Silvaria v Intrepid Museum Found.
2003 NY Slip Op 30215(U)
April 2, 2003
Sup Ct, NY County
Docket Number: 105690/01
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PART 54

0105690/2001

SILVARIA, JOHN
vs
INTREPID MUSEUM FOUNDATION

SEQ 3

SUMMARY JUDGMENT

INDEX NO. 105690/01

MOTION DATE 2/20/03

MOTION SEQ. NO. 3

MOTION CAL. NO. ______

The following papers, numbered 1 to 8 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits	6-7
Replying Affidavits	8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

SCANNED
APR 08 2003

Dated: 4/2/03

SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE ______

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
---X
JOHN SILVARIA,

Plaintiff,

Index No.: 105690/01

-against-

DECISION AND ORDER

INTREPID MUSEUM FOUNDATION and
JERRY ROBERTS,

Defendants
.... X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for alleged defamation and violations of Military Law §§ 317 and 318. Plaintiff brought this action in connection with the termination of his employment as director of exhibits for the U.S.S. Intrepid, in New York City.

Motion

Defendants now move for summary judgment dismissing plaintiffs complaint and submit their attorney's affidavit, the affidavit of Jerry Roberts, Vice President of Exhibits for defendant Intrepid Museum Foundation ("IMF'), plaintiffs deposition testimony and other documentary evidence. In opposition, plaintiff submits his attorney's affirmation and other documentary evidence.

Facts

IMF operates the Intrepid Sea-Air-Space Museum in New York City, which is comprised in large part of three restored naval vessels: the Intrepid, an aircraft carrier; the Edson, a destroyer; and the Growler, a submarine. Affidavit of **J.** Roberts, ¶ **3.** Plaintiff, who served with

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the **U.S.** Navy from 1969 to 1973, and then with the reserves from 1975 through October 2001, began work for IMF on January 31,2000, as Director of Tour Guides and Facilities Management for the Edson and the Growler. EBT of plaintiff, pp. 18, 32. As part of the employment agreement, IMF allowed plaintiff initially to live on the Edson. Id., p. 36. Though no time limit was put on plaintiff's residence on the Edson, the arrangement was not intended to be permanent. Id. Accordingly, plaintiff stored various personal belongings aboard the Edson. Id., p. 95.

Plaintiffs supervisor Jerry Roberts avers as follows: "[s]oon after plaintiff began working for the IMF, Matinah Salmon, Director of Human Resources, and [Roberts] began receiving complaints from a number of tour guides regarding plaintiffs dictatorial management style, including his inappropriate discipline methods and his overt attempts to demoralize the guides. Additionally, the staff complained that plaintiff was prone to sporadic, violent outbursts in front of staff members." Affidavit of J. Roberts, ¶ 5. During the first few months of plaintiffs employment, Roberts "met with plaintiff at least once a week to counsel him on how to improve his management style." Id., ¶ 6. Toward the end of April, 2000, Roberts informed plaintiff that his probationary period was extended an additional ninety days due in part to behavior Roberts deemed "inappropriate for a supervisory employee.", Id ¶ 8. Regarding the meeting with Roberts in April plaintiff testified that Roberts told him he had the requisite skills for the job, but required more supervision because "we weren't quite meshing with the overall picture". EBT of plaintiff, p. 62. As to the extension of the probation period, plaintiff "thought it was great" because his pay and benefits would continue and "it was a job that [plaintiff] really wanted." Id., **p.** 69.

Plaintiff testified that on May 1, 2000, he received notice by telephone to report for active

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duty with the Navy the following day. EBT of plaintiff, p. 74. On May 2,2000, plaintiff reported to Navy Commander Burns at Battery Park in New York City, for duty with the International Naval Review, an exhibition of ships from across the world, scheduled to take place on July 4, 2000 at various sites around Manhattan, Id pp. 80. Plaintiff did not speak to anyone at IMF before reporting for active duty, but he testified that on May 2 or 3, 2000, he left a message with an unidentified individual in the IMF human resources department notifying IMF of his active duty order, Id p. 80, 95. On May 3, 2000, plaintiff sent a copy of the Navy order to IMF addressed to Matinah Salmon. The order stated that plaintiff's job would be completed on July 29, 2000. Id., p. 80.

Mr. Roberts further avers that "[d]uring the early part of May 2000, plaintiff came on board the Edson with a number of other individuals and hosted an unauthorized party where alcohol was consumed. The following morning the IMF staff was forced to clean up the aftermath of the party." Roberts Aff., ¶ 10. As a result of the alleged incident, Roberts "taped a memorandum on plaintiffs cabin door," stating:

> Edson and Growler Guidelines. Effective May 4th, 2000. Issued by Vice President of Exhibits.
>
> There will be no smoking in any interior spaces at any time.
>
> There will be no alcoholic beverages consumed aboard the vessels at any time unless written permission has been issued for a specified exemption by the CEO.
>
> All alcoholic beverages stored aboard the Edson for approved usage will be secured in one compartment under lock and key. Keys will be held only by the VPs of Operations and Exhibits. Once the acting manager, responsible for securing the vessel after close of public tours, has secured the vessel, no one is to be aboard without executive permission. ...

Roberts Aff., Ex. B. Plaintiff acknowledges seeing the posted memorandum on or about May 30,

2000. EBT of plaintiff, p. 100.

On May 30, 2000, Roberts was informed by Nick Rappa, an IMF staff member, "that plaintiff had come on board the Edson that morning, had entered the Ward Room and had broken into one of the arms lockers and removed some bottles of beer and soda from the locker." Roberts *Aff.* ¶ 12. In connection with this incident, Richard Lisi, Director of Security for IMF, conducted a formal investigation and issued a report stating that on May 30, 2000:

> Nick Rappa & Ron Wos were in the Ward Room of the Edson with Master Chief Westlye, when former employee Chief John Silvaria [plaintiff] entered. Silvaria, angry due to the fact that he could not enter the small arms locker adjacent to the Ward Room, went behind the separating curtain and forcefully removed the lock with a crow bar. Once inside the small arms locker, Master Chief Westlye and Chief Silvaria removed bottles of liquor allegedly belonging to Chief Silvaria.

Roberts Aff., Ex. C. Lisi's report was based on personal statements taken from Nick Rappa and Ron Wos, who allegedly witnessed the incident, Id. Ex. D. In a memorandum accompanying the report, Lisi wrote

> It was my understanding that Chief Silvaria was never denied permission to enter Museum property. However, while on Museum property, Chief Silvaria intentionally damaged Museum property in an attempt to gain entry to the weapons locker in the Ward Room of the Edson. It is also my understanding that Chief Silvaria, who is presently on active duty, reports directly to Master Chief Westlye.
>
> It is my opinion that Master Chief Westlye is guilty of failing to supervise a subordinate and Chief Silvaria, according to the Penal Law of the State of New York, is guilty of: 140.05–Trespass...140.35–Possession of burglars tools; 145.00 Criminal mischief in the fourth degree.

Id.

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Plaintiff acknowledges that he came on board the Edson on May 30,2000. EBT of plaintiff, p. 105. Plaintiff testified that he "was accompanying Master Chief Westlye" in an inspection of another vessel, the USS Bradley, which was tied to the Edson, Id. p. 106. While on board, plaintiff sought to retrieve some uniforms and personal effects he had stored in a small arms locker behind the Ward Room. Id., p. 112. The locker was secured by a keyed "Master" lock which plaintiff had purchased in January, 2000, in anticipation of working on board the Edson. Id., p. 119. Plaintiff had hidden the key to the lock on board the Edson, but could not locate it. Id. at 115. Usiiig a halogen tool he obtained from the repair locker on the main deck of the ship, plaintiff removed the lock from the locker and put it in his pocket. Id. at 118, 121. Plaintiff removed his belongings, but was not aware of any alcoholic beverages in the locker. Id., p. 125. Present in the ward room when plaintiff removed the lock were Chief Master Westlye, Mr. Rappa and Mr. Wos. Id., p. 126.

Plaintiffs employment was terminated as a result of the May 30 incident, Id. ¶ 14. Ms. Salmon addressed a letter dated June 1, 2000 to plaintiff stating

> This serves as formal notice that your employment with the Intrepid Museum has discontinued effective 6/1/00. This decision results from the incident that occurred on 5/30/00, in which you entered the Edson's Ward Room with what appeared to be a crow bar, and intentionally broke the lock on the door to the weapons locker to gain entry to the restricted area. As you are well aware destruction of museum property and entering restricted areas of the museum without authorization are prohibited by museum policy, and are grounds for termination. Thus the severity of your conduct leaves no alternative but to terminate your employment for cause.

Roberts Aff., Ex. E. Plaintiff acknowledges receipt of the termination letter. EBT of plaintiff, p. 135.

On June 29,2000, plaintiff again came aboard the Edson, this time on verbal order from Navy Captain Hov "to retrieve shore patrol equipment that was stored on the Edson." Id., p. 137. Plaintiff believed the equipment was placed on the Edson as a result of a "handshake deal" between "the previous curator and whoever was the command master chief." Id., p. 146. At the front gate, plaintiff spoke to Richard Lisi via walkie-talkie and notified him that he would be picking up the items. Id., p. 140. Plaintiff, accompanied by several Navy officers, entered the Museum grounds in a Navy vehicle. Id. Lisi met plaintiff at the Edson. Id., p. 141. Plaintiff told Lisi that he needed to retrieve the "shore patrol stuff that was stored on the third deck." Lisi said that "Jerry [Roberts] probably wanted to check it out before we took it off the property." Id. After speaking to Lisi, plaintiff and his companions went on board and retrieved the equipment, which consisted of approximately twenty-six brassards (arm bands emblazoned with the logo "SP"), night sticks, garrison belts, canteens and coolers. Id., p. 142. Lisi waited at the pier. Id., p. 143.

Plaintiff and his companions put the equipment in the truck and proceeded to exit the Museum premises. Id. p. 144. At the exit gate, Mr. Roberts approached the truck and "went through the whole diatribe of who gave me permission and what was I taking." Id., p. 145. Roberts stated that plaintiff had no right to take the equipment off the Edson. Plaintiff "agreed with that in theory," but explained to Roberts that "it wasn't my stuff that I was taking off it, nor was it Intrepid property, so it was government property." Id. Roberts allegedly told plaintiff that he had "burglarized the ship," and directed at plaintiff "a bunch of unflattering things." Id., p. 148. Roberts avers that "plaintiff got out of the truck and met me in the back of the truck where he showed me the items he had removed, two chests of ice and two bulletin boards. I **asked** for

documents authorizing removal of the items but plaintiff had no documents and refused to tell me the basis of his authority for removing the items. At this point, there was an exchange of words between me and plaintiff and I reminded plaintiff that his employment had been terminated on suspicion of breaking and entering into museum property on the Edson." Roberts Aff. ¶¶ 16-17. It is undisputed that at the time Mr. Roberts directed his comments at plaintiff at the exit gate, Chief Teitter and Petty Officer Ford were in the truck, and Petty Officer Carrol was standing behind the truck. EBT of plaintiff, p. 165.

Plaintiff did not return to the Museum after June 29, 2000 and did not contact anyone in IMF Management thereafter. Roberts Aff., ¶ 18. On July 29, 2000, plaintiffs attorney addressed a letter to Matinah Salmon at IMF stating "[p]lease be advised that this office has been retained by Mr. Silvaria in connection with his employment matters, specifically his termination from your company on June 1, 2000." Bressler Aff., Ex. 2. The letter detailed plaintiff's claims under Military Law and defamation and further stated "[m]y client would like to resolve these matters amicably. I am certain you would also like to avoid the time, expense, and possible negative publicity of litigation in this matter. Please contact me to set up a meeting where my clients [sic] claims can be addressed." Id. By letter dated August 4, 2000, defendants' attorney acknowledged receipt of the July 29 letter from plaintiff's attorney and stated "[w]e are investigating your client's allegations and hope to respond to you shortly." Id., Ex. 3. Plaintiffs attorney affirms that the following week, he spoke to defendants' attorney by telephone and advised that plaintiff "would like his position back." Bressler *Aff.* ¶ 4. Defendants' attorney responded that "she did not think this was possible but that she would talk to her client." Id. Plaintiff was not reinstated.

Conclusions of Law

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. Zuckerman v. City of N.Y., 49 N.Y.2d 557 (1980). Defendants must show by admissible evidence that no violations of Military Law §§ 317 or 318 occurred and that no cause of action for defamation exists. On the record before the Court, defendant has failed to meet its burden.

Military Law §§ 317 and 318

"In the case of any person who, in order to perform military service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who: a) receives a certificate of completion of military service... b) is still qualified to perform the duties of such position; and c) makes application for reemployment within ninety days after he is relieved from such service, if such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." Military Law § 317.

Defendants argue that no violation of Military Law § 317 occurred because plaintiff was not qualified to return to work for IMF and did not timely apply for reemployment. The Court disagrees. The parties cite no reported cases interpreting Military Law §§ 317 or 318 with respect to the questions presented here. Defendants urge the Court to look by way of analogy to Federal authorities interpreting the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 W.S.C. §§ 4311 et seq. The memorandum of the Division of Military and Naval

Affairs annexed to McKinney's 1993 Session Laws of New York, Chapter 312 states that the purpose of Section 317 was "to update and revise specific provisions in accordance with current law on military leave and reemployment rights consistent with the federal veterans' reemployment rights statutes." See Mem. of Div. of Military and Naval Affairs, 1993 McKinney's Session Laws of NY, at 2570. Thus, the cited authorities may provide guidance, they do not control this Court as to matters of New York law. Therefore, the Court must treat these issues as matters of first impression.

"Qualified" is defined as "fitted (as hy training or experience) for a given purpose." Merriam-Wesbster's Collegiate Dictionary 955 (10th ed 1997). The first question presented is whether the reasons given for plaintiffs termination are sufficient to disqualify plaintiff for employment under Military Law § 317. The Court concludes that the allegations in Ms. Salmon's May 30, 2000 letter, if proven, would be sufficient to disqualify plaintiff from employment. It is beyond dispute that an employee who is determined to have intentionally and wrongfully destroyed the employer's property to gain entry to a restricted area would no longer be "fitted" for the given purpose of his employment. The authorities cited by defendants support such a conclusion. See. e.g., Preda v. Nissho Iwai ***Am.*** Corp., 128 F.3d 789 (2nd Cir. 1997)("courts have unanimously held that in order for a veteran to be 'qualified' to return to a prior position, under the meaning of the VRRA and predecessor laws which protected veterans' re-employment rights, the veteran must be not only physically capable of returning to the job but also temperamentally willing and able to work harmoniously with co-workers and supervisors") citing Green v. Tho-Ro Prods.. Inc., 232 F.2d 172, 174-76 (3d Cir. 1956); Trusteed Funds. Inc. v. Dacey, 160 F.2d 413, 420-21 (1st Cir. 1947); Winfree v. Morrison Inc., 762 F. Supp. 1310, 1313 (E.D. Tenn.

1990).

However, the record before the Court is insufficient to establish as a matter of law that plaintiff destroyed IMF's property or was present in the Ward Room without authorization. Plaintiff testified that the lock he damaged was his own; and that he was present under the legitimate authority of Chief Master Westlye. Indeed, the latter assertion is supported by Mr. Lisi's memorandum stating: "Chief Silvaria, who [was] presently on active duty, report[ed] directly to Master Chief Westlye." Similarly, defendants have failed to establish that plaintiff did not timely apply for reemployment. It is well settled that "'[a]n attorney retained in an action has implied authority, by virtue of his retainer, to do what may be necessary to advance his client's interest.'" In re Estate of Bogom, 181 A.D.2d 989 (4* Dept. 1992). Here, it is undisputed that plaintiff's attorney was authorized to act on plaintiffs behalf, and that he did so by verbally notifying defendants' attorney that plaintiff wanted his position back. While Mr. Bressler's affirmation states that the conversation occurred "when [defendants' attorney] came back," there is no evidence of the precise date of the conversation. Thus, the Court finds that a question of fact exists as to whether plaintiff, through his attorney, made a timely application for reemployment pursuant to Military Law § 317.

Defamation

To make out a prima facie case of defamation, a plaintiff must show that a defamatory statement about the plaintiff was made to at least one person other than the plaintiff. See Zaidi v. United Bank, Ltd. 194 Misc.2d 1 (Sup.Ct. NY County 2002). Where neither a public figure nor a matter of public concern are involved, the statement must have been negligently made. Huggins v. Moore, 253 A.D.2d 297 (1st Dept. 1999) revd on other grounds 94 N.Y.2d 296 (1999). Truth

is an absolute defense to a defamation action. See Zaidi, supra.

Slander (verbal defamation) is generally not actionable unless the plaintiff suffers special damage. See Liberman v. Gelstein, 80 N.Y.2d 429 (1992). An exception to this rule is made where slander is alleged based on Statements: (i) charging plaintiff with a serious crime; (ii) that tend to injure plaintiff in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman. See id. 'When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven." Id. at 435. "Serious crimes" for defamation purposes include inter alia murder, burglary, larceny, arson, rape and kidnapping. See id. Statements alleged under the trade, business or profession exception are "limited to defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiffs character or qualities." See id. at 436.

In defamation actions, "[i]t is the role of the court to determine in the first instance whether particular words, viewed in context and given their natural meaning, are reasonably susceptible of a defamatory meaning. ...If the court determines that the contested statements are reasonably susceptible of a defamatory meaning, then the issue of whether that was the sense in which the words were likely to be understood by an ordinary person should be resolved by the trier of fact." McCaffrey v. Royal Dutch Airlines, NYLJ, Dec 15, 1997 at 28, col. 3 citing Mahoney v. Adirondack Pub. Co., 71 N.Y.2d 31 (1987). Plaintiff alleges that Mr. Roberts defamed him by stating on June 29,2000, as plaintiff was leaving the Museum in the company of several others, that plaintiff had burglarized the Museum. Defendants argue that no defamation

action can lie because plaintiff failed to allege publication of Roberts' statements, and that Roberts' statements were true. The Court disagrees. It is undisputed that several other individuals were present in or around plaintiffs truck at the time Roberts made the statements. While plaintiff has not provided any proof that any of those individuals actually heard the allegedly defamatory remarks, it is not his burden to do so here. The facts on the record are sufficient to establish a triable issue of fact as to whether Roberts' statements were published for defamation purposes. **As** to the truth of Roberts' statement, the record establishes only that there is a dispute: plaintiff claims the lock was his and he stole nothing; defendants dispute this. Finally, if plaintiffs allegations are proven, damages will be presumed as Roberts' alleged statement charged plaintiff with the serious crime of burglary. Moreover, the very essence of the statement was that plaintiffs conduct was "of a kind incompatible with the proper conduct of the business, trade, profession." Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Date: April **2,** 2003
New York, New York

SHIRLEY WERNER KORNREICH