

Ryan Milun (Bar No. 043412006)
THE MILUN LAW FIRM, LLC
20 Commerce Drive, Suite 135
Cranford, New Jersey 07016
Phone: 862-702-5010, ext. 1001
ryan.milun@milunlaw.com

Attorneys for Plaintiff

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY**

<p>NJ PUPPY STORE t/a WAYNE PUPPIES</p> <p><i>Plaintiff,</i></p> <p>v.</p> <p>TOWNSHIP OF TEANECK; CURTIS CAVINESS, Chief Registered Environmental Health Specialist and Health Department Township Manager; and HILARY GOLDBERG</p> <p><i>Defendants.</i></p>	<p>Docket No.: BER-L-1240-23</p> <p><i>Civil Action</i></p>
--	---

PLAINTIFFS OPPOSITION TO DEFENDANTS MOTION TO DISMISS

FACTS¹

The Township of Teaneck and Curtis Caviness:

In or around November 2021, Wayne Puppies and its representatives went to the Teaneck Health Department to discuss the text of Section 6-67 and 6-68 of the Code of the Township of Teaneck with Curtis Caviness, Teaneck's Registered Environmental Health Specialist. (Complaint, para. 13). During this conversation in November 2021, Caviness assured Wayne Puppies and its representatives that Wayne Puppies would be permitted to house live animals at the Teaneck location in open view to the public, so long as prospective customers were put on notice that the sale of the puppies could not occur at the Teaneck location and instead had to be made through the Wayne, NJ location. (Complaint, para. 14). Caviness assured Wayne Puppies that the eventual sale of the puppies that were housed at the Teaneck location would not be deemed to violate the Code and that the Township of Teaneck would take no adverse action against Wayne Puppies for simply housing the puppies at the Teaneck location. (Complaint, para. 15).

On January 11, 2022, Wayne Puppies and its representatives had a subsequent telephone conversation with Caviness in which further clarification was sought regarding the allowed business at the Teaneck location, and at that time Wayne Puppies was once again assured that so long as it complied with the agreed upon business plan, there was no violation of the Code and the Township of Teaneck would not take any adverse actions against Wayne Puppies. (Complaint, para. 16). In response to the proposed business plan, the Township of Teaneck approved and granted the relevant permits, at least one of which expressly states "live pet store." (Complaint, para. 17).

¹ The facts in support of this opposition appear in the complaint and/or documents referenced in the complaint.

Wayne Puppies incurred significant expenses, including but not limited to legal fees, to confirm and conform Wayne Puppies consumer documentation to comply with the Township's notice requirements and Code provisions. (Complaint, para. 18). In addition, Wayne Puppies specifically performed the buildout of the Teaneck location, including the construction of specific areas to house live puppies, based on the confirmation and representations of the Township of Teaneck, including Caviness, and the issuance of permits allowing live pets at the Teaneck location. (Complaint, para. 19).

Everything seemed in order, until the Summer of 2022 at which time, the Township inexplicably and without justification reversed its decision granting the approval of Wayne Puppies to operate in Teaneck, per the agreed upon business plan. (Complaint, para. 20). The sudden revocation of the Township of Teaneck's approval of the business plan and its now taking the position that the approved business plan violates the Teaneck Code is completely unjustified, unwarranted, and has caused significant damage to Wayne Puppies. (Complaint, para. 30). Indeed, the revocation of approval was improperly based not on an interpretation of the Code or any change in factual circumstances, but rather in response to political pressure applied by a Teaneck resident that happened to start a Change.org petition in a malicious effort to prevent Wayne Puppies from opening its Teaneck location. (Complaint, para. 31). The Change.org petition was based on false and defamatory accusations lodged against Wayne Puppies, all of which are completely unfounded. (Complaint, para. 32).

Hilary Goldberg Defames Wayne Puppies to Gain a Political Advantage:

On or about July 1, 2022, Goldberg started a petition on Change.org seeking others to support her attempts to interfere with Wayne Puppies business. (Complaint, para. 45). In addition, Goldberg attached links to the Change.org petition to her Facebook and other social media

websites and have invited others to post derogatory comments on Goldberg's various postings. (Complaint, para. 46). The Change.org petition makes knowingly false and misleading statements about Wayne Puppies and the business conducted by Wayne Puppies. For example, Goldberg claimed that Wayne Puppies was a "puppy mill" or obtained its puppies from a "puppy mill." (Complaint, para. 47).

The term "puppy mill" is a derogatory term used to describe the horrific conditions some unfortunate puppies endure with unscrupulous breeders. (Complaint, para. 48). Despite claiming to have full access to public records, Goldberg made the statement that Wayne Puppies was or works with puppy mills, when Goldberg knew, or should have known, that all of the puppies sold by Wayne Puppies come from USDA licensed breeders that are subject to the most stringent health and safety requirements and are subject to routine unannounced government inspections to ensure the facilities are clean and that the puppies themselves are well-treated, well-fed, receive regular daily exercise, and receive full medical examinations and all required vaccinations. (Complaint, para. 49).

In addition to making false statements about Wayne Puppies connection to so-called puppy mills, Goldberg also misrepresented to the public that the breeders who sell puppies to Wayne Puppies keep the puppies in "small cages" that are "rarely cleaned" which leads to "disease, sickness, growths on their bodies". (Complaint, para. 50). Goldberg also falsely claimed that the puppies at Wayne Puppies receive "poor nutrition" and that "dogs have lost eyes due to powerful water" and that after the mothers can no longer breed, they are "killed. . . or. . . got to a rescue" and that the breeders "shoot those dogs." (Complaint, para. 51). All of these statements by Goldberg on the Change.org petition and linked to her Facebook and other social media accounts were specifically targeted at Wayne Puppies in an effort to damage its business and reputation.

(Complaint, para. 52).

In response to the Change.org petition, Wayne Puppies sent a letter to Goldberg putting her on notice that the “knowingly false and misleading statements constitute libel, defamation, and tortious interference with contractual relations, which are actionable in a court of law.”

(Complaint, para. 53). Wayne Puppies requested that Goldberg immediately take down the petition and all related links, comments and posts on Facebook and other social media platforms.

(Complaint, para. 54).

While the Change.org petition was eventually taken down by Goldberg, the damage had been done. (Complaint, para. 55). Not only was the Township of Teaneck and its members now aware of the petition, which again, Wayne Puppies believes the petition was used by Goldberg to gain political capital, but in less than one day there were numerous comments on the petition from local residents calling to ban Wayne Puppies from operating in Teaneck. (Complaint, para. 56).

By this action, Wayne Puppies is seeking to hold Goldberg responsible for the damage to Wayne Puppies business and reputation and for Goldberg’s role, if any, in causing the Township of Teaneck to reverse course and no longer permit Wayne Puppies to operate per the agreed-upon business plan. (Complaint, para. 57).

ARGUMENT

I. The Noerr-Pennington doctrine, relied upon by Goldberg, does not extend to claims for defamation and Goldberg’s first amendment rights do not extend to outright misrepresentations regarding the conduct of Wayne Puppies business.

The Noerr-Pennington Doctrine (the “Doctrine”) applies in limited circumstances and specifically not to defamation claims. Goldberg’s reliance on the Doctrine is misplaced, and even if applicable, there are exceptions to the Doctrine where the petitioning is just a “sham” to cover an attempt to directly harm the business practices of a competitor. See Eastern R.R. President’s

Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961). While Goldberg is not a competitor of Wayne Puppies, her “petitioning” and more specifically her posting of the petition on social media, is arguably a “sham” making the Doctrine inapplicable – indeed, even the Noerr case recognizes that the doctrine is not universally applicable. While the doctrine has been extended to certain circumstances – such as to abuse of process-type cases – (See e.g. Main St. at Woolich, LLC v. Ammons Supermarket, Inc., 451 N.J. Super. 135, 144 (App. Div. 2017)) the Doctrine has never been applied in New Jersey in the context of a defamation action as there are already legal protections in place in connection with defamation claims. Notably, Goldberg has not referenced a single New Jersey case where the Doctrine was applied to prevent a plaintiff from bringing a defamation claim or was a defense to a defamation claim.

Moreover, the few cases that have addressed the Doctrine in connection with defamation claims have noted that **true** petitioning activity is protected, such as in connection with a trial or commentary to a senator, delegate and councilperson in a legislative proceeding are protected. See e.g. Sherrard v. Hull, 53 Md.App. 553, 572 (1983) (discussing split of authority on scope of Noerr-Pennington immunity and true petitioning activity).² Here, Goldberg was not engaging in “true” petitioning activity when she created the Change.org petition and also sent it out to her contacts on Social Media. Rather, Goldberg’s actions, particularly the social media posts, were not petition at all and were intentionally harmful to Wayne Puppies business and therefore not protected by the Doctrine.

² Importantly, even the Sherrard case was overruled by Miner v. Novotny, 304 Md. 164 (1985) “to the extent it was inconsistent with” later opinions discussing the protections afforded in defamation actions, such as McDonald v. Smith, 472 U.S. 479 (1985).

II. The lies describing Wayne Puppies as either a puppy mill or a store that works with puppy mills are actionable defamation.

Goldberg's implication in the Change.org petition that Wayne Puppies operates or works with puppy mills is actionable defamation. The law of defamation exists to achieve a proper balance between protecting reputation and protecting free speech. See Ward v. Zelikovsky, 136 N.J. 516 (1994). A defamatory statement is defined as one that "tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Id. citing Restatement (Second) of Torts § 559. Another definition of defamation relied upon by the New Jersey Courts is "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, good-will or confidence in which the plaintiff is held or to excite adverse, derogatory or unpleasant feelings or opinions against him." Id. citing W.Page Keeton, et al., Prosser and Keeton on the Law of Torts § 111 at 773 (5th ed. 1984). This is exactly what Wayne Puppies is alleging defendant did in this case.

In order to prove a defamation claim, the plaintiff must establish that the defendant (1) made a defamatory statement of fact; (2) concerning the plaintiff; (3) which was false; and (4) which was communicated to a person other than plaintiff. Singer v. Beach Trading Co., 379 N.J. Super. 63, 80 (App. Div. 2005). There can be no doubt that all of the elements have been met. Wayne Puppies has alleged that Goldberg has published a Change.org petition misrepresenting that Wayne Puppies either is or works with puppy mills. The statements in the Change.org petition are defamatory, concern the plaintiff, are false, and were communicated to numerous people other than the plaintiff; indeed within hours of the petition being published there were over 200 participants and many of which made comments directed at Wayne Puppies concerning how they

did not want a “puppy mill” in Teaneck.³

While Goldberg argues that all she was doing was explaining what a puppy mill is and encouraging residents to adopt rather than purchase dogs, the implication is clear. The title of the petition is “Keep Wayne’s Puppies Out of Teaneck” and then the first half of the petition describes puppy mills and the horrendous conditions under which puppies are housed and the various ways in which puppies are mistreated. The implication of the petition is clear. Goldberg was intimating that Wayne Puppies was a puppy mill, and the various comments made in response to the petition evidence that Goldberg’s misrepresentations had the desired effect. The comments to the petition directed at Wayne Puppies establish that the participants in the petition did not make the distinction that Goldberg is arguing on this motion – i.e., that all she was doing was trying to convince people not to purchase dogs. Goldberg’s argument reminds me of my childhood teachers accusing “someone” of wrongdoing, staring right at them, and stating “I am not naming names, but you know who you are.” The purpose of the petition is clear, and it was not to simply argue the virtues of adoption. Instead, it was a targeted and purposeful attack on Wayne Puppies, that amounts to actionable defamation.

Finally, the standard on a motion to dismiss in the case of a complaint charging defamation is simply that the plaintiff “must plead facts sufficient to identify the defamatory words, their utterer, and the fact of their publication.” Dendrite Intern., Inc. v. Doe No. 3, 342 N.J. Super. 134, 155 (App. Div. 2001). Wayne Puppies has sufficiently alleged all three requirements. First, the defamatory statement, as noted above, related to Wayne Puppies allegedly operating or working

³ Goldberg has since removed the Change.org petition, so there is no access to it from the website to show the court the comments that were made by the various participants. During discovery however, Wayne Puppies intends to subpoena Change.org in order to get the details regarding the number of participants and the various derogatory comments made by them as a result of the misrepresentations made by Goldberg.

with a puppy mill. Second, the complaint alleges by whom the false statements were made – by Goldberg. And finally, the complaint also alleges how the statements were published – in this case on a Change.org petition and linked through Goldberg’s social media. With all three elements satisfied, the motion to dismiss should be denied as to the defamation count of the complaint.

III. The lies published by Goldberg regarding the operations of Wayne Puppies business are actionable tortious interference as they were intentionally designed to damage Wayne Puppies’ reputation and its business.

Wayne Puppies has sufficiently alleged tortious interference. A claim for tortious interference with a prospective economic advantage requires a plaintiff to prove the following elements: (1) there was a reasonable expectation of economic advantage; (2) the defendants actions were malicious in the sense that the harm was inflicted intentionally without justification or excuse; (3) the interference caused the loss of the prospective gain or there was a reasonable probability that the plaintiff would have obtained the anticipated economic benefit; and (4) the injury caused the plaintiff damage. See Singer v. Beach Trading Company, 379 N.J. Super. 63, 81 (App. Div. 2005). In the tortious interference cause of action, malice is defined to mean that the interference was inflicted intentionally and without justification or excuse. Id. citing DiMaria Constr., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001).

In the complaint, Wayne Puppies alleges that the defamatory comments by Goldberg directly affected the business by encouraging persons not to purchase puppies from Wayne Puppies – notably, the allegations are taken as true for purposes of this motion. Goldberg’s targeted conduct against Wayne Puppies was done without justification or excuse, and she targeted Wayne Puppies business specifically. If Goldberg simply wanted to post about the virtues of adopting, she certainly could have done so without specifically targeting Wayne Puppies, but instead the attack was direct. Further, the damages suffered by Wayne Puppies – i.e., lost sales – are also

alleged in the complaint. At this stage, the allegations of interference and damages are treated as true for purposes of considering the defendants motion to dismiss and during the course of discovery in this action, Wayne Puppies will provide the necessary proofs regarding the significant business lost due to defendants' interference. Defendant's motion to dismiss should therefore be denied in order to allow Wayne Puppies the opportunity to prove its claims through the discovery process.

V. In the event this Court agrees with the arguments of defendants, plaintiffs should be given an opportunity to amend the complaint to address any concerns of the Court.

In the event there is a dismissal of any of the counts of the complaint as a result of defendant's motion to dismiss, such dismissal should be without prejudice and Wayne Puppies should be given the opportunity to amend the complaint and correct any deficiencies. See Nostrame v. Santiago, 213 N.J. 109 (2013) (noting that ordinarily dismissals under Rule 4:6-2(e) should be without prejudice so that plaintiffs can cure any defects in their pleadings)

CONCLUSION

The actions of the defendant as alleged in detail in the complaint and highlighted above, fully support claims for both defamation and tortious interference. Accordingly, defendants' motion should be denied, and this matter should proceed forward with the discovery process.

Dated: May 18, 2023

THE MILUN LAW FIRM, LLC

Attorneys for Plaintiffs

By: *s/Ryan Milun*
Ryan Milun