

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CLAUDE GERARD,

))
Plaintiff,)

SX-09-CV-076

v.

AMY CLAIRE DEMPSEY and
BIOIMPACT, INC.,

))
Defendants.)

ACTION FOR DAMAGES
(JURY)

2019 VI Super 47

MEMORANDUM OPINION

¶ 1 THIS MATTER comes before the Court on Motion for Summary Judgment of Defendants Amy Claire Dempsey and BioImpact, Inc., filed September 7, 2018, together with Memorandum in Support and Statement of Facts to Which There is No Genuine Dispute (SOF).¹ Plaintiff Claude Gerard's Opposition to Motion for Summary Judgment and Opposition to Defendants' Statement of Facts (Opp. SOF) were filed January 11, 2019; and Defendants' Reply was filed January 25, 2019. For the reasons that follow, Defendants' Motion will be granted, and Plaintiff's Complaint will be dismissed with prejudice by Judgment Order entered herewith.

BACKGROUND

¶ 2 This matter arises from Plaintiff's former employment with the Government of the Virgin Islands as Assistant Director of Coastal Zone Management (CZM) in the Department of Planning and Natural Resources (DPNR) on St. Croix. Complaint, filed April 28, 2009 ¶ 7.² Following the November 2008 gubernatorial election, Defendant Dempsey volunteered to serve on the transition team as co-chair of the DPNR Task Force for the Division of CZM to make "recommendations to Governor John deJongh and members of his administration regarding CZM personnel and persons who should be hired or fired." *Id.* ¶ 10. Theresa (Tracy) Roberts served as co-chair of the Task Force, which included Claudette Young-Hinds, among several others. Plaintiff alleges that Dempsey "used [her] position on the Task Force to forcefully recommend that Plaintiff (and other staff of CZM on St. Croix) be terminated" and to falsely malign,

¹ At the January 24, 2019 hearing on the Motion, Plaintiff conceded that all his claims in this action relate exclusively to Defendant Dempsey and not to Defendant BioImpact, Inc., an entity wholly owned by Defendant Dempsey that was not involved in any of the activities giving rise to his claims. Accordingly, the Motion will be granted as to Defendant BioImpact, and this Opinion focuses solely on Plaintiff's claims against Dempsey. The Complaint as to original Defendants John Doe 1 and John Doe 2 was dismissed with prejudice by Order entered October 11, 2016.

² Plaintiff's initial Verified Complaint was dated and filed February 6, 2009. Prior to any responsive pleading, Plaintiff filed a second Complaint, also dated February 6, 2009, on April 24, 2009. It is the Complaint filed April 24, 2009 that is considered Plaintiff's operative pleading.

injure, and defame Plaintiff for financial gain. *Id.* ¶¶ 11, 12. Plaintiff alleges that Defendant was “aware that Plaintiff and the Government of the Virgin Islands had a contractual relationship wherein Plaintiff was required to perform the duties of Assistant Director of CZM – for compensation.” *Id.* ¶ 13. Plaintiff alleges that Governor deJongh relied on the Task Force’s written and verbal recommendation (the Report) in making personnel decisions, including who to terminate, resulting in Plaintiff’s termination several days after Governor deJongh assumed office. *Id.* ¶¶ 17, 18.³ Plaintiff alleges that Dempsey “conspired to make false and malicious accusations against Plaintiff to destroy his professional reputation and have him terminated from his position as Assistant Director of CZM” so that she could “control CZM and avoid the strict regulations that the law requires and which Plaintiff enforced while he was employed as an Assistant Director of CZM.” *Id.* ¶ 19. Plaintiff alleges that he was “damaged financially and professionally” as a result of Defendant’s interference with “Plaintiff’s contractual relationship between Plaintiff and the Government of the Virgin Islands.” *Id.* ¶¶ 20-23. Finally, Plaintiff alleges that Dempsey

conspired to name replacements ([her] friends and associates) for Plaintiff and the entire staff which Defendant recommended to be terminated. For example, Defendant Amy Dempsey, who resides on the North Shore of St. Croix within Tier 1 wanted to build a driveway made of poured cement. The driveway, because it is within Tier 1 of the Coastal Zone, required a CZM permit. Defendant Dempsey did not want to pay for the permit or prepare the required reports. Immediately after obtaining the removal of Plaintiff from his position as Assistant Director of CZM, Defendant Dempsey constructed an illegal driveway at her residence located at Plot No. 2 and 3 of Estate Clairmont, St. Croix without the necessary CZM permits. *Id.* ¶ 25.

¶ 3 Plaintiff claims that Dempsey tortuously intentionally interfered with his contractual relationship with the Government, and seeks compensatory and punitive damages, plus his costs and fees.⁴

¶ 4 By her Motion, Defendant contends that she is entitled to judgment because the undisputed evidence in the summary judgment record includes no evidence from which a reasonable jury could find

³ Shortly following his termination, Plaintiff filed an action in the District Court of the Virgin Islands against Governor deJongh and the Government of the Virgin Islands, claiming that his termination deprived him of his property interest in public employment without due process of law. Gerard and his co-plaintiff “contended that they were terminated because they expressed their First Amendment rights by endorsing, associating with and supporting gubernatorial candidates other than [] Governor John P. deJongh, Jr. in the 2006 primary election.” The District Court’s injunction directing Gerard reinstatement and compensation for lost wages was reversed by the Third Circuit Court of Appeals. *Iles v. deJongh*, 638 F.3d 169 (3d Cir. 2011).

⁴ Plaintiff’s Complaint included three counts: Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress and Negligent Interference with Contract. By Memorandum Opinion and Order entered August 22, 2016, Defendants’ Motion for Judgment on the Pleadings was granted in part and the first two counts were dismissed with prejudice. The motion was denied as to the third count which was construed to sufficiently set forth a claim for the tort of Intentional Interference with Contractual Relations.

or infer that Dempsey interfered with the contract between Gerard and the Government by the use of improper means or with an improper motive.

LEGAL STANDARD

¶ 5 In evaluating a motion for summary judgment, the Court must determine whether there exists a genuine dispute of material fact; one that would impact the outcome of the case under applicable law. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379-80 (V.I. 2014) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). Such a dispute is genuine if a reasonable trier of fact could decide that particular factual issue material to the claim presented in favor of the non-moving party. *Id.* at 391-92. “Summary judgment is a drastic remedy [and] should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact,” and that judgment is appropriate as a matter of law. *Id.* at 379-80.

¶ 6 Reviewing Defendant’s Motion, the Court does not weigh the credibility of the evidence offered. Instead, all inferences from the evidence are drawn in favor of the nonmoving party, and any conflicting allegations, if properly supported by the record, are resolved in favor of the nonmovant. *See Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citing *Williams*, 50 V.I. at 194-95). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Martin v. Martin*, 54 V.I. 379, 389 (V.I. 2010). If the “moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial.” *Id.* at 391 (citation omitted). If the moving party does carry its initial burden to produce evidence of the absence of material facts in dispute, then “the burden shifts to the non-moving party to present ‘affirmative evidence’ from which a jury might reasonably return a verdict in his favor.” *Chapman v. Cornwall*, 58 V.I. 431, 436 (2013) (citations omitted). In responding to the movant’s evidence showing the existence of no genuine issue of material fact, “the nonmoving party may not rest on its allegations alone, but must present actual evidence, amounting to more than a scintilla, showing a genuine issue for trial,” regarding such disputed fact. *Perez*, 59 V.I. at 527-28.

¶ 7 “A party asserting that a fact... is genuinely disputed must... support the assertion by: (i) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (ii) showing that the materials cited do not establish the absence... of a genuine dispute, or that an adverse party cannot produce admissible evidence

to support the fact.” V.I. R. Civ. P. 56(c)(1). Although the facts are to be interpreted in the light most favorable to the nonmoving party, the nonmoving party “may not rest upon mere allegations and must present actual evidence showing a genuine issue for trial.” *Machado*, 61 V.I. at 379, quoting *Williams*, 50 V.I. at 194.

¶ 8 To determine whether summary judgment is appropriate, the Court must determine the substantive law governing the cause of action. *See Perez*, 59 V.I. at 528. “To prevail on a claim for Intentional Interference with Existing Contractual Relations, a plaintiff in this jurisdiction must prove: (1) the existence of a contract between the plaintiff and a third party; (2) that the defendant knew of that contract; (3) that the defendant interfered with the contract using improper means or with an improper motive; and (4) that the plaintiff was damaged as a result.” *Donastorg v. Daily News Publ'g Co., Inc.*, 63 V.I. 281, 283 (V.I. Super. 2015).⁵

¶ 9 The Superior Court in *Donastorg* noted regarding the third element that “not every act that disturbs a contract...is actionable.” *Id.* at 286-87. To constitute an actionable claim, “interference must be both intentional and improper.” *Id.* at 287. A plaintiff must show that the defendant interfered with his contract by the use of “improper means” (those “that are proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard”) or with “an improper motive” (where “a defendant is not motivated by a genuine business purpose, but rather interferes with a plaintiff’s contract solely for the purpose of injuring the plaintiff.” *Id.* at 287-88.

DISCUSSION

¶ 10 Here, the summary judgment record is sufficient to support findings of the existence of three of the four elements of the tort of Intentional Interference with Contractual Relations. Specifically, there is evidence that: a contract existed between Plaintiff Gerard and the Government of the Virgin Islands; Dempsey knew of the contract; and Gerard suffered financial damage as a result of the termination of the contract. The determination of the Motion rests upon whether Gerard has presented sufficient evidence from which a fact-finder could find that Dempsey interfered with Gerard’s contract with the Government using improper means or with an improper motive.

⁵ In *Donastorg*, the Superior Court conducted a thorough *Banks* analysis, which this Court has adopted, to determine that a plaintiff’s proof of the existence of each of the enumerated factors constitutes the soundest rule for the Virgin Islands regarding the tort of Intentional Interference with Contractual Relations.

¶ 11 Gerard claims that the Report of the Task Force constituted interference with his employment contract with the Government, resulting in its termination and his financial loss. The Report includes the following “assessment of key personnel and personnel challenges” regarding Gerard:

He [Gerard] is the most disliked person with in the division. He seems to feel that his position has given him the power to administer the program as he sees fit. And as [REDACTED] states he is clueless about what Coastal Zone Management even is. He personally says he will not accept certain responses and requires additional information. Gerard does such things as tell applicants that it is a CZM requirement that they must give DPNR a 30’ wide paved easement through their property and provide parking for the beach. He tells applicants what they can and can not do, and it has nothing to do with policy (unwritten) or the regulations. He told GCL they had to hire NRCI, Inc to be their independent monitor for the cable lay which they refused to do because NRCI was many times more costly than other qualified firms, such as Island Resources. He told VIWAPA they must hire an independent monitor for the dredging, and that they must hire NRCI, and their bid was many times more than VIWAPA’s own monitor. He is non responsive and takes months on items that should be done in a day. It takes him months to prepare a permit and then he does not even let clients know they are ready. You must call his office again and again. His department claims they don’t receive things you have written receipts for and then argues about receipts with their stamp and seal on them. Of the end users interviewed, they said Mr. Gerard isn’t there very often and when he is he is difficult. He acts as though he knows everything, he has no knowledge of his program, and he applies rules on an inequitable fashion. Across the board both the public and staff within his own department called for his removal. He is by far the most incompetent disagreeable person in the entire Department. Motion, Exh. B (Gerard Depos. Exh. 4) Report, at 12-13.

¶ 12 Dempsey does not disagree with the assertion of Gerard that the Report of the Task Force was a significant factor in the decision of Governor deJongh to terminate Gerard’s employment. As such, a finding may be made that the Task Force “interfered with the contract” between Gerard and the Government. Gerard attributes the language of the Report to Dempsey. However, Dempsey contends that the offending language of the Report relating to Gerard’s performance was actually researched and drafted by another member of the transition team, Claudette Young-Hinds.

¶ 13 Defendant offers an Affidavit of Claudette Young-Hinds who attests that she conducted interviews with nine end users and subsequently used their feedback to compile documents entitled End User Input and Key Findings, wherein she identified Claude Gerard as a person who should be terminated from his employment. Motion, Exh. E Young-Hinds Affidavit ¶¶ 5-8. Claudette Young-Hinds sent both her End User Input and Key Findings to Tracy Roberts and Amy Dempsey, co-chairs of the Task Force, for inclusion in the Report. *Id.* ¶ 9. Included with Young-Hinds Affidavit, as Exhibits C and D, were copies of the End User Input and Key Findings as submitted. The End User Input section on Claude Gerard reads:

Not at DPNR very often...is disruptive when he is; has different standards for his agency's work versus that of the general public/other government agencies; is cantankerous, out of his skills element, ornery, and applies the rules in an inequitable fashion. 6 Respondents called for Mr. Gerard's ouster. Young-Hinds Affidavit, Exh. C End User Input ¶ 3.

¶ 14 The Key Findings document includes a section entitled "Who to remove," listing Gerard and three other employees, noting that Gerard had been specifically mentioned six times during Young-Hinds end user survey process. Young-Hinds Affidavit, Exh. D Key Findings ¶ 3.

¶ 15 Defendant also submitted the Affidavit of Theresa S. Roberts who co-chaired the Task Force. Therein, Roberts states that the separate notes of each of the committee members were sent to her, from which she "developed a master document called the DPNR Transition Team 'book' which eventually became the final report." From the Transition Team "book," Tracy Roberts and Dempsey "drafted the final report containing our findings, suggestions for improvement and recommended changes. I hand delivered the final report to the transition team at the Government House on St. Thomas." Motion, Exh. D Roberts Affidavit ¶¶ 10-11.

¶ 16 Dempsey as the moving party has presented evidence to demonstrate that she was not the author of the section of the Report of which Plaintiff complains. In response, Plaintiff has submitted no actual evidence regarding the authorship of the offending language of the Report other than his own testimony to support the assertion that Dempsey "wrote the Transition Report." Opp. SOF ¶ 3. Plaintiff's Opposition cites only to Plaintiff's own Affidavit and deposition. In his deposition, Plaintiff stated that he "knows for a fact that Amy Dempsey wrote the report because she was one of the leads on the transition team." Gerard Depos. at 45:11-12. When asked upon what facts he based his knowledge, Gerard responded that he knew "by the wording of the transition report." *Id.* at 45:18. Plaintiff's deposition does little more than parrot the allegations of the Complaint and his Opposition to the Motion cites no evidence in the record that Dempsey authored the Report.

¶ 17 While the undisputed evidence supports Defendant's assertion that she was not the author of the section of the Report of which Plaintiff complains, it also supports the fact that both Dempsey and her co-chair "drafted the final report containing our findings, suggestions for improvement and recommended changes." Roberts Affidavit ¶ 11. That is, regardless of authorship of any specific section, Dempsey participated in the compilation of the final Report and, as co-chair, was ultimately responsible, with Tracy Roberts, for the content of the Report forwarded to Government House. A trial jury could find Dempsey's

involvement with the preparation and transmission of the Report sufficient to constitute interference with Gerard's contract.

¶ 18 The fact that a jury might find that Dempsey interfered with Gerard's contract does not end the inquiry. To defeat summary judgment, Gerard as nonmovant must also present evidence that Dempsey "interfered with the contract using improper means or with an improper motive." *Donastorg*, 63 V.I. at 287. Gerard does not allege, and a jury could not find, that by making staffing recommendations as a volunteer member of the gubernatorial transition team Dempsey employed improper means - those "that are proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.* As such, Gerard cannot defeat summary judgment on a claim that Dempsey interfered with his contract by using improper means.

¶ 19 Gerard may prevail on his claim that Dempsey intentionally interfered with his contractual relationship with the Government to the extent that he is able to prove that Dempsey's actions were undertaken with an improper motive. Plaintiff alleges two improper motives behind Dempsey's publication of the offending portions of the Report.

¶ 20 First, Gerard contends that Dempsey sought to "obtain complete power over CZM" in order to "name the replacements ([her] friends and associates) for Plaintiff and the entire staff which Defendant recommended to be terminated." Complaint ¶ 25. The Report recommends that the Governor

Remove Victor Somme, Bill Rohring, Jennifer Jones, Claude Gerard and Dalila Patten, Make Jean-Pierre Oriole Director of CZM; he has 7 years of experience, understands the program and believes in the program. He is well-liked by NOAA, his fellow staff members and the public. Make Susan Curtis his assistant director in St. Croix. She has master's in planning and a wealth of experience, including experience in securing and maintaining grants. She is also well liked by NOAA. Get new legal council [sic] for both islands. Report, at 14.

¶ 21 Defendant argues that Plaintiff has pointed to no evidence in the record to permit a finding that she had any personal relationship with any of the persons recommended as replacements for Gerard and others. Dempsey has presented affidavits from transition team members Gregory Rhymer, Tracy Roberts, and Claudette Young-Hinds who each attest that at no point during their work with Defendant did Dempsey express any personal views about any member of the DPNR staff or ever make disparaging remarks about or insult Gerard in any way. Roberts Affidavit ¶ 13; Motion, Exh. C Rhymer Affidavit ¶ 16; Young-Hinds Affidavit ¶ 11.

¶ 22 In responding to the Motion, Gerard has rested upon his allegations that Dempsey intended to replace him and his co-workers with her "friends and associates." He has not submitted or pointed to

evidence in the record that Dempsey even knew Susan Curtis, who was recommended for Gerard's position, or any of the other persons recommended for promotion. Asked whether Dempsey and Susan Curtis were friends, met socially, or had even ever met, Gerard responded that he "wouldn't know that." Gerard Depos. at 102:9-104:1. Gerard responded similarly when asked about Jean-Pierre (J.P.) Oriol, the recommended replacement for Victor Somme. Gerard Depos. at 98:24-100:16.

¶ 23 Gerard has not presented affirmative evidence that would permit a jury to find or infer that Dempsey acted with the improper motive of seeking to have him replaced with her friends and associates. Gerard failed to meet that burden by conceding that he did not know whether the persons replacing him and his co-workers at CZM were friends and associates of Dempsey, and his claim that Dempsey interfered with his contract with that improper motive fails.

¶ 24 Plaintiff also alleges that Dempsey "sought the removal of Plaintiff from his position as Assistant Director of CZM in order that she could construct a poured cement driveway at her residence." Plaintiff's Opp., at 6. Gerard contends that because Dempsey's home is within coastal zone Tier 1, her conversion of the existing asphalt driveway to concrete required a CZM permit, and that Dempsey "did not want to pay for the permit or prepare the required reports." Plaintiff's Opp., at 3. Dempsey refutes not only Plaintiff's characterization of her motive, but also its underlying premise. She contends that because the work done to her driveway was the repair of her existing driveway that did not enlarge or expand the footprint to make the driveway wider and did not require any earthwork to be undertaken, the work did not require a CZM Permit.

¶ 25 Both parties agree that the controlling statute is 12 V.I.C. § 910(b)(1), which provides for an exemption to the requirement for a CZM permit, as follows:

Notwithstanding any provision in this chapter to the contrary, no coastal zone permit shall be required pursuant to this chapter for activities related to the repair or maintenance of an object or facility located in the coastal zone, where such activities shall not result in an addition to, or enlargement or expansion of, such object or facility.
12 V.I.C. § 910(b)(1).

¶ 26 Plaintiff concedes that "repairs and maintenance in Tier 1 do not require a CZM Permit" but does not agree that what Dempsey did to her driveway constitutes a repair. Gerard argues that "Dempsey created a new/different driveway by changing the dimensions of her driveway and pouring concrete over an existing asphalt driveway... as such it is not a repair or maintenance but a completely new facility/driveway using a different material, which required a CZM Permit." Opp. SOF, at 4, emphasis in original.

¶ 27 There is no factual dispute as to the existence of Defendant's pre-existing asphalt driveway. Gerard argues that the driveway work did not constitute a repair because the concrete was poured "changing the dimensions" of the original asphalt driveway. *Id.* Yet, photographs of the concrete driveway submitted in support of Gerard's conclusory assertion actually contradict the assertion that the footprint of the concrete driveway exceeded that of the original. Exhibit 2 to Plaintiff's Opp. SOF presents four photographs of Dempsey's concrete driveway, reflecting a line of stones, circled in two of the photographs, along both sides of the driveway. The Exhibit indicates that the stones denote the "location of original edge of asphalt driveway." Those driveway boundary stones clearly extend some distance beyond the width of the new concrete driveway border reflecting, contrary to Plaintiff's assertions, that the concrete driveway is not wider than the pre-existing asphalt driveway. Opp. SOF Exh. 2.

¶ 28 Dempsey submitted an as-built survey map of her property, dated March 1, 1996, that shows an existing 15-foot-wide asphalt driveway. Motion, Exh. F Dempsey Affidavit Exh. A. Dempsey's Affidavit included additional photographs that confirm that the width of the concrete driveway did not enlarge or expand the original asphalt driveway that had been in place since Dempsey purchased the property in 1991. Dempsey Affidavit ¶ 3.

¶ 29 Plaintiff also argues that the work done to Dempsey's driveway did not constitute repair or maintenance because of the change of material from asphalt to concrete. Gerard has cited no statute or regulation that supports his interpretation, and the Court has found none.

¶ 30 The evidence in the summary judgment record does not support Plaintiff's contention that a permit was necessary for the driveway work undertaken by Dempsey. As movant, Dempsey has presented evidence to establish that no permit was required for work done to her driveway which constituted repair and maintenance to an object or facility located in the coastal zone. As such, she asserts that her involvement with the preparation and transmittal of the Report was not improperly motivated by her desire to remove Gerard from his position to avoid the need to obtain a CZM permit.

¶ 31 In response, Gerard has failed to meet his burden to establish the existence of a disputed question of material fact that requires determination by a jury with regard to Dempsey's need to obtain a CZM permit. Since the record confirms that Dempsey required no permit, there is no issue of fact to be resolved with regard to Plaintiff's claim that she interfered with his employment contract with the improper motive of avoiding the need to obtain a CZM permit for the work on her driveway.

¶ 32 Because the summary judgment record contains insufficient facts to permit a finding that Dempsey interfered with the contractual relationship between Gerard and the Government in preparing and transmitting the Report, by the use of improper means or with an improper motive, Plaintiff cannot prove an essential element and thereby cannot sustain a cause of action for Intentional Interference with Contractual Relations. As such, Dempsey's Motion must be granted.

¶ 33 A Judgment Order will enter consistent with this Opinion.

Dated: April 5, 2019.


DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

By: 

Court Clerk Supervisor 4/8/19