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| <b>Schmitt v Artforum Intl. Mag., Inc.</b>                                                                                                                                                                                     |
| 2018 NY Slip Op 33345(U)                                                                                                                                                                                                       |
| December 20, 2018                                                                                                                                                                                                              |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 159496/2017                                                                                                                                                                                                     |
| Judge: Nervo                                                                                                                                                                                                                   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
AMANDA SCHMITT,

-against-

Index Number

ARTFORUM INTERNATIONAL MAGAZINE, INC.,  
and KNIGHT LANDESMAN,

159496/2017

Defendants.  
-----X

FRANK P. NERVO, J:

Motion sequences 001 and 002 are consolidated for disposition in the accompanying decision and order.

In motion sequence 001, defendant *Artforum* International Magazine, Inc. (*Artforum*), moves to dismiss plaintiff's complaint on the ground that it fails to state a cause of action (CPLR 3211 (a) (7) and to strike various allegations from the complaint as scandalous and prejudicial. ( CPLR 3024 (b))

In motion sequence 002, defendant Knight Landesman moves to dismiss the causes of action directed against him, also for failure to state a cause of action.

In her first cause of action, plaintiff alleges retaliation by both defendants a violation of the New York City Human Rights Law [Administrative Code of the City of New York § 8-107 (7), (hereinafter, Admin. Code § 8-107) According to the complaint, on May 7, 2017 ( a date five years after plaintiff resigned from Artforum in August, 2012), plaintiff saw Landesman at a restaurant. Landesman, at that encounter, allegedly "slandered and humiliated [plaintiff] in front of her partner" by saying that she had unfairly accused him of sexual harassment. He then asked her to discuss the matter with him and then " threatened" to discuss "the details" with a person named Kitnick. Plaintiff alleges that Landesman was acting within the scope of his Artforum employment and made the statement to protect himself and *Artforum* from plaintiff's potential legal claims.

Continuing, plaintiff alleges further violations of Admin. Code §8-107 on October 19, 2017 and October 23, 2017. According to the complaint, on October 19, 2017, *Artforum* "again slandered" plaintiff by telling its employees that she was being "unfair", that her relationship with Landesman had been consensual and that she was part of a "campaign" to "take down *Artforum*". The October 23<sup>rd</sup> statement, that Artforum posted on its website and in a publication called *artnet*, was that plaintiff's " claim appears to be unfounded and seems to be an attempt to exploit a relationship that she herself worked hard to create and maintain."

Plaintiff alleges that a person may allege a violation of Admin. Code § 8-107 subsequent to leaving employment and that Landesman's conduct was intended to deter her from making a complaint under that provision.

Plaintiff alleges that as a result of the Admin. Code § 8-107 violations, she has suffered unspecified professional injury, as well as psychological trauma, mental distress, shock, fright, humiliation and loss of reputation.

In her second cause of action for slander and slander *per se*, against both defendants, plaintiff again alleges that on May 7, 2017, Landesman told Kitnick and another person names Guagnini that plaintiff had "unfairly accused" him of sexual harassment and that they needed to "help her understand the reality." Plaintiff alleges that the statement was a false statement of fact or, alternatively, that it was a statement of mixed opinion and fact. According to the complaint, the statement disparaged plaintiff professionally and that Landesman made the statement to Kitnick, knowing that he was an influential art critic and curator. Plaintiff alleges that Landesman was acting within the scope of his employment at *Artforum*, as he was seeking to protect it from potential legal claims. Concluding, plaintiff asserts that Landesman's statements were not subject to any privilege and that his statement was made with the malicious intent to damage her. According to the complaint, as a result of the alleged slander, plaintiff suffered psychological trauma, mental distress and schock.

Plaintiff alleges in her third cause of action, directed at *Artforum*, plaintiff was grossly negligent in that it knew of Landesman's sexual harassment of other women, before she informed it in June, 2016, that she would be able to provide evidence of his alleged harassment to an attorney and to "gather other victims". According to the complaint, *Artforum* told her that it would take action to guarantee that such harassment would not occur again. The complaint alleges that this promise "created a duty to perform its promise with due care." Continuing, plaintiff alleges that *Artforum* conducted itself "so negligently as to be the equivalent of a conscious and reckless disregard of [her] rights." Plaintiff alleges that as a result of *Artforum's* negligence, Landesman accosted and humiliated and defamed her..

Plaintiff's fourth cause of action alleges promissory estoppel against *Artforum*. She again alleges that she told *Artforum*, in June, 2016, that she could provide evidence of Landesman's misconduct to an attorney. According to the complaint, *Artforum* told her not to speak to an attorney and that it was "taking action to insure that whatever may have transpired never happens again." According to the complaint, plaintiff relied on this representation and allowed to statute of limitations on some of her claims to run; however, she does not allege what these claims were.

Plaintiff's fifth cause of action, directed at *Artforum*, alleges defamation and defamation *per se*. According to the complaint, on October 17, 2017, *Artforum* informed most of its employees that it was "likely to be soon to be the subject of a lawsuit based on Landesman's behavior." Then, on information and belief, *Artforum* told its employees that plaintiff's claims were

“unjust” and that she had a consensual and non-physical relationship with Landesman.” Continuing, the complaint alleges, again on information and belief, that “publisher Charles Guarino told *Artforum*’s employees that the potential plaintiff’s (i.e. Schmitt’s) claims were part of a campaign to ‘try to take down *Artforum*.” According to the complaint, *Artforum* required certain of its employees to attend meetings at which these statements were repeated. The complaint does not name these employees or give the dates of the meetings. Plaintiff contends that these statements were knowingly false statements of fact or mixed statements of fact and opinion. She alleges that the statements were made with malicious intent to damage her and that the statements were made to many of her peers and professional contacts. As a result, plaintiff alleges that she suffered psychological trauma, shock, fright and loss of reputation. Again, she seeks \$500,000 in compensatory damages and punitive damages.

In her final, sixth, cause of action, plaintiff alleges defamation and defamation *per se*, against *Artforum*. According to the complaint, on information and belief, on October 23, 2017, *Artforum* issued a written statement to a journalist employed by *artnet* that plaintiff’s claim “appears to be unfounded and seems to be an attempt to exploit a relationship that she herself had worked hard to create and maintain.” *Artforum* published the statement on its own website, the next day. Plaintiff alleges that the statement was one of mixed opinion in that it implied that it was based on facts that were unknown to their audience. She contends that the statement disparaged her “concerning her office, profession, trade or business” in that she was about to lodge baseless claims of sexual harassment against her former employer and supervisor. She asserts that the two publications are widely read in the art industry and that these statements were made with malicious intent to publicly malign her reputation and force her to abandon her claims. She claims that as a result of the statements, she has sustained loss of reputation, as well as shock and psychological trauma and mental distress.

In order to sufficiently plead a cause of action under Admin. Code § 8-107, a plaintiff must plead facts that he or she participated in a protected activity; that the employer knew that the plaintiff had participated in such activity; that the plaintiff suffered an adverse employment action based on the protected activity; and, that there is a causal connection between the protected activity and the adverse action. (see *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 312-313) However, the court notes that in determining a cause of action under the Code provision, the courts must construe it more broadly than the Court did in *Forrest v. Jewish Guild for the Blind*, *id.* and interpret it in a manner that is “uniquely broad and remedial.” The court must determine if there was retaliation “in any manner”. ( *Williams v. New York City Housing Authority*, 61 AD3d 62, 67, 69) Indeed, the court, using a broad interpretation, may find conduct actionable if it harms the public interest by deterring others from filing a charge; that is, a chilling effect. (*id.* at 71) The court assumes, as it must, that all allegations in the complaint are true. However, even using the expanded interpretation now required, plaintiff fails to state a cause of action under Admin. Code § 8-107, and the first cause of action is dismissed.

The alleged misconduct in this case took place five years after plaintiff left *Artforum* and thus five years after plaintiff and Landesman were in an employment relationship. The complaint alleges that Landesman's alleged retaliatory action, in the form of what it characterizes as defamatory remarks on May 7, 2017, took place in retaliation against plaintiff having made a complaint about Landesman to *Artforum*, in June, 2016. Plaintiff's complaint about Landesman was made to *Artforum* only. She never made a complaint to any governmental authority, either during her employment or after it ended. She could not have made such an official complaint in 2016, as the three year statute of limitations had expired.

The five year gap between plaintiff's employment and the alleged wrongful acts is sufficient to eliminate any nexus between her employment and the alleged acts. (see *Bantomi v. Saint Barnabas Hospital*, 146 AD3d 420) There are no facts alleged in the complaint that show how a person would be discouraged from making a complaint of wrongful conduct when a person could not perceive any connection between the alleged wrongful conduct, both defendants' denial of culpability, and plaintiff's prior employment, as this nexus does not exist. ( see *Ballen-Stier v. Hahn & Hansen, L.L.P.*, 284 AD2d 263) This is particularly true in the case of Landesman, as there is no allegation that he was plaintiff's employer and his words were spoken in a purely social setting. Nor can it be said, based on the facts plaintiff alleges, that defendants' words were improper. Defendants were entitled to make responsive statements in defense to plaintiff's accusation. (see *Mehlman v. Montefiore Medical Center*, 98 AD 3d 107, 129) Moreover, as will be discussed, the statements were not defamatory. Therefore, there was no unlawful, retaliatory act.

Plaintiff's second cause of action for slander and slander *per se* is dismissed. According to the complaint, the defamatory words that Landesman uttered were that she "unfairly accused" him of sexual misconduct and that he needed to "help her understand the reality" These words, cannot form the basis of a slander *per se* cause of action.

In order to sustain the cause of action plaintiff alleges, she must plead that the statement is either factual or a mixed statement of fact and opinion; that the statement is false; that it tends to expose a person to contempt and ridicule, hatred, aversion or disgrace; and, that it as alleged in this case, that it damages a person in that person's business or profession. A statement is one of mixed fact and opinion if it is a statement whose facts are unknown to the speaker's audience. Plaintiff fails to allege facts that meet the criteria of defamation *per se*.

The statement that plaintiff was being unfair and required help in understanding the reality is one of pure opinion, not a statement of fact or a mixed statement of fact and opinion. Whether something is fair is a subjective value judgment. It does not lend itself to a true-false analysis. Similarly, the statement about her need understand the reality is not one that can be construed as anything but an opinion.

The second cause of action must be dismissed because it fails to both allege special damages or damages to plaintiff's professional standing. Although it contains plaintiff's conclusory

allegation that the statement that she sustained psychological damage and loss of reputation, she fails to allege facts that show her damage.

In order to allege a cause of action for slander, a person must show a tangible, economic harm. (cf. *Lieberman v. Gelstein*, 80 NY 2d 429, 434-435) While the allegation of psychological or emotional harm may be sufficient in a case of slander *per se* (see *Nolan v. State*, 186; *Rozanski v. Fitch*, 113 AD3d 1010), plaintiff fails to allege facts showing slander *per se*.

Plaintiff fails to satisfy the elements of slander *per se*. To allege a cause of action for slander *per se*, a plaintiff must allege facts showing harm to that plaintiff in his or her business or profession. The alleged defamatory statement must be one that asserts that the alleged defamed person has acted in a manner incompatible with the proper conduct of the business or profession. It must refer to a matter of significance and importance to that entity, not merely a general reflection on the person's character. ( *Lieberman v. Gelstein*, id. at 435) Here, the allegations make no connection to plaintiff's profession and so cannot be defamatory *per se*. While the Landesman made the statement in the presence of two persons associated with plaintiff's profession, the statement did not disparage plaintiff in her status as a member of her profession. The presence of those two individuals is irrelevant to plaintiff's claim.

The allegations in the second cause of action are deficient because they fail to show special damages. ( *Sharratt v. Hickey*, 20 AD3d 734,735) Plaintiff fails to allege any facts showing that she suffered any financial loss as a result of the statements.

Plaintiff also fails to allege any facts to show that the statement was made with malicious intent.

Finally, plaintiff fails to allege any facts that show that *Artforum* could be vicariously liable for Landesman's remark. The remarks, based on the facts alleged in the complaint, were made in a social setting in which Landesman intruded for his own reasons. There is nothing alleged to show that he was engaged in *Artforum's*, business or that it approved his making the remarks.

Plaintiff's third cause of action, against *Artforum* for gross negligence is dismissed.

Plaintiff fails to allege facts that show any duty that *Artforum* owed to plaintiff. Landesman's alleged bad act was not made while he was under *Artforum's*, control. There was nothing to show that *Artforum*, had any obligation or means to control his behavior outside of the workplace when he was not engaged in its business. Plaintiff was not *Artforum's* employee and she alleges no facts that reveal a duty to protect her from the acts of its current employee. The alleged promise, made without consideration, did not create any legally recognized duty to plaintiff, even if the failure to keep that promise resulted in the alleged harm to her. ( *Hunt v. Sotia -Glenville Central School District*, 92 AD2d 680, 681) At most, *Artforum* assumed a moral obligation; however, such an obligation does not create a legally enforceable duty. (see *Bani-Esrali v. Lerman*, 69 NY 2d 807)

In addition to the lack of duty, there was a lack of foreseeability that precludes recovery under the third cause of action. *Artforum*, based on the facts alleged in the complaint, was allegedly aware of Landesman's acts of sexual misconduct. However, nothing in the complaint shows that *Artforum* could have anticipated Landesman's alleged defamatory remarks.

The complaint fails to allege facts that show that failure to adhere to its promise could have been a proximate cause of plaintiff's harm. Rather, the facts, as alleged, show that Landesman's alleged misconduct was the sole proximate cause of the harm plaintiff alleges.

Finally, plaintiff does not allege any facts that show defendant was grossly negligent. She fails to allege any facts in this cause of action that show *Artforum's*, willful misconduct or gross negligence as she fails to show intentional wrongdoing or an indifference to plaintiff's rights. (*J. Petrocelli Contracting, Inc. v. Morganti Group, Inc.*, 137 AD3d 1082, 1083)

The fourth cause of action does not allege facts that establish promissory estoppel; therefore, it is dismissed.

In order to state a cause of action for promissory estoppel, a plaintiff must demonstrate that the promise is sufficiently clear and unambiguous; that the person receiving the promise could reasonably rely on it; and, the person receiving the promise was harmed by it. (see *MatlinPatterson ATA Holdings LLC v. Federal Express Corp.*, 87 AD 3d 836) Plaintiff fails to allege facts establishing these criteria.

The alleged promise was vague, not clear and unambiguous. While the promise was to take some action, the complaint does not state what that action might have been.

The complaint does not allege facts that show that plaintiff could have reasonably relied on the alleged promise. Plaintiff alleges that she received the promise after she told *Artforum*, that she would provide derogatory information about Landesman to an attorney; thus, from her allegation, plaintiff had an attorney when *Artforum* made its alleged promise. As she could have received legal advice, it is apparent that plaintiff should have known that *Artforum* owed no legal duty to her and that its promise was unenforceable as there was no consideration for it.

Plaintiff fails to allege facts that demonstrate that she suffered any harm by relying on *Artforum's* statement. Although plaintiff alleges that she refrained from taking action against both defendants, letting the statute of limitations run, she does not state any statute or regulation that became time-barred. Notably, when *Artforum* made the alleged promise in June, 2016, the statute of limitations on a potential sexual harassment claim had already run, as plaintiff's last employment with *Artforum* was in 2012. (see Admin. Code § 8-502 (d)) Further, the alleged harm she suffered, Landesman's harassment, was not harm. As noted above, he did not harass her; at most, she alleges that he made a purportedly defamatory statement on a single occasion in May, 2017. This was unrelated to any alleged promise by *Artforum*, that, as noted, had no means of preventing the May, 2017 encounter.

The fifth and sixth cause of action, directed at *Artforum*, both for defamation and defamation *per se*, are dismissed. Whether one views the words alleged in the causes of action as statements of fact, statements of opinion or mixed statements of fact and opinion, they are simply not defamatory. The statements, as noted, alleged in the last two causes of action are not defamatory, as they do not, even if false, hold plaintiff up to ridicule, contempt, hatred or disgrace, the elements necessary to sustain a defamation cause of action. The statements, also as noted, do not harm plaintiff in her profession.

The statements do not accuse plaintiff of sexual misconduct. In fact, the reference is to her consensual, non-sexual relationship with Landesman. The statements do not attack her honesty, as they do not call her a liar; nor, do they accuse defendants of lying in order to obtain financial gain. Therefore, plaintiff's reliance on *Davis v. Boheim*, 24 NY3d 131, is misplaced. The statements do not meet the standard of "the sufficiency of a defamation pleading... as they are not "... reasonably susceptible of a defamatory connotation." ( *Davis v. Boheim*, *id.* at 268, quoting *Armstrong v. Simon & Schuster*, 85 NY2d 373, 380) The statements are pure opinion. (see *Pecile v. Titan Capital Group*, 96 AD3d 543) Even if viewed as a mixed statement of fact and opinion, the words cannot be reasonably interpreted as having a defamatory meaning.

Characterizing plaintiff's complaint as unjust does not hold her up to ridicule or say that she is avaricious. Calling her relationship with Landesman consensual and non-physical negates any possibility of a defamatory interpretation; a reasonable person could not anything disgraceful about a non-physical relationship. A reasonable person could not construe the statement that plaintiff was "try[ing] to take down *Artforum*" as defamatory. The statement cannot be interpreted as saying that plaintiff is lying or that she is attempting to profit by her actions. It does not hold her up to contempt, ridicule or dishonesty. Similarly, there is nothing defamatory in the comment that she was being unjust. This subjective statement of opinion does not hold her up to contempt or ridicule. It does not imply dishonesty or an attempt at financial gain. The statement, by any reasonable interpretation, cannot be construed as defamatory.

There are no facts in the complaint to show that the statements were made with a reckless disregard for the truth or with malicious intent. Plaintiff's conclusory allegations are insufficient to show that the statements were made with malice. The statements were not so vituperative as to support an inference of malice. Nor do any facts support a finding of reckless disregard for the truth. (see *Sborgi v. Green, et al.*, 281 AD 2d 230)

As there is no showing of malice, the fifth cause of action must be dismissed as *Artforum* has a limited common interest privilege that bars the defamation claim. ( *Sborgi v. Green*, *id.*; *Oneill v. New York University Hospital*, 97 AD3d 199, 212) *Artforum* and its staff share a common interest in the operation and success of the publication. The exculpatory statements were made to protect the common interest.

The court will not determine that branch of the motion to strike prejudicial matter. In light of the dismissal of the complaint, that branch of *Artforum's* motion is denied as academic.

Accordingly, it is

ORDERED that the motions by defendants *Artforum International Magazine, Inc.* and Knight Landesman to dismiss the complaint pursuant to CPLR 3211 are granted and the complaint dismissed; and it is further

ORDERED that the branch of defendant *Artforum's* motion to strike the complaint pursuant to CPLR 3024 (b) is denied as academic; and it is further

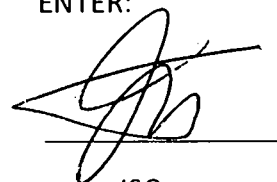
ORDERED that the Clerk is directed to enter judgment dismissing the complaint upon submission of a judgment and proof of service of a copy of this order with notice of entry; and it is further

ORDERED that the proposed judgment shall be presented to the Clerk and, unless otherwise directed by the Clerk, not to chambers or the courtroom.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: December 20, 2018

ENTER:



JSC

HON. FRANK P. NERVO