barrier Co., 440 N.J. Super. 325, 345 (App. Div. 2015) (establishing the elements of a breach of contract claim); JP Morgan Chase v. J.H. Elec. of N.Y., Inc., 893 N.Y.S.2d 237, 239 (N.Y. App. Div. 2010) (same). Therefore, plaintiffs cannot support their claims of breach of contract and tortious interference with a contract.

We turn to a consideration of plaintiffs' trade libel and disparagement claims. It is undisputed that New Jersey law applies to these claims. The trial court found the causes of action were not properly pled as the allegations instead supported a defamation claim. However, a defamation claim is subject to a one-year statute of limitations as opposed to the six-year statute of limitations applicable to trade libel. Patel v. Soriano, 369 N.J. Super. 192, 247 (App. Div. 2004).

In Patel, we outlined the requirements of a disparagement action:

[t]he elements of a disparagement action include proof of publication of material derogatory to the quality of a

plaintiff's business, or to his business in general, of a kind calculated to prevent others from dealing with him, or otherwise to interfere adversely with his relations with others. To establish loss of trade or other dealings, plaintiff must show the falsehood was communicated to a third person and played a material and substantial part in leading others not to deal with plaintiff. Plaintiff must also prove that the statement is false, and that defendant made the statement knowingly or recklessly. Finally, plaintiff must prove special damages, such as the loss of a present or prospective advantage, in the form of pecuniary loss.

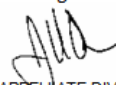
[Id. at 248.]

Statements constituting personal defamation instead state or imply the plaintiff is "personally dishonest, reprehensible, or lacking in integrity." Id. at 249.

The plagiarism allegations regarding plaintiffs' Preliminary Draft did not pertain to plaintiffs work in their companies or the quality of a product but rather reflected on the scientists' dishonesty and character as individuals. The Preliminary Draft was submitted by the individual plaintiffs outside of their responsibilities to their companies. The plagiarism allegations are personal to Drs. Rohde and Poddar rather than derogatory statements aimed at their business. We discern no error in the dismissal of plaintiffs' claims of trade libel/disparagement.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION