

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(Filed: April 17, 2012)

WASTE HAULERS B.I., LLC :

v. :

BLOCK ISLAND RECYCLING :

MANAGEMENT, INC.; KIMBERLY H. :

GAFFETT, in her official capacity as First :

Warden and elected member of the Town :

Council of the Town of New Shoreham; :

RAYMOND J. TORREY, in his official capacity :
as the Second Warden and elected member of :
the Town Council of the Town of New :
Shoreham; KENNETH LACOSTE, in his :
official capacity as an elected member of the :
Town Council of the Town of New Shoreham; :
DR. PETER B. BAUTE, in his official capacity :
as an elected member of the Town Council of the :
Town of New Shoreham; RICHARD P. :
MARTIN, in his official capacity as an elected :
member of the Town Council of the Town of :
New Shoreham; NANCY O. DODGE, in her :
official capacity as the Town Manager and :
Purchasing Agent for the Town of New :
Shoreham; AMY LAND, in her official capacity :
as the Finance Director for the Town of New :
Shoreham :

C.A. No. WB 11-0729

DECISION

SILVERSTEIN, J. Before the Court is Defendant Block Island Recycling Management, Inc.’s (BIRM) Motion Asserting Immunity, pursuant to the Rhode Island Limits on Strategic Litigation Against Public Participation law (the Anti-SLAPP statute), codified at G.L. 1956 § 9-33-1 et seq., and Motion for Limited Discovery in Support of a Hearing Thereon. BIRM moves this Court to dismiss all counts against BIRM and award BIRM reasonable attorneys’ fees and costs under the Anti-SLAPP statute. Additionally, before the Court are the Town of New Shoreham

Defendants’¹ Motion for Protective Order regarding Discovery, as well as Plaintiff Waste Haulers B.I., LLC’s (WHBI) Motion to Compel Discovery and WHBI’s Motion to Conduct Discovery Pursuant to § 9-33-2(b).

I

Facts & Travel

On June 14, 2011, the Town of New Shoreham (New Shoreham) issued a Request for Proposals (RFP) for bids to enter into a three-year contract to operate New Shoreham’s transfer station. This RFP was advertised only in the Block Island Times newspaper. Bids were opened on July 7, 2011, and BIRM was the sole bidder. BIRM and New Shoreham, however, did not enter into a written contract following that bid.

On September 1, 2011, New Shoreham advertised a second RFP, this time in both the Block Island Times and the Providence Journal. Bids were opened on September 9, 2011, and WHBI was the only bidder. Subsequently, BIRM filed an action to enforce the first RFP. New Shoreham rescinded the second RFP and readvertised the transfer station contract in a third RFP. WHBI submitted a new bid on October 14, 2011.

New Shoreham, through the Town Defendants, voted on November 7, 2011 to award the transfer station contract to BIRM. WHBI alleges in its Second Amended Complaint that BIRM illegally and improperly influenced the Town Defendants by “dissemination of false information and the use of coercion.” (Second Am. Compl. ¶ 25.) WHBI alleges that some of the Town Defendants have connections and business relationships with BIRM, that Town Council meetings were held in executive session without proper notice and without opportunity for public

¹ The Town of New Shoreham Defendants (Town Defendants), all of whom are named in their official capacity, are Kimberly H. Gaffett, Raymond J. Torrey, Kenneth Lacoste, Dr. Peter B. Baute, Richard P. Martin, Nancy O. Dodge, and Amy Land.

debate, and that BIRM influenced and coerced the Town Defendants, obstructing and interfering with the public bidding process.

WHBI filed its initial complaint in this action on November 8, 2011 and an Amended Complaint on November 15, 2011. BIRM brought its Motion asserting Anti-SLAPP immunity on November 16, 2011. A Second Amended Complaint was filed November 23, 2011, modifying or eliminating some of the claims in the Amended Complaint that BIRM argued were subject to immunity. On December 20, 2011, a stipulation stating that the “Second Amended Complaint is in force and effect” was signed by all parties and filed, thus making the Second Amended Complaint the controlling pleading in the case. WHBI’s claims, as presented in that pleading, seek declaratory judgment against the Town Defendants (and BIRM as a necessary and indispensable party) for violation of the public purchasing laws (Count I); seek injunctive relief against the Town Defendants and BIRM from executing and operating under the contract with BIRM (Count II); seek declaratory judgment against the Town Defendants for violation of substantive and procedural due process (Count III); allege violation of the Open Meetings Act against the Town Defendants (Count V); and allege promissory estoppel against the Town Defendants (Count VI).² On December 2, 2011, WHBI, relying on the facts and claims as set forth in the Second Amended Complaint, objected to BIRM’s motion asserting immunity.

² On February 2, 2012, this Court dismissed Count IV, which had alleged damages, lost profits, and lost business opportunity.

II

Discussion

The motions at bar relate to BIRM's claim of immunity under the Anti-SLAPP statute and the connected discovery issues presented when such a motion is raised. The Court will first address the Anti-SLAPP statute and then its effect, if any, on the discovery motions in this matter.

A

Anti-SLAPP

BIRM claims that WHBI's allegations against it center on three advertisements that essentially advocated award of the transfer station contract to BIRM over WHBI. BIRM and/or its owners ran the ads in the Block Island Times in October and November 2011. BIRM contends the ads constituted protected speech on a matter of public concern. BIRM brought its motion asserting immunity under the Anti-SLAPP statute based on the First Amended Complaint. However, the Second Amended Complaint is now controlling, and as such, BIRM's Motion will be considered in respect to the facts and claims asserted in the Second Amended Complaint.³

The only count of the Second Amended Complaint brought directly against BIRM is the count for injunctive relief (brought against both BIRM and the Town Defendants), requesting the Court enjoin New Shoreham from executing the transfer station contract with BIRM and enjoin

³ BIRM, in a footnote in its supplemental memorandum, suggests that the Court should not consider the Second Amended Complaint because WHBI did not file a motion to amend. (Def.'s Supplemental Mem. of Law in Supp. of Mot. Asserting Immunity and Mot. for Limited Discovery in Supp. of a Hr'g Thereon 1 n.1, Dec. 2, 2011.) Because the parties stipulated that the Second Amended Complaint is in force and effect on December 20, 2011, the Court need not determine whether it was properly filed. See Stip., Dec. 20, 2011; Super. R. Civ. P. 15(a) (permitting amendment of pleading by written consent of adverse party).

BIRM from operating under the new contract.⁴ Significantly, the Second Amended Complaint omits any detailed allegation of speech on the part of BIRM. It simply alleges that BIRM “illegally and improperly influenced the Town Council Members by the dissemination of false information and the use of coercion” and that the Town Defendants “had already been tainted by false and misleading information disseminated by BIRM and the family that owns it.” (Second Am. Compl. ¶¶ 25, 66.) After the second amendment of its Complaint, WHBI objected to BIRM’s Motion on the grounds that the Motion was moot, or in the alternative, that BIRM’s speech was not a matter of public concern and was a sham, within the meaning provided by the Anti-SLAPP statute.

The General Assembly enacted the Anti-SLAPP statute to encourage “full participation by persons and organizations in robust discussion of issues of public concern” and to disfavor the increasing litigation intended to chill the exercise of freedom of speech and petition for the redress of grievances. Sec. 9-33-1; see Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 752 (R.I. 2004) (“enacted to prevent vexatious lawsuits against citizens who exercise their First Amendment rights of free speech and legitimate petitioning by granting those activities conditional immunity from punitive civil claims”). The Rhode Island Supreme Court has stated, “By enacting the anti-SLAPP statute, the General Assembly intended to secure the vital role of open discourse on matters of public importance, and we shall construe the statute in the manner

⁴ Count I of the Second Amended Complaint is also brought against BIRM “as a necessary and indispensable party.” That count seeks a declaration that the Town Defendants’ practice of evaluating bids and awarding contracts violated the purchasing law, G.L. 1956 § 45-55-1 et seq. WHBI was required to add BIRM to this Count as an interested party. See Sullivan v. Chafee, 703 A.2d 748, 754 (R.I. 1997) (requiring plaintiff in declaratory judgment action “join all those necessary and indispensable parties who have an actual and essential interest that would be affected by the declaration”). WHBI’s Count I for declaratory judgment is not actually brought directly against BIRM, but rather, seeks declaration that the Town Defendants violated the purchasing laws. Nonetheless, the Count contains no inference of any speech on the part of BIRM related to the requested relief.

most consistent with that intention.” Hometown Props., Inc. v. Fleming, 680 A.2d 56, 62 (R.I. 1996). Furthermore, it was “the General Assembly’s clear design that conditional immunity apply to all legitimate petitioning activity that becomes the subject of a punitive claim.” Id. at 63.

The conditional immunity of the Anti-SLAPP statute provides, in pertinent part:

“(a) A party’s exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims. Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section, except if the petition or free speech constitutes a sham. The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose. The petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both:

(1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and

(2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.

....

(e) As used in this section, ‘a party’s exercise of its right of petition or of free speech’ shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern.” Sec. 9-33-2.

Essentially, a party is immune from civil claims “directed at petition or free speech” in connection with an issue of public concern. See id. In particular, speech made “in connection

with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding,” is protected speech. See id. However, the immunity does not apply if the speech constitutes a sham, meaning it is “not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose.” Id. The petition is only a sham if it is both objectively and subjectively baseless. See id.

Although the parties raise arguments regarding whether or not speech by BIRM was on a matter of public concern or was a sham, the Court need not reach those issues. Based on the claims alleged in the Second Amended Complaint, in this case the Court is satisfied that there is no “civil claim . . . directed at petition or free speech.” See § 9-33-2(a).

By the plain language of the statute, in order for BIRM to assert Anti-SLAPP statute immunity, there would need to be a civil claim against BIRM, and that civil claim would need to be “directed at” protected speech. See id. Protected speech includes a “written or oral statement made in connection with an issue under consideration or review” See id. at (e). Here, the civil claim against BIRM is for injunctive relief preventing New Shoreham from awarding the transfer station contract to BIRM. That count of the Second Amended Complaint conspicuously lacks any allegation of written or oral speech by BIRM. See Second Am. Compl. ¶¶ 51-57. The prior paragraphs of the complaint, incorporated by reference into the count, similarly provide little to suggest the claim for injunctive relief was in any way “directed at” free speech. See id. at ¶ 25 (providing only potential reference to speech and alleging only “dissemination of false information”); § 9-33-2(a) (protecting against lawsuits directed at speech). Without allegations of speech that could be protected, there cannot be claims directed at that speech. This Court is not convinced that the Second Amended Complaint sets forth any claim against BIRM directed at any written or oral speech.

Therefore, this Court does not find BIRM to be within the class of defendants contemplated by the General Assembly to be afforded Anti-SLAPP statute immunity. See Hoffman v. Davenport-Metcalf, 851 A.2d 1083, 1088 (R.I. 2004) (declining to extend purview of Anti-SLAPP statute where court not persuaded lawsuit concerned types of activities the Legislature intended to protect). Cf. Karousos v. Pardee, 992 A.2d 263, 266-72 (R.I. 2010) (holding abuse of process claim based on filing of zoning board appeal barred by Anti-SLAPP statute immunity); Alves, 857 A.2d at 747-54 (holding libel and false-light claims based on remarks at public meetings and letters to editor in newspaper barred by Anti-SLAPP statute); Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208, 1210-14 (R.I. 2000) (holding defamation action based on statements in newspaper barred by Anti-SLAPP statute); Hometown Props., 680 A.2d at 63-64 (holding defamation and tortious interference claims based on written statements clearly constitute an exercise of free speech provided immunity); Cove Rd. Dev. v. W. Cranston Indus. Park Assocs., 674 A.2d 1234, 1235-39 (R.I. 1996) (holding malicious prosecution and abuse of process claims based on appeal of zoning board amendment barred by Anti-SLAPP statute). All of the Rhode Island Supreme Court cases applying the Anti-SLAPP statute to provide immunity concern claims explicitly directed towards speech or petitioning activities. See id. That scenario is not present here, precluding BIRM from claiming immunity. With the Second Amended Complaint, WHBI's lawsuit is—at least now—not a lawsuit intended to chill the valid exercise of speech, which the Anti-SLAPP statute intends to protect. See § 9-33-1; Global Waste Recycling, 762 A.2d at 1213 (discussing legislative intent). Thus, there is no alleged speech that is the “subject of a punitive claim” brought in the Second Amended Complaint. See Hometown Props., 680 A.2d at 63 (explaining General Assembly's intent that

the Anti-SLAPP statute apply to protected speech “that becomes the subject of a punitive claim”).

B

Discovery

When a party brings a motion asserting Anti-SLAPP statute immunity, discovery is stayed, except that the court may order specified discovery to be conducted. See § 9-33-2(b). BIRM in its Motion included a Motion for Limited Discovery to conduct a Rule 30(b)(6) deposition of WHBI. Relatedly, the Town Defendants move the Court for a Protective Order regarding depositions and discovery from the Town Defendants, in light of the pending Anti-SLAPP motion for immunity.⁵ WHBI, however, asks the Court to compel discovery from the Town Defendants or to permit discovery pursuant to § 9-33-2(b).

The merits of the individual motions, brought because of the stay of discovery under the Anti-SLAPP statute, are of no moment now, given the Court’s decision herein on the applicability of the Anti-SLAPP statute. The Court, at this time, denies BIRM’s motion for limited discovery, denies the Town Defendants’ motion for a protective order, and denies both of WHBI’s motions to compel or conduct discovery. Upon entry of the Court’s Order on the Anti-SLAPP issue, discovery shall resume, without effect of any new orders by the Court. See § 9-33-2(b) (“stay of discovery shall remain in effect until notice of entry of the order ruling on the motion”). The parties are free to bring discovery motions in the future, should they be necessary.

⁵ The Town Defendants’ Motion for Protective Order is explicitly based on the Anti-SLAPP statute stay of discovery, but also lists other motions to dismiss as reasons supporting issuance of a protective order. (Mot. of Town of New Shoreham Defs. for Protective Order Regarding Deps. and Disc. from Town Defs. 1-2, Nov. 30, 2011.) The motions to dismiss Counts IV-VI of the Second Amended Complaint have been decided by the Court; thus, they are no longer pending and do not support the Town Defendants’ request for a protective order, as the Town Defendants had argued.

III

Conclusion

After due consideration, the Court denies BIRM's motion asserting immunity pursuant to the Anti-SLAPP statute. Under the Second Amended Complaint, there is no claim directed at any protected speech of BIRM. Discovery in this matter shall resume and the automatic stay shall be lifted upon filing of the Order ruling on the Anti-SLAPP immunity Motion. Prevailing counsel shall present an Order consistent herewith, which shall be settled after due notice to counsel of record.