CAUSE NO. 2006-79728

| | | |
|---|---|---|
| SUPERIOR REFINISHING SYSTEMS, LLC d/b/a SUPERIOR SERVICES and TEXAS NES, LLC d/b/a NE SERVICES | § | IN THE DISTRICT COURT OF |
| vs. | § | HARRIS COUNTY, TEXAS |
| STATE BANK and VINCE MANCUSO | § | 295TH JUDICIAL DISTRICT |

**Defendant Prosperity Bank's and Vince Mancuso's Traditional Motion for Partial Summary Judgment on Plaintiffs' Claims for Defamation and Business Disparagement**

To the Honorable Tracy E. Christopher:

Defendants Prosperity Bank, f/k/a State Bank (hereinafter "State Bank" or sometimes "the bank") and Vince Mancuso (collectively, "defendants"), move for summary judgment on plaintiffs' claims of defamation and business disparagement and their claims for lost profits, "lost gross sales," or any other consequential damages.

## 1. Nature and Stage of Proceeding

In this case, two commonly-owned customers of State Bank have sued the bank and a bank officer for defamation and business disparagement. Both plaintiffs signed substantially similar contracts. In those contracts, both plaintiffs consented to the allegedly defamatory and disparaging statements defendants made. Plaintiffs' consents afford defendants the defenses, as a matter of law, of absolute privilege to plaintiffs' claims. Therefore, the Court should enter judgment as a matter of law for both the bank and the bank officer.

Plaintiffs also waived their claims for consequential damages. This waiver entitles defendants to judgment as a matter or law on these claims as well.

Defendants file this motion early in the case rather than burden the Court and parties with discovery because basic legal defenses determine the outcome. (Both governing contracts

contain jury waivers. The Court – not a jury – will determine the merits of this proceeding whether on summary judgment or in a bench trial.)

**2. Undisputed Facts**

Plaintiffs run a series of local residential cabinet and interior refinishing businesses. (For convenience, this motion refers to all plaintiff parties as "plaintiffs" or individually as "Superior Refinishing" and "Texas NES.") In 2003, plaintiffs began a factoring relationship with State Bank that enabled them to take cash in exchange for assigning accounts receivable to State Bank. Both plaintiffs (Superior Refinishing and Texas NES) signed two substantially identical "Accounts Receivable Purchasing Agreements" ("the Purchasing Agreements"). These Purchasing Agreements are attached as Exhibit 1(A) and 1(B) to the accompanying affidavit of Vince Mancuso ("Mancuso Aff."), and all other exhibits are attached to Mr. Mancuso's affidavit in like fashion. The affidavit of State Bank executive vice president Malvin Green proves up these agreements as business records. Green Aff. ¶ 2.

Under the Purchasing Agreements, plaintiffs sold to State Bank (the purchaser) "as absolute owner, **with full recourse**, such of Seller's Accounts as are listed from time to time on Invoice Delivery Schedules." Mancuso Aff. ¶ 4 & Exh. 1(A) and 1(B), at 3 (emphasis in original). Plaintiffs also gave State Bank a lien on ***all*** plaintiffs' accounts receivable. *Id.*

Further, consistent with most factoring arrangements, plaintiffs gave the bank consent to contact plaintiffs' customers directly and to take payments directly from plaintiffs' customers. As part of this consent, plaintiffs "waive[d] and release[d] any rights and claims . . . based in any way upon such contacts." *Id.* The agreements define the universe of rights and claims waived as "including, but not limited to claims for ***disparagement, interference with business***

***relationships, or any other form of damage to the Seller or its business(es)***." *Id.* ¶ 5 & Exh. 1(A) and 1(B), at 10 (emphasis added).

Plaintiffs gave the bank powers of attorney to contact plaintiffs' customers. *Id.* ¶ 5 & Exh. 1, at 17. Plaintiffs even signed "to whom it may concern" form letters confirming that plaintiffs assigned their "present and future accounts receivable to STATE BANK," that the recipients of the letters are "irrevocably authorized" to rely on photocopies or faxes of the letters, that the letters supersede any prior contrary communication, and that the letters "may only be rescinded by the Bank in writing." *Id.* ¶ 5 & Exh. 2(A) & 2(B); *see also* Green Aff. ¶ 2 (proving up letters as business records). Notably, the parties expressly disclaimed any oral agreements, specifically to empower this Court to dispose of disputes like this in a summary judgment proceeding. *Id.* ¶ 5 & Exh. 3(A) & 3(B); Green Aff. ¶ 2; *see generally Whitney Nat'l Bank v. Air Ambulance, Inc.*, 2007 U.S. Dist. LEXIS 31482, *33-34, 35-36 (S.D. Tex. April 22, 2007) (Rosenthal, J.) (enforcing merger clauses as to prior, contemporaneous, and subsequent oral agreements).

Indeed, the bank would never have entered into these factoring agreements without plaintiffs' consent to contact debtors and plaintiffs' waiver of defamation/disparagement claims like this. Mancuso Aff. ¶ 6. As defendant Mancuso explains, the factoring industry relies on courts to enforce these provisions to protect banks and finance companies against the risk of customers' presenting the bank with exaggerated or fabricated invoices. *Id.*; *see also Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 884 n.4 (S.D.N.Y. 1999) (discussing well-known problem of "phony invoicing" in factoring business).

Unfortunately, that's what happened here. In late spring and early summer 2006, State Bank discovered that plaintiffs had deceived State Bank about the timing, amount, and existence of several invoices. Mancuso Aff. ¶ 7.

Ultimately, in June 2006, plaintiffs defaulted on their payments under the Purchasing Agreements. *Id.* (Plaintiffs tacitly concede their default in their petition.) In any event, the bank had the right to collect directly from plaintiffs' customers even without plaintiffs' default.

Upon plaintiffs' default, State Bank (working through defendant Mancuso and others) notified plaintiffs' customers ("Account Debtors" under the Purchasing Agreements) to make payment to the bank. *See* Mancuso Aff. ¶ 8. Again, the Purchasing Agreements gave the bank full discretion to contact any of plaintiffs' customers (that is, plaintiffs' "Account Debtors" under the Purchasing Agreements). In fact, the Purchasing Agreements define "Account Debtor" broadly to include any party obligated to pay an "Account," which simply means "any right of the Seller [plaintiffs] to payment as a result of the Seller's sale or lease of goods and/or rendering of services . . . ." Mancuso Aff. ¶ 8 & Exh. 1(A) and 1(B), at 10 (emphasis added).

In short, the bank and its officer, Mancuso, had the right to contact any of plaintiffs' accounts and say whatever they wanted. That was part of the consideration plaintiffs gave up (along with the accounts themselves) in exchange for the cash the bank gave them. Plaintiffs' consents in the Purchasing Agreements allowed defendants to do exactly what plaintiffs complain about here.

### 3. Argument and Authorities

#### (A) Plaintiffs' Consents Give Defendants Complete and Absolute Defenses to Plaintiffs' Defamation and Business Disparagement Claims

Plaintiffs contend that defendants' June 16, 2006 notice and related communications to customers constituted defamation and business disparagement. But plaintiffs' claim has a lethal defect: plaintiffs' signing of the Purchasing Agreements, with the agreements' waivers, releases, and powers of attorney in defendants' favor. Plaintiffs' consent to these terms gives defendants complete and absolute defenses to plaintiffs' defamation and business disparagement claims.

Texas law makes clear that "[t]he ***consent*** of another [the person defamed] to the publication of defamatory matter concerning him is a ***complete defense*** to his action for defamation." *Smith v. Holley*, 827 S.W.2d 433, 436 (Tex. App.—San Antonio 1992, writ denied), quoting Restatement (Second) of Torts § 583 (1977) (emphasis added). As the *Smith v. Holley* court observed, "[t]he general social policy of denying recovery for conduct to which the plaintiff has given his consent finds expression in an ***absolute immunity*** in cases where consent is given to defamation." *Id.*, quoting Prosser & Keeton on Torts § 114, at 823 (5th ed. 1984) (emphasis added). Texas has long followed this rule. More than sixty years ago, the Texas Supreme Court stated: "If the publication of which the plaintiff complains was consented to, authorized, invited, or procured by the plaintiff, he cannot recover for injuries sustained by reason of the publication." *Lyle v. Waddle*, 188 S.W.2d 770, 772 (Tex. 1945); *see also Renfro Drug Co. v. Lawson*, 160 S.W.2d 246, 251 (Tex. 1942) (observing that a libel or slander "invited or procured" by plaintiff is not enough to support a defamation suit).

The doctrine of "absolute privilege" applies with equal force to plaintiffs' business disparagement claim (a business injury claim) as it does to plaintiffs' defamation claim (a

personal injury claim). Again, the Restatement says: "The circumstances under which there is an absolute privilege to publish an injurious falsehood [i.e., a business disparagement] ***are in all respects the same*** as those under which there is an absolute privilege to publish matter that is personally defamatory." Restatement (Second) of Torts § 635, comment a (emphasis added); *see generally Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 767-68 (Tex. 1987) (noting that privileges to defamation and business disparagement "are based on public policy concerns which elevate the good to be accomplished by the free and open exchange of information over the harm which may result from the falsehood").

The absolute privilege of consent rests in basic tort law. Consent can occur with respect to any manner of intentional torts ranging from defamation to surgical procedures to tackle football to trespass to land. Each would be tortious in the absent of consent. *See Smith v. Holley*, 827 S.W.2d at 438. In fact, consent can effectively bar recovery in a tort action even with respect to criminal conduct. *Id.*, quoting Restatement (Second) of Torts § 892C.

Here, plaintiffs consented to whatever communications the bank (and, of course, Mancuso) had with their customers. Nothing in plaintiffs' consent limited the bank to a standard of pleasantness, good manners, or truthfulness. Plaintiffs' waiver extended to "any rights and claims" based "in any way" upon the bank's contacts with plaintiffs' accounts. Mancuso Aff., ¶ 5 & Exh. 1(A) and 1(B), at 10. Plaintiffs gave the bank power of attorney "[t]o contact Account Debtors at any time in order to verify and/or collect Accounts." *Id.* at 17. Again, like *Smith v. Holley*, plaintiffs' consent reaches all kinds of defamatory remarks; "it does not authorize disclosure of true information only, or favorable information." 827 S.W.2d at 439. That's the deal plaintiffs made. They cannot retrade on it now.

Indeed, in this case, State Bank obtained plaintiffs' consent for the same concerns about "phony invoicing" that pervade the factoring business in general. *See Shamis*, 34 F. Supp. 2d at 884 n.4; Mancuso Aff. ¶ 6. Plaintiffs' fraud ultimately led to the bank's actions in this case. Defendants need not prove that fraud here. Defendants need only prove plaintiffs' consent, waiver, and power of attorney in defendants' favor.

**(B) Plaintiffs Waived Their Claims for Consequential Damages**

Another clause in the Purchasing Agreements bars plaintiffs' damages claims: the exclusion of consequential damages.

Plaintiffs allege millions of dollars in "lost gross sales" arising from defendants' alleged defamation/disparagement. *See, e.g.*, plaintiffs' disclosures, attached as Exh. 4, at 3. (In fact, in their disclosures, plaintiffs allege no damages under their "overcharge"/breach-of-contract claim, the only other claim in this case.) Of course, plaintiffs are entitled only to lost profits, not lost revenues, if they are entitled to anything at all. But plaintiffs waived their claims for lost profits and all other consequential damages in the Purchasing Agreements:

> Seller hereby releases and discharges Purchaser, its officers, employees and designees, from any liability arising from any acts under this Agreement or in furtherance thereof whether of omission or commission, and whether based upon any error of judgment or mistake of law or fact, except willful misconduct. ***In no event will Purchaser have any liability to Seller for lost profits or other special or consequential damages.***

Exh. 1(A) & 1(B), ¶ 9.3, at 7 (emphasis added).

Texas law honors exclusions, like this one, that preclude liability for consequential damages. *See, e.g., Global Octanes Tex. L.P. v. BP Exploration & Oil, Inc.*, 154 F.3d 518, 521 (5th Cir. 1998) (applying Texas law and honoring agreement to limit liability); *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 747-48 (Tex. App.—Fort Worth 2005, no pet.) (same).

This Court should honor this limitation and strike plaintiffs' claims for lost profits, "lost gross revenues," and any other type of consequential damages they claim against defendants.

**4. Prayer**

Plaintiffs consented to the conduct they allege in their defamation and disparagement claims. That consent constitutes a complete and absolute defense to those claims. Moreover, plaintiffs waived their claims for consequential damages, including their claims for lost profits and "lost gross revenue." Therefore, this Court should grant this motion and enter judgment as a matter of law for State Bank and Vince Mancuso on plaintiffs' defamation and business disparagement claims.

Dated this 15th day of June, 2007.

Respectfully submitted,

**SIEGMYER, OSHMAN & BISSINGER LLP**

By: _____

Gerald S. Siegmyer
State Bar No. 18343300
David K. Bissinger
State Bar No. 00790311
2777 Allen Parkway, Tenth Floor
Houston, Texas 77019
Telephone: (713) 524-8811
Facsimile: (713) 524-4102

**Attorneys for Defendants, Prosperity Bank, a Texas Banking Association, as successor by merger to State Bank, and Vince Mancuso**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to the following counsel of record via hand delivery, on this the 15th day of June, 2007:

Craig Welscher
The Welscher Law Firm
1111 North Loop West, Suite 702
Houston, Texas 77008
***Counsel for Plaintiffs, Superior Refinishing Systems, LLC d/b/a Superior Services Texas NES, LLC d/b/a NE Services***

David K. Bissinger