

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ABBADON CORPORATION,	:	January Term 2008
Plaintiff,	:	
v.	:	No. 4415
CROZER-KEYSTONE HEALTH SYSTEM:	:	
ET. AL.,	:	COMMERCE PROGRAM
Defendants.	:	
	:	Control Number 075168

ORDER

AND NOW, this 13TH day of November 2009, upon consideration of Defendant Deloitte Financial Advisory Services LLP and Louis R. Pichini's Motion for Summary Judgment, Plaintiff's response in opposition, all matters of record and in accord with the attached Opinion, it hereby is **ORDERED** that Defendants Deloitte Financial Advisory Services LLP and Louis R. Pichini's Motion for Summary Judgment is **granted in part and denied in part** as follows:

1. The Motion for Summary Judgment to Count V (defamation) is **granted** as to the contract overcharge statements and the insurance statements and **denied** as to the organized crime statements.
2. The Motion for Summary Judgment to Count VI (commercial disparagement) is **granted**.

BY THE COURT,

ARNOLD L. NEW, J.

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OPINION

Plaintiff Abbadon Corporation (hereinafter “Abbadon”) initiated this action against defendant Crozer-Keystone Health System (hereinafter “Crozer”) for breach of contract and unjust enrichment and against Deloitte Financial Advisory Services LLP and Louis R. Pichini (hereinafter “Deloitte defendants”) for defamation and commercial disparagement.

Abbadon is a corporation engaged in the business of cleaning, construction, maintenance and repair and snow removal. Crozer is a non-profit healthcare system comprised of five hospitals, along with a comprehensive physician network of primary care and specialty practices. Deloitte Financial Advisory Services LLP (hereinafter “Deloitte”) is a limited liability partnership. Louis R. Pichini (hereinafter “Pichini”) is an employee of Deloitte with a title of Director of Financial Advisory Services LLP.

Beginning in 2001, Abbadon and Crozer entered into contracts wherein Abbadon would provide Crozer with cleaning services, emergency contract services and snow removal services for a fee. In November 2007, Crozer retained Deloitte Financial Advisory Services, LLP to assist it in its efforts to ensure appropriate administration of its material management, purchasing, and environmental services activities, to investigate whether its employees were complying with federal, state and local laws and its own policies and procedures in selecting

Abbadon as a vendor and to assist with an internal investigation related to Abbadon, including its billing practices and participation in contract bid processes. During the investigation, Deloitte personnel including Pichini interviewed Crozer employees in December, 2007 and January, 2008¹ and conducted a review of documents including e-mail communications and purchasing records.

In late December 2007 or January 2008, Deloitte made an oral presentation regarding the investigation to Crozer's senior management including Crozer CEO Joan Richards, Richard Bennett, Crozer's COO, Donald Legreid, Crozer's chief legal counsel, Gene Zegar, Crozer's vice president of human resources, Mr. Wilson and Mr. Boff. At this presentation, Pichini was asked whether he was aware of a connection between Abbadon and organized crime. Pichini stated he was not aware of such a connection. The Crozer executives requested that Pichini re-interview certain employees in this regard.

On January 10, 2008, Crozer terminated four employees Gillin, Ruskowski, Sulecki and Gallagher. On January 11, 2008, Crozer terminated its relations with Abbadon. Crozer released a statement to the press regarding the terminations wherein Crozer concluded that there had not been any theft, misappropriation of funds or other criminal activity.

On February 1, 2008, Abbadon filed this lawsuit against defendant Deloitte and Louis R. Pichini as well as Crozer. As to the Deloitte defendants, Abbadon alleges claims for defamation and commercial disparagement. The claims center upon contract overcharging statements and organized crime statements. After discovery, the defamatory statements regarding the contract overcharging have been identified as follows:

1. Abbadon received no bid work to convert a greenhouse and was paid \$250,000.

¹ Some employees interviewed included Michael Ruskowski, Daniel Gillin, John Sulecki, Stephen Gallagher, and Ed Gillespie.

2. Abbadon submitted duplicate invoices.
3. Abbadon submitted invoices with insufficient information to verify billed charges.
4. Abbadon billed for trucks used in snow removal and salting at \$170 per hour when Crozer purchasing records disclose the contract rate was \$100 an hour in 2006 and 2007.
5. Abbadon billed Crozer for using ATV snowplows at \$145 per hour when Crozer purchasing records disclosed the contract rate was for \$100 per hour.
6. Abbadon billed for bulk salt at \$120 per ton when the purchasing records disclose the contract price was \$80 per ton.
7. Abbadon submitted invoices for calcium chloride bags when they were delivered to Crozer and then billed for the same calcium chloride bags when the bags were used.
8. Abbadon billed \$146,110 for snow removal from February 13, 2007 to February 15, 2007, the invoices were not verified, confirmed or questioned by Michael Ruskowski or Stephen Gallagher and that the charges included 11 plow trucks working continuously for 47 hours and that Internet historical weather service reports reported only minimal snow fall on the three days encompassed by the 47 hour period.
9. Abbadon was paid to clean buildings on the Crozer campus from 2004 through 2007 that were torn down in approximately 2003.
10. Abbadon was paid to clean buildings for six years which were cleaned by Belk Cleaning.

Abbadon also claims that Pichini made statements connecting Abbadon to organized crime.

The statements included the following:

1. Pichini asking if Gillin knew Faffy Iannarella.

2. Pichini telling Gillin that Pichini was the guy who put Nicky Scarfo away.
3. Pichini telling Gillin that Gillin was associated with Abbadon.
4. Pichini asking Gallagher if he knew Abbadon did business out of a row house in South Philadelphia and if he was afraid to question Abbadon's invoices.
5. Pichini accusing Abbadon of being the Mafia.
6. Pichini stating that Ivan and Joe Cohen, Abbadon, are all connected with the Mafia, they are in the Mafia.
7. Pichini telling Ruskowski that he was going to prove that Ivan and Joe Cohen were in the Mafia.
8. Pichini telling Gillin that Abbadon was mobbed up.

Presently before the court is the Deloitte defendants' motion for summary judgment.²

DISCUSSION

A. Abbadon's claims for defamation arising from the contract overcharge statements are dismissed while the claim for defamation arising from the organized crime statements continues.

In a defamation case, a plaintiff must prove: (1) The defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditional privileged occasion.³ Where the issue is properly raised, a defendant has the burden of proving: "(1) the truth of the defamatory communication;

² The Crozer defendants have also filed a motion for summary judgment which will be addressed in a separate order.

³ Moore v. Cobb-Nettleton, 889 A.2d 1262, 1267 (Pa. Super. 2005)(*quoting* Porter v. Joy Realty, Inc., 872 A.2d 846, 849 (Pa. Super. 2005)).

(2) the privileged character of the occasion on which it was published; and/or (3) the character of the subject matter of defamatory comment as of public concern.⁴

The publisher of defamatory matter is not liable if the publication was made subject to a privilege and the privilege was not abused.⁵ Communications which are made on a proper occasion, from a proper motive, in a proper manner and which are based upon reasonable cause are privileged.⁶ Abuse of a conditional privilege is indicated when the publication is actuated by malice or negligence⁷, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or included defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose.⁸

Here, the statements attributed to the Deloitte defendants regarding contract overcharging are a matter of public concern and are conditionally privileged. The record clearly demonstrates that Deloitte was retained by Crozer to assist it in its efforts to ensure appropriate administration of its material management, purchasing, and environmental services activities and investigate whether its employees were complying with federal, state and local laws and its own policies and procedures in selecting Abbadon as a vendor. Deloitte was advised by Crozer that it received a complaint on the compliance line in July, 2006, that an employee may have a conflict of interest in overseeing the Abbadon construction contract, that Abbadon received no bid contracts and

⁴42 Pa. C.S. A. section 8343 (b).

⁵ Elia v. Erie Ins. Exch., 634 A.2d 657, 660 (Pa. Super.1993).

⁶ Miketic v. Baron, 450 Pa. Super. 91, 675 A.2d 324, 327 (Pa. Super. 1996).

⁷ Cases that have held that a conditional privilege can be lost by negligence are restricted to matters which are not of a public concern. See, American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania, 872 A.2d 1202 (Pa. Super. 2005). Here, the issue is a matter of public concern and therefore the conditional privilege cannot be lost by negligence.

⁸ Miketic v. Baron, 675 A.2d at 328.

charged Crozer exorbitant amounts of money. Crozer had a legitimate business interest in the information gathered by Deloitte and therefore Deloitte's statements regarding contract overcharging are privileged.

Abbadon argues that Deloitte abused the privilege by failing to interview Abbadon personnel about the over billing accusations and by showing hostility toward interviewees who did not provide satisfactory responses to Pichini. Abbadon must establish that Deloitte abused the conditional privilege. Upon review of the depositions and other materials submitted, there is no evidence of abuse by Deloitte. Deloitte, acting within the guidelines established by Crozer, over the course of several weeks, interviewed Crozer employees and reviewed records pertaining to the subject contracts. After conducting the interviews and reviewing the records Deloitte made its findings to Crozer. The findings were confined to the limits placed by Crozer to determine whether its employees were complying with federal, state and local laws and its own policies and procedures in selecting Abbadon as a vendor.

Since the record fails to establish that Deloitte's investigation was made with malice, was made for a purpose other than that for which the privilege was given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose, the court finds that the conditional privilege was not abused. Accordingly, Deloitte's motion for summary judgment as it pertains to the contract overcharging statements is granted.

As it pertains to the organized crime statements however, Deloitte's motion for summary judgment is denied since a genuine issue of material fact exists as to whether Deloitte abused the conditional privilege and whether Abbadon suffered any damages as a result of Deloitte's statements.⁹

⁹ As it pertains to the insurance statements, the court finds that the Deloitte defendant's motion for summary judgment is granted since Abbadon admitted that it pays employees in cash to avoid paying federal and state payroll

B. Abbadon's claim for commercial disparagement is dismissed.

In count VI of the amended complaint, Abbadon purports to state a claim for commercial disparagement. In order to prove a claim for commercial disparagement, also known as injurious falsehood, the plaintiff must prove that: 1) the defendant published a disparaging statement concerning the business of the plaintiff, 2) the statement was false, 3) the defendant intended that the publication cause pecuniary loss or reasonably should have recognized that publication would result in pecuniary loss, 4) the publication caused actual pecuniary loss, and 5) the publisher knew the statement was false or acted in reckless disregard of its truth or falsity.¹⁰ Although, the torts of commercial disparagement and defamation are similar, each protects different and distinct interests. The tort of defamation seeks to protect against damage to one's reputation, while the tort of commercial disparagement protects a vendor from pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability.¹¹

In Menefee v. Columbia Broadcasting Sys., Inc., 458 Pa. 46, 54, 329 A.2d 216 (1974), the Pennsylvania Supreme Court made the following observation:

One of the most important purposes for which liability for the publication of matter derogatory to another's personal reputation is imposed is to enable the person defamed to force his accuser into open court so that the accusation, if untrue, may be branded as false by the verdict of a jury. The action for disparagement has no such purpose and cannot be used merely to vindicate one's title to or the quality of one's possessions. . . .¹²

taxes and that it registered vehicles for the express purpose of reducing insurance rates. Abbadon also admitted some of the expenses may have been for salaries and that Abbadon would not have paid payroll taxes for those payments. (Plaintiff's response to Defendant Deloitte's Statement of Undisputed Facts ¶¶ 120-122).

¹⁰ Pro Golf Mfg. v. Tribune Review Newspaper Co., 570 Pa. 242, 246, 809 A.2d 243, 246 (2002) (citing Restatement (Second) Torts § 623(A) (1977)); Restatement (Second) of Torts §§ 623A).

¹¹ Menefee v. Columbia Broadcasting Sys., Inc., 458 Pa. 46, 54, 329 A.2d 216 (1974)

¹² Id. (quoting Restatement of Torts introductory note to Chapter 28).

Notwithstanding this difference, any circumstances that would give rise to a conditional privilege for the publication of defamation, is likewise a conditional privilege for the publication of commercial disparagement.¹³ As such, the claim for commercial disparagement based on the contract overcharge statements is dismissed for the same reason as the defamation based claim.

As for the claim for commercial disparagement based on the organized crime statements, the claim is likewise dismissed. The organized crime statements are not directed to the quality of goods or services provided by Abbadon. Rather, the organized crime statements impugn Abbadon's reputation for honesty. Since Abbadon seeks damages for its reputation rather than for the pecuniary loss suffered because the statements attack the quality of its services, summary judgment is granted.

CONCLUSION

For the foregoing reasons, the Deloitte Defendants' motion for summary judgment to Count V (defamation) is granted as to the contract overcharging statements and the insurance statements and denied as to the organized crime statements. The motion for summary judgment to Count VI (commercial disparagement) is granted. An order consistent with this opinion is attached.

BY THE COURT,

ARNOLD L. NEW, J.

¹³ Restat 2d of Torts, § 646A.