SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12M**

Justice

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RAPHAEL RYBAK,

Plaintiff,

- v -

SLAWOMIR PLATTA, THE PLATTA LAW FIRM, PLLC

Defendant.

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INDEX NO. 158270/2020

MOTION DATE 10/31/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of the employment termination of plaintiff-attorney Raphael Rybak (plaintiff) by defendant-employers Slawomir Platta (Mr. Platta) and the Platta Law Firm, PLLC (the Platta Firm) (collectively, defendants).

In his complaint, plaintiff alleges causes of action for defamation, defamation *per se*, trade libel/injurious falsehood, tortious interference with prospective business advantage, and intentional interference with contractual relationship as against Mr. Platta. Plaintiff also alleges causes of action against the Platta Firm for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and conversion. As against all defendants, plaintiff alleges causes of action for unpaid wages under Article 6 of the New York Labor Law, and for improper deductions under Article 6 of the New York Labor Law. Defendants now move for summary judgement or, in the alternative, a protective order to prohibit the disclosure of privileged communications.

I. Alleged Facts

Plaintiff began employment as an Associate Attorney of the Platta Firm on or about September 5, 2017. *See* NYSCEF Doc. No. 4, Complaint at 4. Plaintiff was terminated from employment with the Platta Firm on February 8, 2019. *Id* at 19. After plaintiff was terminated by the Platta Firm, plaintiff went out to dinner with Alexandra Kuta, who was employed as a physical therapist for a client of the Platta Firm, Dariusz Hrychorczuk (Mr. Hrychorczuk). *See NYSCEF* Doc. No. 38. Plaintiff claims that Ms. Kuta said that Mr. Hrychorczuk told her that he was sad that plaintiff was no longer with the Platta Firm, and that Mr. Platta told him (Mr. Hrychorczuk) that plaintiff was terminated from his position because he was drinking while working. *Id* at 7.

Prior to his employment at the Platta Firm, plaintiff exchanged emails with Slawek W. Platta, a representative of the Platta Firm. *See NYSCEF* Doc. No. 36. In these emails Mr. Platta advised plaintiff of his start date, salary, and the bonus structure at the Platta Firm. *Id.* Plaintiff was to receive a bonus percentage on any settlements or verdicts he personally achieved as 3% of the settlement until the end of 2018, increasing each year by 1% and capping at 5% (S&V Bonus) and an additional bonus of 1% of the net quarterly income for each quarter, provided the firm has a net profit of $1 million or greater that quarter (NQI Bonus). *Id.*

On or about September 22, 2020, plaintiff's counsel sent a Cease and Desist letter to Mr. Platta advising him that plaintiff believed he was owed compensation for his work in 2019 totaling $21,000, that Mr. Platta had wrongfully slandered plaintiff to at least two of Mr. Platta's clients, and that Mr. Platta's actions had cost plaintiff business opportunities in the form of clients who would have procured plaintiff's services but for Mr. Platta's words. *See NYSCEF* Doc. No. 37.

Plaintiff initiated the present action by filing a Summons against defendants on October 6, 2020. Plaintiff then filed a Complaint against defendants on November 24, 2020.

II. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

A. Plaintiff's Causes of Action Against Mr. Platta

i. Defamation and Defamation *Per Se*

Mr. Platta argues that plaintiff's defamation and defamation *per se* claims must fail under two separate theories. First, he argues that since plaintiff first learned of the allegedly defamatory statements in August of 2019 from Ms. Kuta (*See NYSCEF* Doc. No. 32 at 55), the statements themselves (allegedly made by Mr. Platta) must necessarily have been made prior to that date. Though Mr. Platta correctly identifies the statute of limitations as one-year from the date of utterance (*Arvanitakis v Lester*, 145 AD3d 6650 [2d Dept 2016]), it is plaintiff who correctly calculates the statute of limitations in this case. Plaintiff cites Executive Orders 202.8 and 202.67, issued by then-Governor Cuomo tolling the statute of limitations on all suits in New York State from March 20, 2020, through November 3, 2020. *See* 9 NYCRR 8.202.8, 8.202.67. Mr. Platta

may be correct that the defamation claims are time-barred as plaintiff fails to meet his burden of establishing when the alleged statements were uttered by Mr. Platta. However, plaintiff maintains that this information is in the sole possession of Mr. Platta and Mr. Hrychorczuk, who have yet to be deposed.

Mr. Platta further argues that plaintiff's defamation and defamation *per se* claims should be dismissed as both privileged communication and hearsay. *See* NYSCEF Doc. No. 39 at 9. Mr. Platta argues that, as statements made by counsel to his client, the alleged defamatory statements are privileged. *Id* at 11. Mr. Platta contends that, since plaintiff only became aware of the alleged defamatory statements from Ms. Kuta, who heard them from Mr. Hrychorczuk, who claimed to have heard them from defendant, the statements are hearsay within hearsay and therefore not actionable. *Id* at 18.

Plaintiff counters that since the statements were made in the pre-litigation phase of the matter, absolute privilege does not apply, and since the statements alleged do not relate to any of the issues in Mr. Hrychorczuk's personal injury case, qualified privilege also does not apply. *See* NYSCEF Doc. No. 58 at 18. Plaintiff follows with the argument that, even if privilege applied, Mr. Hrychorczuk waived the privilege when he repeated the statements to Ms. Kuta. Plaintiff further argues that the allegedly defamatory statements are not hearsay at either stage. Plaintiff maintains that the statements from defendants to Mr. Hrychorczuk is not hearsay, as it is not being offered for the truth of the matter asserted, but rather to prove the statements were made at all (*citing DeSario v SL Green Mgmt. LLC.*, 105 AD3d 421 [1st Dept 2013]), and that the statements from Mr. Hrychorczuk to Ms. Kuta are not relevant to a hearsay analysis, as Mr. Hrychorczuk will be called upon in depositions to recall the statements as directly said to him. *See* NYSCEF Doc. No. 58 at 24.

This Court finds that privilege does not apply as to these alleged defamatory statements. The statements were not made in anticipation of litigation (*See Strauss v Ambinder*, 61 AD3d 672 [2d Dept 2009]), nor was the communication either a request by a client for legal advice, or statements providing legal service from attorney to client. *See Theroux v Resnicow*, 2021 NYMiscLEXIS 3845 (New York County Sup Ct. 2021). Further, this Court finds that the hearsay analysis, as provided by defendant in both its Memorandum of Law (NYSCEF Doc. No. 39) and its Memorandum in Reply (NYSCEF Doc. No. 60), does not apply to the alleged statements from Ms. Kuta to plaintiff because the statements are not being offered for the truth of the matter asserted, but are instead being offered to show how plaintiff became aware of Mr. Hrychorczuk's statements. As defendants agreed that Mr. Hrychorczuk himself will be a witness at trial and agreed to produce him for deposition (*See* NYSCEF Doc. No. 51), he may certainly testify as to any statements defendant made to him regarding plaintiff's termination.

Accordingly, Mr. Platta's motion for summary judgment as to plaintiff's defamation and defamation *per se* claims is denied.

ii. Trade Libel/Injurious Falsehood

Mr. Platta's sole argument that plaintiff's Trade Libel/Injurious Falsehood claims should be dismissed is that plaintiff has alleged no pecuniary damages on this claim. The elements of Trade Libel are "the knowing publication of false and derogatory facts about the *plaintiff's business* of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment." *Banco Popular N. Am. v Lieberman*, 75 AD3d 460 (1st Dept 2010) (emphasis added).

Plaintiff argues that Mr. Platta's assertion is premature, since defendant and non-party witness Mr. Hrychorczuk have not yet been deposed, and plaintiff believes he lost the opportunity to represent Mr. Hrychorczuk due to defendant Mr. Platta's statements. *See* NYSCEF Doc. No. 58

at 17. One of the elements of Trade Libel/Injurious Falsehood is that the derogatory statements must relate to plaintiff's business. Here, the alleged derogatory statements were about the plaintiff's business, as the statements alleged that he was either drinking or drunk while at work. Although there is no evidence that Mr. Platta told anyone that plaintiff was a bad attorney or could not handle Mr. Hrychorczuk's case, these statements could be interpreted by a client as implying same.

Plaintiff is correct that pecuniary damages may be developed in deposition testimony. *See Fountain v Ferrera*, 118 AD3d 416 (1st Dept 2014). Given that issues of fact exist as to this cause of action, Mr. Platta's motion for summary judgment as to plaintiff's Trade Libel/Injurious Falsehood claim is denied.

iii. Tortious Interference with Prospective Business Advantage and Intentional Interference with Contractual Relationship

A claim for tortious interference with prospective business advantage must allege that the defendant's conduct which interfered with plaintiff's business prospect(s) was undertaken for the sole purpose of harming the plaintiff, or that the conduct was improper or wrongful independent of the interference which it allegedly caused. *Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312 (1st Dept 2004). A claim for intentional interference with contractual relationship must allege (1) the existence of a contract, enforceable by plaintiff, (2) defendant's knowledge of the contract's existence, (3) the intentional procurement of the breach of contract by defendant, and (4) resulting damages to plaintiff. *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corporation*, 296 AD2d 103 (1st Dept 2002).

Mr. Platta argues that plaintiff's claim for both Tortious and Intentional Interference with Prospective Business Advantage and Contractual Relationship must fail for two reasons. First

defendant Mr. Platta argues that plaintiff can establish no "wrongful means" through which defendant interfered with plaintiff's business relations, and second, that as a member of the Platta Firm, Mr. Platta could not interfere with the Platta Firm's contract. *See* NYSCEF Doc. No. 39 at 21. Mr. Platta claims that in order for an act to be qualified as "wrongful means", the alleged act must amount to a crime or an independent tort. Mr. Platta also argues that, as a managing partner of the Platta Firm, he is not personally liable for any tortious interference between plaintiff and the Platta Firm. *Id* at 25.

Plaintiff opposes, arguing that defamation, as a tort, is an appropriate basis to establish "wrongful means" of interference. *See* NYSCEF Doc. No. 58 at 24. Plaintiff further argues that Mr. Platta's protection from liability for any interference of the contract between plaintiff and the Platta Firm is negated when, as alleged, Mr. Platta participates in an independent tort (defamation) for his own personal gain.

This Court finds that there is a sufficient question of fact as to whether Mr. Platta engaged in the tort of defamation. As defamation is a "predicate wrongful act for a tortious interference claim" (*Amaranth LLC v J.P. Morgan Chase & Company*, 71AD3d 40 [1st Dept 2009]) there is a question of fact as to plaintiff's claim for tortious interference with his contract with the Platta Firm.

Accordingly, Mr. Platta's motion for summary judgment as to the Tortious Interference with Prospective Business Advantage and Intentional Interference with Contractual Relationship is denied.

B. Plaintiff's Causes of Action Against the Platta Firm

i. Breach of Contract

The Platta Firm argues that plaintiff's claim for breach of contract regarding plaintiff's alleged S&V bonus and alleged NQI bonus should be dismissed because the Platta Firm has paid plaintiff some S&V bonuses since his termination, and because it believes there is no contractual right for plaintiff to receive an NQI bonus for a quarter which ended after plaintiff was terminated. *See* NSYCEF Doc. No. 39 at 23.

Plaintiff contends that since the Platta Firm does not deny that it is actively evaluating whether it owes plaintiff an S&V bonus for the *Kurek* matter, the claim for Breach of Contract is viable. *See* NYSCEF Doc. No. 46 at 25. Plaintiff also argues that the Platta Firm's interpretation of the contract, specifically, that plaintiff was required to work an entire quarter in order to receive the NQI bonus, is not supported by the contract.

The specific language in question is as follows: "Additional bonus of 1% of net quarterly income for each quarter in which the firm makes a net profit of $1mil or more" *See* NYSCEF Doc. No. 31 at 53.

This Court finds there is a sufficient question of fact as to the parties' intent when entering into the contract that must be determined by a finder of fact. Accordingly, the Platta Firm's motion for summary judgment as to breach of contract is denied.

ii. Breach of the Covenant of Good Faith and Fair Dealing

The Platta Firm argues that plaintiff's claim for Breach of the Covenant of Good Faith and Fair Dealing is duplicative of plaintiff's Breach of Contract claims. It further argues that since plaintiff's claims for Breach of the Covenant of Good Faith and Fair Dealing stem from the same conduct as plaintiff's Breach of Contract claim, they must be dismissed.

Plaintiff raises no opposition to defendant's assertion that the Breach of Covenant of Good Faith and Fair Dealing claim is duplicative.

Accordingly, the Platta Firm's motion for summary judgment as to the Breach of the Covenant of Good Faith and Fair Dealing claim is granted, and the claim is dismissed as duplicative of plaintiff's Breach of Contract claim.

iii. Unjust Enrichment and Conversion

The Platta Firm asserts that plaintiff's Unjust Enrichment claim fails because the written contract between plaintiff and the Platta Firm governs any unjust enrichment claims. *See* NYSCEF Doc. No. 39 at 26.

Plaintiff agrees to withdraw the Unjust Enrichment and Conversion claims in light of the Platta Firm's stipulation that an enforceable contract existed between the Platta Firm and plaintiff.

Accordingly, the Platta Firm's motion for summary judgment as to the Unjust Enrichment and Conversation claims is granted, and the claim is dismissed.

C. Plaintiff's Cause of Action Against Defendants

i. Unpaid Wages under Article 6 of the New York Labor Law

Defendants argue that plaintiff's claim for Unpaid Wages under New York Labor Law (NYLL) § 191 (d) must be dismissed as plaintiff is not an individual subject to its provisions. NYLL § 191 (d) reads:

> Every employer shall pay wages in accordance with the following provisions: (d) Clerical and other worker – A clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer.

Defendants cite to NYLL § 190 (7), which defines 'clerical and other worker' and states:

> "Clerical and other worker" includes all employees not included in subdivisions four, five and six of this section, except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week.

As plaintiff's earnings are in excess of nine hundred dollars a week (*See* NYSCEF Doc. No. 31) and plaintiff's opposition does not address NYLL § 190 (7), this Court finds that plaintiff is not an individual subject to the provisions of NYLL § 191 (d).

Accordingly, defendants' motion for summary judgment as to plaintiff's Unpaid Wages claim under NYLL § 191 (d) is granted and that cause of action is dismissed.

ii. Improper Deductions under Article 6 of the New York Labor Law

Defendants argues that the funds plaintiff seeks in its eleventh cause of action are bonuses under NYLL § 190, and not wages. Defendants cite to *Truelove v Northeast Capital & Advisory Inc.*, 95 NY2d 220 (2000), which held that a bonus which was conditioned on an employee's continued employment was not a wage under NYLL § 190 (1).

Plaintiff maintains that since the NQI bonus was expressly linked to labor and services rendered by plaintiff, and was "guaranteed and non-discretionary", it was therefore encompassed by NYLL § 190 (1)'s definition of wages. *Ryan v Kellogg Partners Institutional Services*, 19 NY3d 1 (2012) (where plaintiff's bonus was guaranteed and non-discretionary as a term and condition of his employment.) As in *Ryan*, plaintiff argues the NQI bonus, as iterated in the August 1, 2017, email (*See* NYSCEF Doc. No. 31 at 53), was a condition of his employment and therefore held as wages under NYLL § 190 (1). *Id* at 23.

This Court finds that there is question of fact as to if plaintiff's NQI bonus was a condition of his employment and was therefore guaranteed and non-discretionary, as it was not predicated on plaintiff's continued employment at the defendant firm.

Accordingly, defendants' motion for summary judgment as to plaintiff's Improper Deductions claim under NYLL § 193 is denied.

D. Defendant's Request for a Protective Order Prohibiting Discovery of Privileged Communications

In the event that plaintiff's defamation claims survived summary judgment, defendants request a protective order to prohibit discovery of all privileged communications between the firm

and its clients. Plaintiff argues that the request is moot, as plaintiff has already stipulated that Mr. Platta's deposition be conducted subject to a confidentiality provision. Plaintiff further asserts that defendants may, at any point during defendants' deposition, object to a question as calling for privileged information.

In determining if a protective order is necessary upon motion of a party, the party seeking the order must "establish the right to protection" and "the protection must be narrowly construed; and its application must be consistent with the purpose underlying the immunity." *Liberty Petroleum Realty, LLC., v Gulf Oil, L.P.*, 164 AD3d 401 (1st Dept 2018).

Since the outstanding depositions include not only Mr. Platta, but also the non-party witness Mr. Hrychorczuk, this Court finds that a protective order is too restrictive as a means of protecting privileged communications. Mr. Hrychorczuk has the exclusive right to waive that privilege, while defendants do not. *See* CPLR 4503. Therefore, the appropriate remedy for Mr. Platta is an objection during deposition if he believes a question at his deposition would require a breach of privilege to answer, and if necessary, a ruling from this Court, so that plaintiff is not prohibited from asking Mr. Hrychorczuk questions about information he has previously divulged to a third party.

Accordingly, defendants' motion for a protective order is denied.

III. Conclusion

Based upon the foregoing, it is hereby

ORDERED that Mr. Platta's motion for summary judgment as to plaintiff's defamation and defamation *per se* claims is denied; and it is further

ORDERED that Mr. Platta's motion for summary judgment as to plaintiff's Trade Libel/Injurious Falsehood claims is denied; and it is further

ORDERED that Mr. Platta's motion for summary judgment as to the Tortious Interference with Prospective Business Advantage and Intentional Interference with Contractual Relationship is denied; and it is further

ORDERED that the Platta Firm's motion for summary judgment as to Breach of Contract is denied; and it is further

ORDERED that the Platta Firm's motion for summary judgment as to the Breach of the Covenant of Good Faith and Fair Dealing claim is granted and this claim is dismissed; and it is further

ORDERED that the Platta Firm's motion for summary judgment as to the Unjust Enrichment and Conversion claim is granted and this claim is dismissed; and it is further

ORDERED that defendants' motion for summary judgment as to plaintiff's Unpaid Wages claim under NYLL § 191 (d) is granted and this claim is dismissed; and it is further

ORDERED that defendants' motion for summary judgment as to plaintiff's Improper Deductions claim under NYLL § 193 is denied; and it further

ORDERED that defendants' motion for a protective order is denied.

The forgoing constitutes the Order and Decision of the Court.

4/12/2024
DATE

HON. LESLIE A. STROTH
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE