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24-P-627

Appeals Court

B.C. CONSTRUCTION CO., INC. vs. JOHNSON ROBERTS ASSOCIATES,
INC.

No. 24-P-627.

Middlesex. March 18, 2025. - October 3, 2025.

Present: Massing, Neyman, & Wood, JJ.

Contract, Interference with contractual relations, Bidding for contract, Construction contract. Municipal Corporations, Contracts. Evidence, Motive. Libel and Slander. Privileged Communication. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on June 7, 2021.

The case was heard by Adam L. Sisitsky, J., on a motion for summary judgment.

Kevin P. Polansky (Joseph P. Murphy also present) for the plaintiff.

Stephen J. Orlando for the defendant.

WOOD, J. The plaintiff, B.C. Construction Co., Inc. (B.C.), brought this action against the defendant, Johnson Roberts Associates, Inc. (JRA), alleging intentional

interference with advantageous business relations and defamation. A Superior Court judge granted JRA's motion for summary judgment on both counts and entered a judgment dismissing the complaint. B.C. appeals. We affirm.

Background.¹ In 2013, the city of Everett (Everett) awarded B.C. a contract to renovate and construct an addition to Everett's library building and selected JRA as the project's architect. At the end of the project, B.C. submitted change orders to Everett, increasing the total project cost. Separately, JRA offered Everett a \$20,000 credit for a dispute unrelated to the change orders.

In 2019, the town of Dracut (Dracut) hired JRA as the architect for the construction of a new fire station and retained the Vertex Companies, Inc. (Vertex), as its owner's project manager (OPM). Vertex and JRA worked together to evaluate bids for the fire station project, ultimately identifying B.C. as the lowest bidder.² Vertex sent an e-mail

¹ "We summarize the evidence in the summary judgment record in the light most favorable to [B.C.], the nonmoving party." Adams v. Schneider Elec. USA, 492 Mass. 271, 274 (2023).

² Under G. L. c. 149, § 44A (2) (C), certain construction projects by public agencies "shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids." Under G. L. c. 149, § 44A (1), being a "[r]esponsible" bidder means "possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent

message to the Attorney General's office (AGO),³ explaining that it had information regarding JRA's problematic history with B.C. in connection with the Everett project, and that Dracut had been informed of other negative experiences with B.C. In view of that information, Vertex asked whether Dracut had the right to reject B.C.'s bid. The AGO advised that Dracut should independently gather client reviews of B.C.'s prior projects and, if it found negative reviews, then it should give B.C. the chance to respond. The AGO confirmed that after taking these steps, Dracut would have the right "to reject a low bidder who is not responsible." Philip O'Brien, a JRA principal, and Vertex prepared a report for Dracut's building committee summarizing B.C.'s municipal project references and the AGO's e-mail message and ultimately recommending a different bidder for the project. Dracut's building committee then offered B.C.'s president, Michael Cresta, an opportunity to meet and address the negative project reviews. Following that meeting, Dracut rejected B.C.'s bid.

workmanship and financial soundness in accordance with the provisions of [G. L. c. 149, § 44D]."

³ The Attorney General's fair labor division provides guidance to municipalities and other interested parties on compliance with public bidding laws. See Office of the Attorney General, Public Bidding, <https://www.mass.gov/public-bidding> [<https://perma.cc/YCC7-A79V>].

Because of budgeting issues, Dracut had to delay the project and conduct another round of bidding six months later. After B.C. submitted a new bid for the project as the lowest bidder, JRA again reviewed B.C.'s references and summarized its findings in a report.⁴ JRA reported that it had contacted some of B.C.'s references from the first round of bidding and some new references, which generated a mix of negative and positive reviews. JRA also identified a reference from an architect reporting that B.C. was "suing [the architect] and the [municipal client] for unpaid changes," and that the municipal client was countersuing B.C. for damages. Once again, JRA did not recommend B.C. for the project, and Dracut again rejected B.C.'s bid, this time with no offer to discuss the negative reviews.

In late 2019, as Dracut was completing its second round of bidding, the city of Cambridge (Cambridge) hired JRA as the architect for the construction of a fire station. After B.C. submitted one of the lowest bids for the project, another JRA principal, Jeffrey Davis, sent an e-mail message to Cambridge's project manager apparently referencing JRA's experience working with B.C. on the Everett project. Davis's message stated that,

⁴ There is no indication in the record that Vertex continued to serve as the OPM for this second round of bids.

"[JRA] worked with [B.C.] in 2013/2014 -- if they weren't the worst, they were among the [two] worst [general contractors] that we have ever worked with. As such, we really need to talk to current references to understand if they still suck." Davis worked with a JRA associate, Michael Bellefeuille, to prepare a report summarizing JRA's bid review (Cambridge report), which included client reviews of B.C.'s prior work. Davis also incorporated information obtained through reference checks and from JRA's previous reports on the Dracut project. The Cambridge report stated that it appeared "that many of [B.C.'s] recently completed projects may have required formal dispute resolution (including mediation and litigation) in order to complete the project." Cambridge rejected B.C.'s bid.

Not all municipalities, however, reached the same conclusion with respect to B.C. Around the same time as the Dracut and Cambridge projects, the town of Newbury (Newbury) sought bids to build a new police station. B.C. was the lowest bidder. Although JRA was not the architect for the Newbury project, Newbury's permanent building committee obtained a copy of one of JRA's reports from the Dracut project, which contained unfavorable information about B.C. Vertex, which was the OPM on the project, nonetheless found that B.C. was a responsible bidder, and Newbury awarded the job to B.C.

Discussion. "The allowance of a motion for summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law" (quotation and citation omitted). Williams v. Board of Appeals of Norwell, 490 Mass. 684, 689 (2022). When a party moves for summary judgment on claims that the opposing party will have the burden of proving at trial, the moving party must demonstrate "that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). We review a grant of summary judgment de novo. See Casseus v. Eastern Bus Co., 478 Mass. 786, 792 (2018).

a. Intentional interference with advantageous business relations. To prevail on a claim of intentional interference with advantageous business relations, B.C. must prove that (1) it had an advantageous business relationship with a third party, (2) JRA knowingly induced the third party to forgo the business relations, (3) JRA's interference was improper in motive or means, and (4) B.C. was harmed by the interference. See Kelleher v. Lowell Gen. Hosp., 98 Mass. App. Ct. 49, 54 (2020), citing Psy-Ed Corp. v. Klein, 459 Mass. 697, 715-716 (2011). The central question in this appeal is whether there is

a genuine dispute of fact as to whether JRA's actions were motivated by an improper motive or means that harmed B.C.

This turns on the application of Cutting Edge Homes, Inc. v. Mayer, 103 Mass. App. Ct. 749 (2024) (Cutting Edge). We focus first on improper motive. "To show an improper motive, what is required is a showing of an intent specifically to harm the plaintiff, unrelated to any legitimate business purpose" (emphasis omitted). Id. at 755. See Cavicchi v. Koski, 67 Mass. App. Ct. 654, 658 (2006) (improper motive "may include ulterior motive [e.g., wishing to do injury]" as well as "evidence of retaliation or ill will toward the plaintiff" [citation omitted]). B.C. argues that its prior strained relationship with JRA -- evidenced by JRA's comments that it did not want to work with B.C. following its experience with B.C. on the Everett project and the fact that B.C.'s bids were rejected on projects where JRA was the architect but accepted on projects where JRA was not -- creates a reasonable expectation that B.C. can prove improper motive through ill will. We disagree.⁵

⁵ "Improper means include violation of a statute or common-law precept, e.g., by means of threats, misrepresentation, or defamation." Cavicchi, 67 Mass. App. Ct. at 658. B.C. does not allege JRA violated a statute. We address its claim of defamation, and the related allegation that JRA misrepresented B.C.'s business practices, below.

As we explained in Cutting Edge, the critical inquiry is whether there was any evidence that the alleged tortfeasor's motive or means were "improper," as defined by the Restatement (Second) of Torts (1979) (Restatement). Cutting Edge, 103 Mass. App. Ct. at 753. Articulating what is known as the "honest advice" rule, section 772 of the Restatement states that

"One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person

"(a) truthful information, or

"(b) honest advice within the scope of a request for the advice."

In its comments, the Restatement reiterates that it is not improper to "merely give[] truthful information to another." Restatement (Second) of Torts § 772 comment b. Further, the comments explain that the honest advice rule applies where (1) the advice was requested, (2) the advice given was within the scope of the request, and (3) the advice was honest. Id. at § 772 comment c. Advice is deemed "honest" so long as the advisor exercised good faith. See id. at § 772 comment e.

The summary judgment record before us established that in each project bid, JRA's municipal client asked it to provide advice about B.C. The record also established that, in each instance, JRA provided advice within the scope of the request; that is, advice relevant to whether B.C. was a "[r]esponsible"

bidder. G. L. c. 149, § 44A (1). Finally, B.C. has no reasonable expectation of proving that JRA's advice was not honest because it failed to demonstrate that there was a genuine issue of fact regarding JRA's exercise of good faith. JRA gathered and summarized multiple reviews -- both positive and negative -- by B.C.'s prior municipal clients and then relied on that summary as the basis of its opinion that B.C. was not a responsible bidder.⁶

We agree with the judge that nothing in the record supports B.C.'s contention that JRA implied in bad faith that municipalities had difficulty getting B.C. to finish the construction phase of projects. That JRA's negative statements may have been imprecise does not suggest an improper motive. For example, B.C. argues that JRA's statement in the Cambridge report that "many of [B.C.'s] recently completed projects may have required formal dispute resolution (including mediation and litigation) in order to complete the project," along with JRA's assertion to Cambridge's project manager about its negative impression of B.C., creates a genuine factual dispute about whether JRA acted with improper motive. However, the record

⁶ To the extent that B.C.'s bids were accepted on municipal projects where JRA was not the architect, that is irrelevant to whether JRA provided honest advice on projects where it was the architect.

does not support an inference that JRA's statements about B.C. were made in bad faith. B.C. argues only that the fee disputes underlying JRA's statements invariably occurred after B.C. had completed the construction phase of the projects, and that JRA's failure to identify any projects that B.C. required litigation to complete establishes that JRA knew its statements were false.

In fact, JRA clearly explained the basis for its statement that many of B.C.'s recent projects "may have required formal dispute resolution" to complete in the Cambridge report. Prior to writing that report, JRA spoke with participants from seven municipal projects that B.C. commenced between 2015 and 2018. JRA reported that, "Based on news reports and anecdotal respondent comments, we understand that several projects resulted in dispute resolution, including litigation and mediation, between [B.C.] and [o]wners and/or [d]esigners." JRA reported further that, "Numerous respondents noted that [B.C.] sometimes performed unauthorized work outside of the contract requirements." Finally, JRA stated that, "Several respondents noted excessive and unfounded claims for change orders by [B.C.]. Several respondents noted that [B.C.] sought additional compensation for work that was included in the [c]ontract [d]ocuments." In short, this was relevant information within the scope of JRA's duty to provide honest advice. Because JRA's statement that some projects "may have required formal dispute

resolution" to complete was founded on factual information that it gathered from references and news reports, the record does not support B.C.'s contention that JRA deliberately made a false claim about litigation being necessary to complete its projects.⁷

We also agree with the judge that, even if JRA's recommendation was influenced by a prior negative experience with B.C., which caused bias and greater reliance on negative reviews, that fact would have been, at most, evidence of negligence, which is insufficient to raise a genuine dispute as to improper motive or means. See Cutting Edge, 103 Mass. App. Ct. at 754 (in order to establish "improper" conduct for purposes of tortious interference claim, "[i]t is not sufficient to show that the advisor was negligent, or made negligent or even grossly negligent misrepresentations"). See also Restatement (Second) of Torts § 772 comment c ("If the[] conditions [for honest advice] are present, it is immaterial that the [advisor] . . . dislikes the third person and takes pleasure in the harm caused to him by the advice"). In fact, where the record demonstrates that JRA was providing advice for a legitimate business purpose -- selecting a responsible bidder

⁷ There is no record support for B.C.'s claim that JRA treated it "more severely than other contractors" by "withholding clear positive references, and outright misrepresenting others."

for a municipal construction project -- JRA's negative impression of B.C., based on its prior experience working with B.C. on a municipal construction project, was highly relevant. Cutting Edge, supra at 755 (improper motive requires "an intent specifically to harm the plaintiff, unrelated to any legitimate business purpose"). Accordingly, JRA's prior negative experience with B.C. does not create a genuine issue of material fact as to whether JRA failed to provide "honest advice within the scope of a request for the advice." See Restatement (Second) of Torts § 772.⁸ Accordingly, JRA was entitled to summary judgment as to the claim of intentional interference with advantageous business relations.

b. Defamation. "To prevail on a claim for defamation, a plaintiff must establish that (1) the defendant published a defamatory statement of and concerning the plaintiff; (2) the statement was a false statement of fact (as opposed to opinion); (3) the defendant was at fault for making the statement, and any privilege that may have attached to the statement was abused; and (4) the plaintiff suffered damages as a result, or the

⁸ In the context of taxpayer-funded public construction projects, such as this one, a narrow reading of the honest advice rule would be contrary to the public interest, as it could discourage architects and OPMs, hired by municipalities to evaluate the responsibility of bidders, from sharing critical reports that may articulate a justifiable reason to reject a bid or bidder.

statement was of the type that is actionable without proof of economic loss." Lawless v. Estrella, 99 Mass. App. Ct. 16, 18-19 (2020).

B.C. again focuses on this statement from the Cambridge report: "It appears that many of [B.C.'s] recently completed projects may have required formal dispute resolution (including mediation and litigation) in order to complete the project." JRA argues that B.C.'s defamation claim fails for several reasons, including that the common-interest privilege protects JRA from liability. We agree.

"Massachusetts courts have recognized that a person may possess a conditional privilege to publish defamatory material if the publication is reasonably necessary to the protection or furtherance of a legitimate business interest" (citation omitted). Kilnapp Enters., Inc. v. Massachusetts State Auto. Dealers Ass'n, 89 Mass. App. Ct. 212, 218 (2016). "[A] publication will be deemed conditionally privileged if the publisher of the statement and the recipient have a common interest in the subject and the statement is reasonably calculated to further or protect that interest" (quotation and citation omitted). Downey v. Chutehall Constr. Co., 86 Mass. App. Ct. 660, 666 (2014). The privilege does not apply if there is evidence that the publisher either "(1) acted out of malice, (2) knew the information was false, (3) had no reason to believe

the information to be true, (4) acted in reckless disregard of the truth or the defendant's rights, or (5) published the information unnecessarily, unreasonably, or excessively." Id. at 667. "Negligence is not enough to cause the loss of the privilege." Id. To establish recklessness, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" (citation omitted). Id. "Where, as here, a defendant in a defamation action establishes the existence of a privilege, the burden rests upon the plaintiff to raise a trial-worthy issue of an abuse of that privilege." Id. at 665.

We agree with the judge that "[t]he record contains no evidence from which the court may infer that JRA 'entertained serious doubts as to the truth of' the statement at issue." See Downey, 86 Mass. App. Ct. at 667 ("Recklessness is a difficult standard to meet"). Indeed, as discussed supra, JRA reported that its statement that B.C.'s "recently completed projects may have required formal dispute resolution" was based on reference checks with B.C.'s prior municipal clients. This information supports the judge's conclusion that there is no genuine dispute that JRA made the allegedly defamatory statement in good faith, fulfilling its professional obligation to its municipal client and furthering their common interest in selecting a responsible bidder. B.C. produced no evidence demonstrating that JRA should

have doubted the honesty and accuracy of those references, which were provided by B.C. itself as part of the bidding process. There can be no doubt that a municipality selecting a contractor for a construction project would have an interest in knowing the contractor's recent history of seeking payment for similar projects through dispute resolution, including litigation and mediation. See Lawless, 99 Mass. App. Ct. at 23-24 (statements made by defendant in response to request to assess plaintiff's job performance as town treasurer fell within conditional privilege). Because JRA's statement was privileged, the judge properly allowed JRA's motion for summary judgment on B.C.'s defamation claim.

Judgment affirmed.