SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

858
CA 24-01076
PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

ARMBRUSTER CAPITAL MANAGEMENT, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH BARRETT AND APEX WEALTH ADVISERS,
LLC, FORMERLY KNOWN AS APEX ADVISERS, LLC,
DEFENDANTS-APPELLANTS.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ADAMS LECLAIR LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered June 7, 2024. The order, insofar as appealed from, denied the cross-motion of defendants for leave to amend the second counterclaim and to add parties.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the cross-motion is granted upon condition that the amended answer is served within 30 days of entry of the order of this Court.

Memorandum: Plaintiff and defendant Apex Wealth Advisers, LLC, formerly known as Apex Advisers, LLC (Apex), are registered investment advisors. Defendant Elizabeth Barrett (defendant) is a financial advisor and the owner of Apex. Plaintiff and defendants entered into an asset purchase agreement (APA) whereby defendant sold Apex’s client list to plaintiff for a set price, payable in installments. In connection with the APA, defendant agreed to work part-time for plaintiff for the purpose of providing plaintiff with assistance in retaining Apex’s former clients. However, defendant resigned from plaintiff’s employment after less than a year.

Plaintiff commenced this action for breach of a restrictive covenant provision in the APA, and defendants counterclaimed for, inter alia, defamation, alleging that plaintiff made statements asserting that defendant lacked professional competence or integrity. Plaintiff moved to dismiss the defamation counterclaim pursuant to CPLR 3016 (a) and 3211 (a) (7). Defendants cross-moved for leave to amend the defamation counterclaim and to add as parties plaintiff’s chief executive officer and president (individual parties), who

authored the alleged defamatory statements. Supreme Court granted the motion and denied the cross-motion. As limited by their brief, defendants appeal only from the denial of their cross-motion.

"Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Holst v Liberatore*, 105 AD3d 1374, 1374 [4th Dept 2013] [internal quotation marks omitted]; *see Caputo v Tubiolo*, 236 AD3d 1426, 1427 [4th Dept 2025], *lv denied* 44 NY3d 905 [2025]; *LHR, Inc. v T-Mobile USA, Inc.*, 88 AD3d 1301, 1304 [4th Dept 2011]). "The decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *see Fusco v Hansen*, 228 AD3d 1279, 1280 [4th Dept 2024]).

A party asserting a claim for defamation must show "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Fika Midwifery PLLC v Independent Health Assn., Inc.*, 208 AD3d 1052, 1054 [4th Dept 2022] [internal quotation marks omitted]; *see Miserendino v Cai*, 218 AD3d 1261, 1262 [4th Dept 2023]; *Accadia Site Contr., Inc. v Skurka*, 129 AD3d 1453, 1453 [4th Dept 2015]). Statements "that tend to injure another in his or her trade, business or profession" constitute defamation per se (*Fika Midwifery PLLC*, 208 AD3d at 1054 [internal quotation marks omitted]). In addition, a plaintiff must "set forth in the complaint the particular words complained of, as required by CPLR 3016 (a), and must state the time, place and manner of the allegedly false statements and to whom such statements were made" (*id.* [internal quotation marks omitted]).

Initially, we reject plaintiff's assertion, raised as an alternative basis for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that the proposed amended counterclaim failed to comply with CPLR 3016 (a). In support of their cross-motion, defendants submitted the emails that were sent by the individual parties, which contained the alleged defamatory statements. We conclude that, in doing so, they met the pleading requirements of CPLR 3016 (a) (*see generally Accadia*, 129 AD3d at 1454; *McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [1st Dept 2008]; *Polish Am. Immigration Relief Comm. v Relax*, 172 AD2d 374, 374 [1st Dept 1991]), as the court implicitly found.

We conclude that the court abused its discretion in denying defendants' cross-motion (*see Holst*, 105 AD3d at 1374; *LHR, Inc.*, 88 AD3d at 1304). Defendants sufficiently alleged that the statements made by the individual parties were false and that they were reasonably susceptible of a defamatory connotation. In determining the sufficiency of a defamation pleading, we must "consider 'whether the contested statements are reasonably susceptible of a defamatory connotation' " (*Davis v Boeheim*, 24 NY3d 262, 268 [2014]; *see Bisimwa v St. John Fisher Coll.*, 194 AD3d 1467, 1471 [4th Dept 2021]), and, in doing so, we must "give the disputed language a fair reading in the

context of the publication as a whole" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]). Here, the emails were sent to clients of plaintiff who had previously been clients of defendants and advised them that defendant was no longer employed by plaintiff. The emails stated that the investment trading industry was "highly regulated," that plaintiff had "compliance policies" to protect its clients against "conflicts of interest," and that defendant found those policies "overly burdensome." We conclude that the disputed language provides a basis "from which the ordinary reader could draw an inference" (*James v Gannett Co.*, 40 NY2d 415, 420 [1976], *rearg denied* 40 NY2d 990 [1976]) that plaintiff was accusing defendant of failing to adhere to ethical standards in the investment trading industry.

We further agree with defendants that the statements constituted defamation per se, such that defendants did not need to allege special damages. " 'A statement imputing incompetence or dishonesty to the [party] is defamatory per se if there is some reference, direct or indirect, in the words or in the circumstances attending to their utterance, which connects the charge of incompetence or dishonesty to the particular profession or trade engaged in by [the party]' " (*Miserendino*, 218 AD3d at 1265). The statement "must be more than a general reflection upon [the party's] character or qualities[;] . . . [it] must reflect on [the party's] performance or be incompatible with the proper conduct of [their] business" (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]). Here, as alleged in the proposed amended counterclaim, the statements conveyed that defendant was unable to conduct her work in a legally compliant and ethical manner and that she lacked professional competence or integrity.

Contrary to plaintiff's contention, its submissions in opposition to the cross-motion did not establish that the proposed amendment was patently lacking in merit. In support of its contention that the contested statements were substantially true, plaintiff submitted defendant's email to plaintiff's chief executive officer and excerpts from defendant's deposition. The individual parties stated in their emails that defendant found compliance with plaintiff's policies "overly burdensome" and that the parties could not "come to an agreement which satisfied both sides" or that defendant had "decided that the only way to avoid the rule was to resign." In defendant's email to plaintiff's chief executive officer, she stated that she found plaintiff's pre-approval and reporting requirements with respect to personal securities trading to be "burdensome and time consuming," and she admitted that again in her deposition. She further testified, however, that the statement "the only way to avoid the rule was to resign" was untrue because "[t]hat was not the only way." In other words, defendant's statements established that she found the policies burdensome and time-consuming, but they do not establish that she left plaintiff's employment *because of* those policies, as stated in the emails by the individual parties.

Moreover, even assuming, arguendo, that the statements were substantially true and that defendants are relying on a theory of defamation by implication, we conclude that the proposed amended counterclaim is not patently lacking in merit. " 'Defamation by

implication’ is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements” (*Armstrong*, 85 NY2d at 380-381; *see Bisimwa*, 194 AD3d at 1472; *Partridge v State of New York*, 173 AD3d 86, 90 [3d Dept 2019]). There is a heightened legal standard for a claim of defamation by implication (*see Bisimwa*, 194 AD3d at 1472). “Under that standard, ‘[t]o survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the [party asserting the defamation claim] must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference’ ” (*id.*; *see Partridge*, 173 AD3d at 91-92). The second part of the test is an objective inquiry and “ ‘asks whether the plain language of the communication *itself* suggests that an inference was intended or endorsed’ ” (*Partridge*, 173 AD3d at 94).

We agree with defendants that they met the heightened pleading standard. As testified to by defendant, the statements that were made do not tell the whole story and convey a false impression that defendant was entirely at fault for the demise of the employment relationship because she found plaintiff’s compliance policies burdensome. But as alleged in the answer, plaintiff’s chief executive officer blamed defendant for the departure of a large client, said that he did not trust her and that she would steal all of plaintiff’s clients, and threatened legal action against her. Defendant resigned from employment shortly after that outburst. Thus the statements by the individual parties, even if true, conveyed the false suggestion and impression that the only reason defendant left plaintiff’s employment was because she did not want to comply with policies that were in place to “protect[ ]” the clients. Furthermore, the plain language of the statements suggested that the individual parties intended that false suggestion and impression so that the clients would remain with plaintiff.

Inasmuch as we conclude that the court abused its discretion in denying that part of defendants’ cross-motion for leave to amend the defamation counterclaim, we further conclude that the court abused its discretion in denying that part of defendants’ cross-motion for leave to add the individual parties to the defamation counterclaim. In opposition, plaintiff does not raise any contention that the defamation counterclaim against the individual parties is time-barred (*see generally* CPLR 203 [f]; *Buran v Coupal*, 87 NY2d 173, 177-181 [1995]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court