

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND WOOD : CIVIL ACTION
 :
 v. :
 :
 DAVID L. COHEN, et al. : NO. 96-3707

RAYMOND WOOD : CIVIL ACTION
 :
 v. :
 :
 JOSEPH DWORETZKY, et al. : NO. 97-1548

M E M O R A N D U M

Padova, J.

March , 1998

Plaintiff, Raymond Wood, brings these consolidated actions against the City of Philadelphia ("City") and a number of City officials, claiming that the Defendants discriminated against him on the basis of his race and retaliated against him because he had previously sued the City and City officials. The discrimination and retaliation alleged in the Complaints in large part involved Plaintiff's efforts to develop urban entrepreneurial projects and his business relationship with Odunde, Inc. ("Odunde"), a community-based organization.

Before the Court is Defendants' Motion for Summary Judgment, which seeks judgment in favor of all Defendants in both actions on all counts. For the reasons set forth below, the Court will grant in part and deny in part Defendants' Motion.

I. BACKGROUND

A. Wood v. Cohen, et al.

In Wood v. Cohen, et al. ("Cohen"), Plaintiff names the following as Defendants: David L. Cohen, former Chief of the Staff to the Mayor of Philadelphia; John Kromer, Director of the Office of Housing and Community Development ("OHCD"); John F. Street, President of the City Council; and the City.¹

1. Facts²

Plaintiff alleges the following. Plaintiff is a real estate developer in the City. In March 1994, he filed a separate lawsuit in this Court against several City officials alleging a conspiracy to undermine one of his commercial development projects, an international farmers market ("Farmers Market") in North Philadelphia. Wood v. Rendell, Civ.A.No. 94-1489, 1995 WL 676418 (E.D. Pa. Nov. 3, 1995) ("Rendell"). A March 1995 television program featured the Farmers Market and described it as a beneficial community activity. Following that program,

¹As set forth more fully in footnote 3 below, by agreement of the parties, Barbara Kaplan, Executive Director of the Office of City Planning, has been dismissed with prejudice as a Defendant in Cohen.

²As discussed more fully below, some of the operative facts are in dispute. In addition, a number of Plaintiff's contentions are without factual support. Therefore, the factual background for each lawsuit is based on the allegations contained in Plaintiff's Complaint in that suit.

Defendants Kromer and Street referred to Plaintiff as a "loon" and "lunatic," referred to the Farmers Market project as a "bombed-out piece of worthless trash," and discouraged at least one potential investor, John Weston, from investing in the project. (Cohen Am. Compl. at ¶¶ 15-25.)

In April 1994, Plaintiff established a professional relationship with Odunde, a non-profit, community based organization that aims inter alia (1) to promote the cultural heritage of the black residents of South Philadelphia; (2) create economic opportunities for small black businesses; and (3) to permanently establish the Odunde Cultural Festival ("Festival") in South Philadelphia. (Id. at ¶ 30). From March 1994 to the present, Defendants "took action to hinder plaintiff's ability to raise alternative funds for his market development" and "disrupt[ed] plaintiff's ability to nurture and interact profitably with its client Odunde." (Id. at ¶¶ 33-34). According to Plaintiff, each Defendant played a unique role in interfering with his activities related to Odunde. The City imposed, after June 1994, additional fees on Odunde and its vendors that the City traditionally either had waived or subsidized for other non-profit festivals; restricted the size and quantity of vending sites available for Odunde's vendors; harassed vendors who participated in the Festival; and acting with Defendants Street and Cohen, rejected requests for access to

City programs and technical assistance. (Id. at ¶¶ 33-35.)

Defendant Street, between January 1995 and June 1995, encouraged United States Representative Tom Foglietta to withdraw support he previously gave to Odunde and the Festival; induced Odunde officials to distance themselves from Plaintiff by promising alternative funding for the Festival; encouraged local black officials not to participate in the Festival; and hindered, in August, 1995, subsequent fund-raising activities undertaken to reimburse Plaintiff. (Id. at ¶¶ 41-43.) Defendant Street engaged in this activity in retaliation for Plaintiff having sued the City on prior occasions and "because plaintiff was a black male and Street did not want plaintiff to be [a] successful, independent black male who was not dependent on or subject to Street's control." (Id. at ¶ 44).

Plaintiff claims that Defendant Cohen falsely stated, in May 1995, that the City would fund the Festival. These statements made Plaintiff's fund-raising efforts appear "disingenuous, unnecessary, and greedy," interfered with his ability to raise money, and discredited him. (Id. at ¶¶ 36-37.) Defendant Cohen made such statements "with knowledge or reason to know they were false . . . and would harm plaintiff's fund-raising efforts on behalf of his client Odunde." (Id. at ¶ 38). He undertook this conduct "in retaliation for plaintiff having filed the prior

litigation against the City defendants and/or were [sic] independently motivated by racial considerations." (Id. at ¶ 40).

Defendant Kromer, during a fund-raising meeting on December 12, 1995 held in the office of City Councilwoman Anna Verna, stated "and/or implied" that Plaintiff "had no experience to be involved in any housing or development activity, that plaintiff had sued him and the City and[,] therefore[,] was not someone with whom Odunde should do business if it wanted City services[,] and the OHCD would not be doing business with plaintiff." (Id. at ¶ 53). He thereafter denied Plaintiff and Odunde access to federal funds. (Id. at ¶¶ 54-60.)

2. Causes of Action³

The Amended Complaint in Cohen contains five counts brought

³As a result of a prior order of the Court and a stipulation of the parties, the individuals originally named as Defendants in the various Counts included in the Amended Complaint in Cohen have been changed. The Court dismissed the City with prejudice from Counts I, II, III, and IV of the Amended Complaint. Wood v. Cohen, et al., Civ.A.No. 96-3707, 1997 WL 59324 (E.D.Pa. Feb. 12, 1997). In addition, the parties stipulated to the following: the dismissal with prejudice of Defendants Kaplan and Street as defendants in Counts I and II; the dismissal with prejudice of Defendants Cohen and Street as defendants in Count III; the dismissal with prejudice of Defendants Cohen and Street only from the equal protection claim in Count IV; and the dismissal with prejudice of Defendant Kaplan as a defendant in Counts VI and VII. (2/25/98 Stip. and Ord.)

under federal law. Count I is brought under 42 U.S.C.A. § 1981 (West 1994) against Defendant Kromer and charges him with racial discrimination. This Count is based on the factual allegations set forth in paragraphs 1-25 of the Amended Complaint -- that is, Defendant Kromer's alleged disparagement of Plaintiff and the Framers Market project to John Weston and his alleged attempts to discourage Mr. Weston from investing in the Farmers Market and to encourage him to invest in other City projects.

Count II is brought under 42 U.S.C.A. § 1983 (West Supp. 1997) against Defendant Kromer and charges him with violating Plaintiff's equal protection rights. This Count is based on the same factual allegations as Count I.

Count III is brought under 42 U.S.C. § 1981 against Defendant Kromer and charges him with racial discrimination. This count is based on Plaintiff's activities with Odunde and the Odunde Festival.

Count IV is brought under 42 U.S.C. § 1983. This Count includes a due process claim, based on Plaintiff's reputation and livelihood interests, and a First Amendment retaliation claim against Defendants Cohen, Kromer, and Street.⁴ This Count also

⁴In Cohen and Dworetzky, Plaintiff includes his First Amendment retaliation claims in counts brought under Section 1981. The First Amendment retaliation claim is properly brought under Section 1983 because, unlike Section 1981, it is not limited to racial considerations. Anderson v. Davila, 125 F.3d 148, 159-60 (3d Cir. 1997)(official retaliation for the exercise of First Amendment rights creates an actionable claim under

includes an equal protection claim against Defendant Kromer for denying Plaintiff the same benefits and protections accorded similarly situated white males in connection with Plaintiff's activities with Odunde and the Odunde Festival.

Count V is brought under 42 U.S.C. § 2000d (West 1994) and charges that the City, through Defendants Cohen, Kromer, and Street, discriminated against Plaintiff by denying him access to federally funded, economic development programs administered by the City.

The Cohen Amended Complaint also contains two state law claims. Count VI is brought against Defendants Kromer and Street for slander and libel. Count VII is brought against Defendants Cohen, Street, Kromer, and the City for tortious interference with Plaintiff's commercial and business relations.

B. Wood v. Dworetzky, et al.

In Wood v. Dworetzky, et al. ("Dworetzky"), Plaintiff names the following as Defendants: Joseph A. Dworetzky, former City Solicitor; James B. Jordan, former Chair, Litigation Group of the City Law Department; William R. Thompson, former Senior Attorney,

Section 1983); White v. Napoleon, 897 F.2d 103, 111-12 (3d Cir. 1990)("Retaliation for the exercise of constitutionally protected rights is itself a violation of rights secured by the Constitution actionable under section 1983."). Therefore, the Court will treat Plaintiff's First Amendment claim as though it were brought under Section 1983.

City Law Department; and the City.

1. Facts

Plaintiff alleges that Defendants engaged in the following conduct. On January 23, 1996, Defendant Thompson of the City's Law Department wrote to Plaintiff's counsel, Rosalind Plummer, advising her that all future communications from Plaintiff to Defendant Kromer and OHCD must be conducted through Defendant Thompson because of the pending Rendell litigation and "the apparent atmosphere of accusation in Mr. Wood's letter."

(Dworetzky Compl. at ¶¶ 27-29 and Exh. to Compl.) The letter that Defendant Thompson references was written by Plaintiff to Defendant Kromer on December 18, 1995 following a meeting held on December 12, 1995 with Plaintiff, representatives of Odunde, City Councilwoman Verna, and Defendant Kromer.

Plaintiff alleges that the policy set forth in Defendant Thompson's January 23, 1996 letter, and confirmed by Defendants Jordan and Dworetzky, operated to exclude and restrict Plaintiff from access to the City's federally funded technical assistance and development programs administered and operated through OHCD. (Id. at ¶¶ 26-29, 46-50.) Plaintiff further contends that by vesting Defendant Thompson, the attorney handling the Rendell litigation, with control over Plaintiff's access to OHCD, Plaintiff's access to OHCD programs and technical assistance was

further restricted. (Id. at ¶¶ 30-32.) As a result, Plaintiff was denied the opportunity to secure funding for Odunde, was shut out of the City's community/development activities, was prevented from pursuing any development projects in distressed urban communities, and was unable to pursue his livelihood as an entrepreneurial developer. (Id. at ¶¶ 59-66.)

2. Causes of Action

The Complaint in Dworetzky contains three counts. Count I is brought against all Defendants under Section 1981. Plaintiff alleges that the retaliative conduct and restrictive policies alleged in the Complaint were engaged in by Defendants because Plaintiff is an African-American.

Count II is brought against all Defendants under Section 1983. Plaintiff alleges that Defendants violated his First Amendment rights to petition and to exercise free speech, his equal protection rights, and his due process rights to pursue his livelihood.

Count III is brought against all Defendants under Section 2000d and is based on the alleged racial discrimination engaged in by Defendants in restricting Plaintiff's access to federally funded programs.

II. LEGAL STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is

appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

III. DISCUSSION

A. Section 1981

Plaintiff brings claims in both lawsuits based on 42 U.S.C. § 1981. Section 1981 provides as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

To sustain a claim under Section 1981, Plaintiff must demonstrate the following: "(1) that he is a member of a racially cognizable group; (2) an intent to discriminate on the basis of race by the defendant; and (3) that the discrimination concerned one or more of the activities enumerated in the statute, i.e. mak[ing] and enforc[ing] contracts." Wood v. Rendell, 1995 WL 676418, at *3 (citing Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993)(remarking "[s]ection 1981 . . . prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason

of his or her race"))).

The United States Court of Appeals for the Third Circuit ("Third Circuit") has applied the burden shifting analysis laid down in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973), and refined in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 152-53, 101 S. Ct. 1089, 1093-94 (1981), to Section 1981 cases where intent to discriminate is at issue. Chauhan v. M. Alfieri Co., Inc., 897 F.2d 123, 126-27 (3d Cir. 1990). Defendants argue that under the burden shifting analysis, Plaintiff has not adduced any evidence that the conduct of Defendants of which Plaintiff complains was the result of Defendants' intent to discriminate against Plaintiff because he is African-American.

Under the McDonnell Douglas formula, Plaintiff must first establish a prima facie case of racial discrimination. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; Chauhan, 897 F.2d at 127. Only then does the Court reach the issue of Defendants' intent to discriminate. The burden shifting analysis is utilized because intentional discrimination is often difficult to prove. Chauhan, 897 F.2d at 127. If Plaintiff establishes a prima facie case of racial discrimination, the burden shifts to Defendants to offer a legitimate, non-discriminatory reason for their actions. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. Once Defendants make this proffer, the burden shifts back to Plaintiff

to prove that the Defendants' proffered reasons are a pretext for discrimination, that is, that the Defendants' actual intent was racial discrimination. Id., 411 U.S. at 804, 93 S. Ct. at 1825.

Here, even if the Court assumes that Plaintiff has established a prima facie case for the many acts of discrimination he alleges, Defendants have offered legitimate, non-discriminatory reasons for all of their actions.⁵ For example, with respect to the collection of vendor fees and the consideration of a different location for the Odunde Festival, Defendants have proffered evidence that such fees are routinely collected to offset the costs incurred by the City in providing

⁵McDonnell Douglas set forth the elements of a prima facie case of racial discrimination in the context of a Title VII employment discrimination case. To establish a prima facie case in that context, a plaintiff must show (1) that s/he is a member of a racial minority, (2) that s/he applied and was qualified for a job that an employer was seeking to fill, (3) that despite her/his qualifications, s/he was rejected, and (4) that afterwards, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. The Supreme Court recognized that the standard for establishing a prima facie case of racial discrimination is not inflexible and must be modified to accommodate differing factual situations. Id., 411 U.S. at 802 n.13, 93 S. Ct. at 1824 n.13; Burdine, 450 U.S. at 253 n.6; 101 S. Ct. at 1094 n.6. Although portions of Defendants' Motion appear to be aimed at challenging the establishment by Plaintiff of a prima facie case, they never expressly make this argument by addressing the required elements of a prima facie case. In addition, Plaintiff alleges a broad array of conduct that allegedly is discriminatory, which would necessitate a painstaking prima facie analysis for each alleged incident. For that reason, the Court will not analyze the threshold question of whether Plaintiff has established a prima facie case of racial discrimination, but instead will focus on the intent issue, as Defendants have done in their Motion.

services to festivals and that the possible change of location for the Festival was prompted by public safety concerns.⁶ At this stage, the burden shifts back to Plaintiff to show that Defendants' explanations for their actions are pretextual.

The Third Circuit in Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994), set forth what a plaintiff must adduce to survive a motion for summary judgment when the defendant offers a legitimate reason for its action in a "pretext" discrimination case.

[T]he plaintiff generally must submit evidence which: 1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse [] action.

Id. at 762.

Fuentes also addresses the nature and quantum of evidence that Plaintiff must adduce on the issue of pretext.

[T]he plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the [defendant's] articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the [defendant's] action. . . . [A] plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (I) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or

⁶The Court notes that the Festival was not moved from its South Philadelphia location.

determinative cause of the adverse [] action. . . . [T]he non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for [the asserted] non-discriminatory reasons.

Id. at 764-765 (internal quotations and citations omitted).

The Court finds that Plaintiff has not come forward with competent evidence, as defined in Fuentes, to demonstrate that a genuine issue of fact exists as to pretext. Plaintiff's "evidence," when boiled down to its essence, is simply that racial discrimination has to be the basis for Defendants' conduct because there is no other reason to justify their behavior. At his deposition, Plaintiff testified as follows:

I believe my race was a significant reason why the City did not do business with me. And my reason for feeling that way was that I have never been given any satisfactory reason why the City would not do business with me. It certainly had nothing to do with the quality of my projects or the pieces that I brought to the table.

(11/4/97 Wood Dep. at 26.) This clearly does not meet the Fuentes standard. Plaintiff has utterly failed to demonstrate any weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Defendants' proffered legitimate reasons for their conduct with respect to Plaintiff's Section 1981 claim in Cohen.

This conclusion applies with equal force to Plaintiff's Section 1981 claim in Dworetzky. There is nothing contained in

any of the correspondence cited by Plaintiff as forming the basis for his Section 1981 claim to suggest the existence of racial animus by Defendants. The reasons given by Defendants for denying Plaintiff direct contact with Defendant Kromer and the OHCD were based on the hostile attitude displayed by Plaintiff towards Defendant Kromer and Plaintiff's filing of the Rendell action. Plaintiff has not adduced any evidence that conceivably could support a finding of intentional racial discrimination. Therefore, Plaintiff's Section 1981 claims in Cohen (Counts I and III) and Dworetzky (Count I) fail as a matter of law.⁷

B. Section 1983

In these consolidated lawsuits, Plaintiff brings a number of different claims under Section 1983 -- retaliation for Plaintiff's exercise of his First Amendment rights (i.e., filing the Rendell action), equal protection, and due process (both property and liberty interests).⁸ The Court will address each of

⁷An alternate basis for granting summary judgment on Count I of Cohen exists. Counts I and II of Cohen are brought only against Defendant Kromer and are based solely on the allegations in the Amended Complaint concerning John Weston. As discussed more fully in Section E.1 below, Plaintiff has adduced no evidence to support these allegations. In particular, there is no evidence whatsoever that connects Defendant Kromer to John Weston. Therefore, summary judgment in favor of Defendant Kromer will be granted on Counts I and II of Cohen.

⁸In Cohen, Plaintiff includes his First Amendment retaliation claims in the counts brought under Section 1981, not Section 1983. In Dworetzky, the retaliation claim is brought

these claims in turn.⁹

1. Retaliation for Exercising First Amendment Rights
In Mt. Healthy City School District Bd. of Educ. v. Doyle,
429 U.S. 274, 97 S. CT.. 568 (1977), the Supreme Court held that
an individual has a viable claim against the government when he
or she is able to prove that the government took action against
him or her in retaliation for his or her exercise of First
Amendment rights. As explained by the Third Circuit in Anderson
v. Davila, 125 F.3d 148, 161 (3d Cir. 1997),

Under Mt. Healthy and its progeny, an otherwise legitimate
and constitutional government act can become
unconstitutional when an individual demonstrates that it was
undertaken in retaliation for his exercise of First
Amendment speech. This doctrine demonstrates that, at least
where the First Amendment is concerned, the motives of
government officials are indeed relevant, if not
dispositive, when an individual's exercise of speech
precedes government action affecting that individual.¹⁰

To prevail on his First Amendment retaliation claim,

under both Section 1981 and Section 1983.

⁹The Court notes that in Dworetzky, unlike in Cohen,
Defendants never moved to dismiss the Monell claims against the
City.

¹⁰Mt. Healthy falls within a larger category of Supreme Court
cases known as the "unconstitutional conditions" doctrine,
whereby "government 'may not deny a benefit to a person on a
basis that infringes his constitutionally protected freedom of
speech' even if he has no entitlement to that benefit." Board of
County Commissioners v. Umbehr, ___ U.S. ___, 116 S. Ct. 2342,
2347 (1996)(quoting Perry v. Sindermann, 408 U.S. 593, 597, 92 S.
Ct. 2694, 2697 (1972)).

Plaintiff must establish the following three elements: (1) he engaged in protected activity; (2) Defendants responded with retaliation; and (3) his protected activity was the cause of Defendants' retaliation. Id.

Defendants admit, and the Court finds, that by filing the Rendell action, Plaintiff engaged in protected activity. The right of access to court is protected by the First Amendment's clause granting the right to petition the government for grievances. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 612 (1972); Brown v. Grabowski, 922 F.2d 1097, 1111 (3d Cir. 1990). Where, as here, the protected activity is a lawsuit, Plaintiff only needs to show that his lawsuit was not frivolous in order to make out a prima facie retaliation claim.¹¹ San Filippo v. Bongiovanni, 30 F.3d 424, 434-443 (3d Cir. 1994)

Regarding causation, Plaintiff must show that his filing of the Rendell action was a "substantial" or "motivating" factor in the Defendants' decision to retaliate against him. Mt. Healthy, 429 U.S. at 287, 97 S. Ct. at 576; Anderson v. Horn, Civ.A.No. 95-6582, 1997 WL 152801, at *2 (E.D.Pa. March 28, 1997). If he

¹¹Although a plaintiff ordinarily must show that his speech was a matter of public concern to qualify it as protected activity under the First Amendment, the Third Circuit has held that this requirement does not apply where the protected activity is the filing of a non-frivolous lawsuit by the plaintiff. Anderson v. Davila, 125 F.3d at 162.

makes this showing then the burden shifts to the Defendants to prove that they would have reached the same decision in the absence of the prior law suit. Id.

The Rule 56 submissions raise genuine issues of fact as to the following: whether Defendants responded with retaliation to Plaintiff's filing of the Rendell action; if so, whether the Rendell action was a substantial or motivating factor in the Defendants' decision to retaliate against Plaintiff; and whether Defendants would have reached the same decision or engaged in the same conduct in the absence of Rendell action. In particular, the Court finds that the evidence contained within the Rule 56 submissions concerning alleged statements by Defendants Kromer and Cohen and correspondence authored by members of the City Law Department arguably raise an inference of retaliatory motive. For these reasons, the Court will deny Defendants' Motion for Summary Judgment as to the First Amendment retaliation claims included in Count IV of Cohen and Count II of Dworetzky.¹²

2. Equal Protection

In order to sustain a claim under Section 1983 based on the Equal Protection Clause of the Fourteenth Amendment, Plaintiff must show he "was a member of a protected class, was similarly

¹²Although Plaintiff can go forward with his First Amendment retaliation claim, only actions that occurred after the filing of the Rendell action can form the basis for this claim.

situated to members of an unprotected class, and was treated differently from the unprotected class." Wood v. Rendell, 1995 WL 676418, at *4 (citation omitted). As an African-American, Plaintiff is a member of a protected class. But Plaintiff has not come forward with evidence to support the other two required elements of an equal protection claim based on race. This failure is fatal to Plaintiff's equal protection claims as framed in Count IV of Cohen and Count II of Dworetzky.

In an attempt to salvage these claims, counsel for Plaintiff argued during the hearing on Defendants' Motion that, although the claims as stated in the Complaints allege discrimination on the basis of Plaintiff's race, Plaintiff's equal protection claims are not race-based. Instead, these claims are based on Defendants' denial to Plaintiff of access to benefits controlled by OHCD to which he was entitled as a citizen. (1/16/98 Hr'g Tr. at 62-64) In making this argument, Plaintiff has failed to identify the particular protected class of which he is a member. Does the protected class consist of intended beneficiaries of federal funds? Developers? Citizens of the United States?

In its most general sense, the Equal Protection Clause directs that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985). However, to maintain an action under the Equal Protection Clause, a plaintiff

"must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual." Huebschen v. Dept. of Health & Social Service, 716 F.2d 1167, 1171 (7th Cir. 1983); see also Murray v. Pittsburgh Board of Education, 919 F. Supp. 838, 847 (W.D.Pa. 1996).

Although Plaintiff argues that an equal protection analysis can be applied here, the Court declines to do so for two reasons. First, the Court finds that Plaintiff's claim is based on unfair treatment he allegedly received as an individual. As such, he cannot maintain a claim based on the Equal Protection Clause. Second, the Court finds that Plaintiff's equal protection claim is nothing more than a recharacterization of his First Amendment retaliation claim.

The Court of Appeals for the Seventh Circuit ("Seventh Circuit") in Vukadinovich v. Bartels, 853 F.2d 1387, 1392 (7th Cir. 1988) addressed a similar situation. In Vukadinovich, a dismissed high school teacher brought suit under Section 1983, alleging that school board members had violated his First and Fourteenth Amendment rights for allegedly dismissing him for statements he made to a newspaper. The plaintiff claimed that he was treated differently from other uncertified teachers in retaliation for the exercise of his First Amendment rights. The Seventh Circuit held as follows:

[The Equal Protection Claim] fits uneasily into an equal protection framework. Normally, we think of the Equal Protection Clause as forbidding the making of invidious classifications -- classifications on the basis of such characteristics as race, religion, or gender. Here, plaintiff is not claiming that he was classified on the basis of some forbidden characteristic, only that he was treated differently because he exercised his right to free speech. We believe that this is best characterized as a mere rewording of plaintiff's First Amendment retaliation claim.

Id. at 1391-92; accord Thompson v. City of Starkville, 901 F.2d 456, 468 (5th Cir. 1990); Watkins v. Bowden, 105 F.3d 1344, 1354 (11th Cir. 1997).

For these reasons, the Court will grant Defendants' Motion as to Plaintiff's equal protection claims included in Count IV of Cohen and Count II of Dworetzky.

3. Due Process

A plaintiff claiming due process violations pursuant to Section 1983 must allege inter alia that he or she "was deprived of a protected liberty or property interest." Sample v. Diecks, 885 F.2d 1099, 1113 (3d Cir. 1989). Plaintiff alleges due process violations based on his reputation and livelihood interests.

a. Reputation

Plaintiff maintains that Defendants damaged his reputation in violation of his due process rights. The defamation at issue

here involves the alleged statements made by Defendant Kromer at the meeting with Plaintiff, Councilwoman Verna, and representatives of Odunde about Plaintiff's character and his abilities as a developer.¹³

The Supreme Court in Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976), held that reputation alone is not an interest protected by the Due Process Clause. Damage to reputation is actionable under Section 1983 only if it occurs in the course of or is accompanied by a change or extinguishment of a right or status guaranteed by state law or the Constitution. Id. at 701-12, 96 S. Ct. at 1160-65. This element is referred to as the "reputation-plus" requirement. Ersek v. Township of Springfield, 102 F.3d 79, 83 n.5 (3d Cir. 1997).

The Court finds that Plaintiff's due process claim based on his reputation interest fails as a matter of law. Here, there is no evidence that the defamation occurred in the course of or was accompanied by a change or extinguishment of a constitutional right. At most, the defamation resulted in financial harm to Plaintiff. "[F]inancial harm resulting from government defamation alone is insufficient to transform a reputation interest into a liberty interest." Sturm v. Clark, 835 F.2d 1009, 1012-1013 (3d Cir. 1987). Therefore, the Court grants

¹³Defendant Kromer's alleged defamatory statements also serve as the basis for Plaintiff's common law defamation claim (Count VI in Cohen).

Defendants' Motion for Summary Judgment as to Plaintiff's due process claim based on his reputation interests in Count IV of Cohen.

b. Livelihood

Plaintiff also claims a constitutionally protected liberty interest based on his freedom to pursue his chosen profession free from government interference. Such rights are protected by the Fifth and Fourteenth Amendments. Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1259 (3d Cir. 1994). "It is the liberty to pursue a calling or occupation, and not the right to a specific job that is secured by the Fourteenth Amendment." Id.

In Cohen, Plaintiff claims that he was deprived of development opportunities in connection with Odunde. As such, this deprivation upon which this claim is based is a specific job with a single client. Assuming that Plaintiff has been denied development opportunities in connection with Odunde, this does not constitute a due process deprivation based on his liberty interests in his livelihood. Therefore, this aspect of his due process claim in Count IV of Cohen fails.

Plaintiff's due process claim in Dworetzky is much broader. In Dworetzky, Plaintiff contends that, because he was denied access to OHCD and federal funding administered and distributed by the City, his efforts as an urban entrepreneurial developer

have been thwarted. The Court has reviewed the Rule 56 submissions related to this claim and finds that genuine issues of fact exist as to whether Plaintiff was denied the right to pursue his chosen profession. The Court notes that Plaintiff's claim in Dworetzky differs from the liberty interest claim he raised in the Rendell action, which was based on a single development project and was dismissed on the defendants' summary judgment motion. Wood v. Rendell, 1995 WL 676418, *4.

Accordingly, the Court will deny Defendants' Motion for Summary Judgment as to Plaintiff's due process (livelihood) claim set forth in Count II of Dworetzky and grant Defendants' Motion as to Plaintiff's due process (livelihood) claim set forth in Count IV of Cohen.

D. Title VI

In Cohen and Dworetzky, Plaintiff maintains that the City, through the actions of the individual Defendants, violated 42 U.S.C.A. § 2000d (West 1994)(hereinafter "Title VI") by

restricting and/or denying him access to federal funds because he is an African-American who sued the City.¹⁴

¹⁴To the extent that Plaintiff's claim encompasses the Farmers Market project, such a claim is barred under the doctrine of collateral estoppel because this Court held in Wood v. Rendell, et al. that Plaintiff had failed to provide any evidence of discriminatory intent on the part of any entity responsible

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. By the terms of the statute, discrimination based on race, color, or national origin is barred by Title VI. Regents of University of California v. Bakke, 438 U.S. 265, 284, 98 S. Ct. 2733, 2745 (1978)(purpose of Title VI is "to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution").

The statute ensures that where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the final beneficiary, those funds will not be used for a discriminatory purpose. Grove City College v. Bell, 687 F.2d 684, 691 n.14 (3d Cir. 1982)(noting that legislative history of Title VI indicates congressional intent to cover indirect assistance programs).¹⁵

for the administration and distribution of federal funds in connection with the Farmers Market. Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411 (1980); Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988).

¹⁵For a private plaintiff to assert a claim under Title VI, s/he must be the intended beneficiary of, an applicant for, or a participant in a federally funded program. Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1235 (7th Cir. 1980); National Assoc. for the Advancement of Colored People v. Medical Center, Inc., 599 F.2d 1247, 1252 (3d Cir. 1979) (holding that

The Court finds that Plaintiff has failed to provide any evidence of discriminatory intent on the part of Defendants, OHCD, or any other entity responsible for the administration and distribution of federal funds, in connection with Odunde or Plaintiff's other clients or projects. Accordingly, Defendants' Motion for Summary Judgment will be granted with respect to Plaintiff's Title VI claims and judgment will be entered against Plaintiff as to Count V of Cohen and Count III of Dworetzky.

E. State Law Claims

1. Slander and Libel

In Count VI of Cohen, Plaintiff presents a state law claim

beneficiaries of government supported programs may sustain cause of action). Additionally, the plaintiff must demonstrate that the entity administering the federal funds engaged in intentional discrimination. "Title VI itself directly reach[es] only instances of intentional discrimination." Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct. 712, 716 (1985).

Defendants admit that the City is a recipient of federal funds in connection with the OHCD programs. (Cohen Ans. at ¶ 58.) In their Motion, Defendants do not specifically challenge the assertions made by Plaintiff in Cohen and Dworetzky that he and Odunde are "intended beneficiaries" within the meaning of Title VI, although Defendants generally move for summary judgment on standing grounds, arguing that Plaintiff does not have standing to seek redress for alleged harm to Odunde or other non-parties. Because the Court finds that there is no evidence to support a finding of intentional racial discrimination, the Court does not need to reach the issue of whether Plaintiff is an intended beneficiary within the meaning of Title VI.

of slander and libel¹⁶ against Defendants Kromer and Street. The claim against Defendant Street is based on alleged defamatory statements made to John Weston about Plaintiff. The claim against Defendant Kromer is based on alleged defamatory statements made by Defendant Kromer about Plaintiff at the meeting with Councilwoman Verna.

A prima facie case of defamation requires establishment of the following elements:

- (1) [t]he 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.
- (7) Abuse of a conditionally privileged occasion.

Furillo v. Dana Corp. Parish Div., 866 F. Supp. 842, 847 (E.D. Pa. 1994)(citation omitted).

With respect to the defamation claim against Defendant Street, Plaintiff has failed to adduce any evidence that Defendant Street made any statements to John Weston, let alone defamatory statements. In his Response to Defendants' Requests for Admissions and Interrogatories, Plaintiff attributes the alleged defamatory statements to an unidentified male assistant to Defendant Street, not to Defendant Street. (Defs.' Ex. 85

¹⁶The alleged defamatory statements underlying this claim were all oral.

at 1.) Moreover, to the extent that Plaintiff learned of the alleged statements from Weston, Plaintiff's testimony to that effect would be inadmissible hearsay. Because there are no genuine issues of material fact, the Court will grant Defendants' Motion as to Count VI against Defendant Street.

The Court reaches a different conclusion with respect to Plaintiff's defamation claim against Defendant Kromer. Defendants admit that Defendant Kromer informed Councilwoman Verna that Plaintiff had filed the Rendell action, but argue that this was a true statement and a matter of public record, and therefore, was not defamatory. Defendants ignore, however, the following evidence adduced by Plaintiff: "John Kromer began to attack Plaintiff by stating that Mr. Wood had sued the city and was not someone to get city assistance for ODUNDE. He also stated that it had been proven that Mr. Wood was not qualified to provide the assistance ODUNDE wanted." (Fernandez Aff., Defs.' Ex. 58.)¹⁷

The Court finds that genuine issues of fact exist as to whether Defendant Kromer defamed Plaintiff. For this reason, the Court will deny Defendants' Motion as to Count VI against Defendant Kromer.

¹⁷Lois Fernandez was Chief Executive of Odunde during the relevant times and attended the meeting with Councilwoman Verna, Defendant Kromer, and Plaintiff.

2. Tortious Interference

In Count VII of Cohen, Plaintiff charges Defendants Cohen, Street, Kromer, and the City with tortious interference with Plaintiff's commercial/business relations. In particular, Plaintiff alleges that "[t]he joint and several actions by defendants had the effect of interfering with and disrupting plaintiff's relationship with its [sic] client Odunde, of preventing plaintiff from having a profitable business relation with said client and of interfering with plaintiff's [sic] ability to move forward on his market development with private sector involvement." (Cohen Am. Compl. at ¶ 90.)

In his Response to Defendants' Motion, Plaintiff further expands on this claim and includes both interference with contractual relations and interference with prospective business relations. Count VII thus embraces two separate but related intentional torts: (1) interference with contractual relations and (2) interference with prospective business relations. Both torts are recognized in Pennsylvania. Capecchi v. Liberty Corp., 176 A.2d 664 (Pa. 1962)(interference with contractual relations); Glenn v. Point Park College, 272 A.2d 895, 898 (Pa. 1971)(extending the tort to interference with prospective business relations).

This claim requires the demonstration of (1) an existing or prospective contractual relationship between the plaintiff and

third parties, (2) a purpose or intent to harm the plaintiff,¹⁸ (3) the absence of privilege or justification on the part of the defendant, and (4) the occurrence of actual harm or damage to the plaintiff as a result of the defendant's conduct. Capecci, 176 A.2d at 666; Glenn, 272 A.2d at 898.

A threshold requirement for establishing these torts is the existence of either an actual contract or a prospective business relationship between Plaintiff and a third-party. Glenn, 272 A.2d at 898 (“[u]nderlying these requisites, of course, is the existence of a contract or prospective contractual relation between the third person and the plaintiff.”). With respect to a prospective contractual relation, there must be an objectively reasonable probability that a contract will come into existence. Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 184 (3d Cir. 1997). It must be something more than a “mere hope.” Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979). Under Pennsylvania law, merely pointing to an existing business relationship or past dealings does not reach the level of “reasonable probability.” General Sound Telephone Co., Inc. v.

¹⁸The harm to the plaintiff occurs when the defendant causes a third party not to perform a contract with the plaintiff or enter into or continue a business relation with the plaintiff. Capecci, 176 A.2d at 666; Cloverleaf Dev. v. Horizon Fin., 500 A.2d 163, 167 (Pa. Super Ct. 1985)(with an interference with prospective business relationship claim, the harm to the plaintiff is the prevention by the defendant of the accrual of the prospective relationship).

AT&T Communications, Inc., 654 F.Supp. 1562, 1565 (E.D.Pa. 1987).

a. Interference with Contractual Relations

Plaintiff bases his interference with contractual relations claim on his "Exclusive Management and Special Services Contract" with Odunde.¹⁹ (Defendants' Exh. 1.) Defendants argue that Plaintiff has not shown any actual harm to his relationship with Odunde, but only that his personal finances suffered because of the Defendants' actions toward Odunde. This raises the issue of whether Plaintiff's interference claim is based on conduct by Defendants aimed at Plaintiff or at Odunde. As explained in Gemini Physical Therapy and Rehabilitation, Inc. v. State Farm Mut. Auto. Ins. Co., 40 F.3d 63, 66 (3d Cir. 1994),

[i]n contrast to section 766 of the Restatement, which has been adopted by Pennsylvania, a party is liable under section 766A for merely making a third party's performance of his contract with another party more expensive or burdensome. As this court stated in its careful analysis of the two sections in Windsor Secur., Inc. v. Hartford Life Insurance Co., 986 F.2d 655 (3d Cir. 1993), "[s]ection 766 addresses disruptions caused by an act directed not at the

¹⁹In his Response to Defendants' Motion, Plaintiff also argues that Defendants interfered with a contract with Greg Goodwin to provide security services for the Odunde Festival. (Pl.'s Resp. at 69.) At the hearing on Defendants' Motion, Plaintiff's counsel did not list this contract as a basis for Plaintiff's interference claim and so it appears that Plaintiff has abandoned this portion of this claim. Even if this is not the case, Plaintiff cannot assert an interference claim on this basis because the contract at issue was between Odunde and Goodwin, not Plaintiff and Goodwin. (Pl.'s Exh. 19, Fernandez Aff. at ¶ 8.)

plaintiff, but at a third person: the defendant causes the promisor to breach its contract with the plaintiff. Section 766A addresses disruptions caused by an act directed at the plaintiff: the defendant prevents or impedes the plaintiff's own performance." Id. at 660. Not only are the targets of the two sections different, but section 766A is much more difficult to apply and conducive to disputes.

Although Plaintiff's interference claim is not clearly articulated, the alleged interference by Defendants that forms the basis for this claim was aimed at Plaintiff, not Odunde. In fact, the gravamen of Plaintiff's claims against the Defendants is that they had previously been supportive of Odunde and the Odunde Festival, but once they learned of Plaintiff's business relationship with Odunde, Defendants withdrew their support from the Festival and other projects of Odunde. Moreover, once Plaintiff no longer was associated with Odunde, Defendants once again supported Odunde and the Odunde Festival. As a consequence of Defendants' interference, Plaintiff contends that he was unable to perform his contractual obligation to raise funds for Odunde, and so he had to personally loan money to Odunde for the Festival. The Third Circuit has held, however, that a defendant's interference with the plaintiff's performance of a contract, making the performance of a contract more costly to the plaintiff, is not cognizable under Pennsylvania law. Id. Accordingly, the Court will grant summary judgment as to Plaintiff's interference claim based on his contract with Odunde.

b. Prospective Business Relations

Plaintiff asserts the existence of the following prospective business relations: (1) with the Nigerian delegation and Odunde for a proposed mixed-use development, including an African village; (2) with unspecified community organizations in Northwest Philadelphia; and (3) with Congressman Foglietta for a prayer breakfast fundraiser. (3/16/98 Hr'g Tr. at 93-102.)

The Court finds that the Rule 56 Submissions raise a genuine issue of fact as to the existence of a prospective business relationship with the Nigerian delegation and Defendants' interference with that relationship. (Pl.'s Exh. 27, Wood Aff. at ¶ 21.)²⁰ With respect to the other two prospective business relationships, however, the Court will grant summary judgment in favor of Defendants.

Although it is true that "prospective contractual relationships are by definition more difficult to identify precisely," Centennial, 885 F.Supp. at 688, that does not excuse a complete failure to identify them. Plaintiff has not identified at all the community organizations in Northwest

²⁰Although the Court has determined that the evidence adduced by Plaintiff precludes the granting of summary judgment, the contours of the claim are nonetheless quite vague and the relevant conduct of each Defendant is difficult to discern. Moreover, Defendants did not specify in their Motion grounds for judgment in favor of specific Defendants with respect to the Nigerian delegation claim. Therefore, this claim will proceed as to all of the named Defendants.

Philadelphia with which he allegedly had a prospective business relationship. This failure is fatal to this portion of his tortious interference claim. Plaintiff's characterization of a potential prayer breakfast with Congressman Foglietta as a prospective business relationship is farfetched. Plaintiff has cited no authority to support the proposition that sponsorship of a fundraiser by a United States government official could constitute a business relationship.

Accordingly, the Court will grant summary judgment in favor of the Defendants as to all aspects of Plaintiff's tortious interference claim, except the interference with the prospective business relationship with the Nigerian delegation.

IV. CONCLUSION

In summary, the Court will grant Defendants' Motion for Summary Judgment as to the following: (1) Counts I, II, III, and V of Cohen in their entirety; (2) the equal protection and due process (reputation and livelihood) claims in Count IV of Cohen; (3) Count VI of Cohen as to Defendant Street; (4) Count VII as to all contractual and prospective business relations, except the prospective relationship involving the Nigerian delegation; (5) Counts I and III of Dworetzky in their entirety; and (6) the equal protection claim in Count II of Dworetzky.

As a result of the Court's findings, the following claims

remain in these actions: (1) a due process claim based on Plaintiff's liberty interest in pursuing his chosen profession (Count II of Dworetzky); (2) First Amendment retaliation claims based on Plaintiff's filing of the Rendell action (Count IV of Cohen and Count II of Dworetzky); (3) a defamation claim based on Defendant Kromer's alleged defamatory statements (Count VI of Cohen); and a tortious interference claim based on Plaintiff's prospective business relationship with the Nigerian delegation.

An appropriate Order follows.