

Hoesten v Best

2005 NY Slip Op 30379(U)

July 15, 2005

Supreme Court, New York County

Docket Number: 114919/99

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK

PART 2

Justice

0114919/1999

HOESTEN, RAYMOND J.

VS
BEST, CONSTANCE

SEQ 3

SUMMARY JUDGMENT

INDEX NO. _____

NOTION DATE _____

NOTION SEQ. NO. _____

NOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 29 2005

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/15/05

LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2**

----- X

RAYMOND J. HOESTEN,

Plaintiff,

- against -

DECISION / ORDER

**CONSTANCE BEST and MITCH MCGUIRE, as
Treasurer of the AMERICAN FEDERATION OF
TELEVISION AND RADIO ARTISTS, NEW YORK
LOCAL,**

Index No. 114919/99

Defendants.

----- X

LOUIS B. YORK, J.:

Plaintiff Raymond J. Hoesten commenced this defamation action against defendants Mitch McGulre, in his representative capacity as Treasurer of the American Federation of Television and Radio Artists, New York Local ("AFTRA" or "the union"); and Constance Best, an AFTRA employee (collectively "the defendants"). According to plaintiff, over a three-and-one-half year period, Best published a series of alleged defamations that called into question his professional competence and proximately caused his termination as stage manager of the ABC daytime drama "One Life To Live" ("OLTL"). Plaintiff claims defamation per se, defamation and tortious interference with prospective business relations. Currently, defendants move for summary judgment. Plaintiff opposes the motion. For the reasons stated below, the court grants the motion in part, dismissing all actions against AFTRA. The motion is granted in part and denied in part regarding the actions against defendant Best.

The uncontested facts leading up to this case are as follows: After being hired as a freelancer under the terms of the collective bargaining agreement between ABC and the Directors Guild of America ("DGA"), plaintiff Hoesten was employed as a stage manager on the daytime drama "One Life To Live" for over 26 years. As part of his job, plaintiff would

interact with actors on the set, including actors with no spoken lines ("extras") and those with fewer than five spoken lines in a program ("under-5s"). Among other responsibilities, plaintiff positioned and cued the actors and relayed instructions from the control booth to the performers. Between 1995 and 1998, Best, an Executive Assistant at AFTRA, lodged five complaints against plaintiff with ABC, alleging inappropriate and abusive treatment of extras and under-5s. Defendant Best was acquainted with plaintiff because she had been AFTRA's Field Representative on the OLTL set between 1981-1988 and a supervisor of field representatives between 1988-1992. After this time, she was promoted to the position of Executive Assistant.

On September 14, 1998, ABC terminated plaintiff's employment. This decision followed an August 21, 1998 meeting between ABC executives and Best in which Best had repeated each of the five complaints she had lodged in the prior three-and-one-half years. A summary of each complaint follows.

1. Complaint of Janelle Douglas. On February 13, 1995, Best faxed a complaint about Hoesten to the producers of OLTL, in which Best relayed the purported complaint of actress Janelle Douglas, now deceased. Douglas alleged that on February 8, 1995, Hoesten had become agitated at a group of extras and yelled something to the effect of: "They call themselves f---ing actors and they don't even know how to take direction."

2. Complaint of Brockton Pierce. On February 11, 1997, Best telephoned Joy Axelrad, an ABC labor relations executive, and conveyed the complaint of under-5 Brockton Pierce. Pierce, who had had difficulty remembering his lines, had been fired by Hoesten. During that telephone conversation, Best stated that Hoesten "Intimidates and is unprofessional to extras and under 5s and pushes the performers onto the set."

3. Complaint of Madeline Balmaceda. On November 12, 1997, four days after she had received a complaint from actress Madeline Balmaceda, Best wrote a letter to ABC

stating:

This letter is a follow-up to our conversation today regarding serious verbal and physical abuse of background performers by one of the stage managers at "One Life To Live." This particular stage manager repeatedly tugs, pushes, and pulls actors into position, instead of using verbal cues or hand gestures. The stage manager follows a pattern of intimidation and humiliation, and is a cause of tension on the set.

4. Complaints of Randy Scheine and Linda Wang. On July 24, 1998, Best sent the following letter to ABC:

Recently, during our taping, an actor was given instructions to stay out of a shot for several scenes. Based on the flow of action, the actor entered the shot during the last scene, at which point Ray yelled at him, "What the f--- are you doing in the shot!" When the actor tried to check his note with him, Ray slammed his notebook shut, and walked away.

Last week, an actress who was hired as an extra was handed a script with her name on it. When she appeared on the set, she showed Ray the script. He exploded, called her an idiot, and asked if she stole the script from someone's dressing room. As if that insult was not enough he made a remark to the effect, that the Sushi she had for lunch made her unable to follow directions. This actress, an Asian-American, has said that she does not care to work on the show again.

These are examples of Ray Hoesten's pattern of disparagement and intimidation of actors, particularly those hired as under-fives and extras.

Plaintiff's Complaint, filed July 22, 1999, alleges that Best's reports to ABC, communicated over a three and one half year period, and repeated at the August 21, 1998 meeting, were defamatory and motivated by malice. Best did not personally witness any of the five reported incidents and defendants did not undertake an investigation to verify the accuracy of the actors' complaints.

DISCUSSION

Defendants' summary judgment motion is based upon several of their affirmative defenses. The court addresses them below, in turn.

STATUTE OF LIMITATIONS

Defendants assert that under CPLR § 215(3) plaintiff's claims relating to the allegedly

defamatory statements made prior to July 22, 1998 are time-barred because plaintiff did not commence this action until July 22, 1999. Thus, defendants contend that plaintiff's action may only be predicated upon the letter of July 24, 1998. In opposition, plaintiff argues that because all of Best's allegedly defamatory remarks were republished at the August 21, 1998 meeting, the action is timely as to all five remarks.

An action for libel or slander must be commenced within one year of the date of first publication. CPLR § 215(3); see Hochberg v. Nissen, 180 A.D.2d 435, 436, 580 N.Y.S.2d 12 (1st Dept. 1992), appeal denied 80 N.Y.2d 755 (1992). Under the single publication rule, a subsequent reading "of libelous material by additional individuals does not change the accrual date for a defamation cause of action." Gelbard v. Bodary, 270 A.D.2d 866, 706 N.Y.S.2d 801 (4th Dept. 2000). However, under the republication rule each distinct publication of a defamatory statement constitutes a new publication that gives rise to a new cause of action. See Barber v. Daly, 185 A.D.2d 567, 586 N.Y.S.2d 398 (3rd Dept. 1992). Therefore, if Best's repetition of her remarks was a republication rather than "a delayed circulation of the original edition," then the action is timely. Rinaldi v. Viking Penguin, Inc., 52 N.Y.2d 422, 435, 438 N.Y.S.2d 496 (1981) (hardcover and paperback editions are distinct publications); see also Cook v. Conners, 215 N.Y. 175, 179, 109 N.E. 78 (1915) (morning and afternoon newspapers give rise to separate causes of action); Restatement (Second) of Torts § 577A, Comment on §§ 1 ("It is the general rule that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises.").

Applying these principles to the present case, the court finds that those remarks Best repeated at the August 21, 1998 meeting with ABC were republished, and a new accrual date for a defamation cause of action was tolled. Best's repetition of her complaints at that

meeting reached many new recipients. See Firth v. State of New York, 98 N.Y.2d 365, 362, 371 747 N.Y.S.2d 69, 72 (2002) (statute of limitations renewal justified when "the subsequent publication is intended to and actually reaches a new audience."). Also, the August 21, 1998 meeting was bilateral and executory in nature, whereas Best's earlier communications with ABC, were unilateral and informational in nature. See Lehman v. Discovery Communications, Inc., 332 F.Supp.2d 534 (E.D.N.Y. 2001) ("[R]enewed impact . . . creates a new opportunity for injury, thereby justifying a new cause of action."). Thus, given the context of the August 21, 1998 meeting, Best's repetition of each of her prior complaints amounted to more than "a delayed circulation of the original edition." Rinaldi, supra, at 435.

Defendants urge that, even if the remarks of August 21 are not time-barred, plaintiff is procedurally barred from asserting these claims because the Complaint failed to set forth the contents of those remarks with the particularity required under CPLR § 3016(a). CPLR § 3016(a) provides that "[I]n an action for libel or slander, the particular words complained of shall be set forth in the complaint" Because defamatory words provide the legal predicate for a cause of action, "[t]he failure to set forth the actual words . . . renders the complaint defective." Brown v. Reed, 10 Misc.2d 8,9, 167 N.Y.S.2d 41 (N.Y.Sup. 1957); see also Cerro de Pasco Tunnel & Mining Co. v. Hagglin, 106 App.Div. 401, 94 N.Y.S. 593 (1905) (plaintiff must separately state and number causes of action if suing upon several publications). In the present case, the Complaint sets forth the contents of the July 24, 1998 letter, which relates to the complaints of Scheine and Wang, in full, but it refers only generally to other allegedly defamatory statements. Plaintiff may not defeat a motion for summary judgment on grounds he did not adequately allege in the Complaint, therefore defendants' motion to limit plaintiff's claims to the statements made in the July 24, 1998 letter is granted.

FEDERAL PREEMPTION

Next, defendants move for summary judgment on the ground that Section 7 of the National Labor Relations Act ("NLRA") preempts plaintiff's cause of action for defamation in a state court. Plaintiff responds that Best's complaints regarding Hoesten's behavior did not constitute a grievance or give rise to a labor dispute within the meaning of the NLRA.

Section 7 of the National Labor Relations Act guarantees the rights of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. Sec. 157.

In San Diego Building Trades Council Local 2620 v. Garmon, 359 U.S. 236 (1959) ("Garmon"), the Supreme Court stated that the NLRA preempts state law "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." 359 U.S. at 244.

However, the Garmon Court recognized that "the States need not yield jurisdiction 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . (o)r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.'" Id. at 243–244. In Linn v. Plant Guard Workers, Local 114, the Court found that a State's concern with redress for defamatory harm satisfies this criteria but that for the Garmon exception to apply the complainant must prove specific damages and actual malice so "that the prospect of damages not dampen the ardor of labor debate and truncate the free discussion envisioned by the Act." 383 U.S. 53, 64 (1966).

Applying these principles, the court finds that the present case does not fall within the ambit of Linn. Linn considered defamatory statements published in union leaflets

"during a period of labor unrest" and "with specific reference to labor controversies." Linn v. Plant Guard Workers, Local 114, supra, at 64. Those courts which have applied Linn have done so only within the specific context of NLRA controversies; i.e., during labor union formation, elections, contract negotiations and strikes. See, e.g., Gateway Theatrical of Bellport, Inc. v. Associated Musicians of Greater New York, 240 A.D.2d 538, 658 N.Y.S.2d 692 (2nd Dept. 1997) (applicable to defamation claim arising out of a union organizing campaign); O'Neill v. Peekskill Faculty Ass'n, 120 A.D.2d 36, 507 N.Y.S.2d 173 (N.Y.A.D. 2nd Dept. 1986) (applicable where alleged defamatory incident was directly involved in labor negotiations). Best's remarks did not arise out of a labor dispute within the meaning of the Section 7 of the NLRA. The present case does not implicate any of the rights enumerated in Section 7. In addition, Best's complaints were not presented as formal grievances referencing the collective bargaining agreement between ABC and AFTRA. Defendant's argument, that the three-and-one-half year lapse between Best's first complaint and ABC's decision to terminate is tantamount to a labor dispute, is unfounded. ABC and AFTRA were never at loggerheads and they never debated the subject of plaintiff's treatment of actors on the set. Instead, Hoesten's eventual dispute with AFTRA is a private one that is inconsequential to the federal scheme and beyond the circumscribed jurisdiction of the National Labor Relations Board. Therefore, plaintiff's defamation claims are not preempted by federal law.

QUALIFIED PRIVILEGE

According to defendants, Best's statements are privileged because ABC and AFTRA shared a bona fide interest in the treatment of actors on the set of "One Life To Live" and publication was appropriately limited. In opposition, plaintiff argues that because Best's statements were published with malice, the privilege does not apply.

New York courts recognize a qualified privilege where a "communication [is] made by

one person to another upon a subject in which both have an interest," Stillman v. Ford, 22 N.Y.2d 48, 53, 290 N.Y.S.2d 893 (1968), or where a party has "a moral or societal duty to speak" and the statement is made to a party having a corresponding interest. Herlihy v. Metropolitan Museum of Art, 214 A.D.2d 250, 258, 633 N.Y.S.2d 106 (1st Dept. 1995). However, a showing that a communication of common interest was published with malice, with knowledge of its falsity, or with reckless disregard of whether the statement was false, destroys the privilege and renders the communication actionable. See Liberman v. Gelstein, 80 N.Y.2d 429, 437, 590 N.Y.S.2d 857, 862 (1992).

In the present case, a qualified privilege attached to Best's communications with ABC regarding Hoesten's behavior because AFTRA and ABC shared an interest in preventing verbal and physical abuse of actors on the set of "One Life To Live." Also, public policy favors "robust and uninhibited" communications between labor unions and employers and the conciliatory resolution of workplace conflicts. See Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 273 (1974). Therefore, the burden shifts to the plaintiff to make an evidentiary showing that Best's remarks were motivated by malice. See Liberman, supra at 441. Plaintiff has sustained this burden and raised a triable issue of fact on the question of malice. In the July 24, 1998 letter, Best attributed racist remarks to Hoesten. Hoesten avers that he was away from the set when these words were spoken. An eyewitness attests that another stage manager was actually the communicant. That other stage manager has admitted that he made the disparaging remarks. Best did not investigate the allegations and refused to meet with Hoesten to discuss the complaints. Moreover, Best arguably revealed a bias when she characterized five alleged incidents out of thousands of interactions during plaintiff's 26 years on the "One Life To Live" set as "a pattern of verbal and physical abuse." In sum, a reasonable juror could conclude that Best was motivated by ill will or acted in reckless disregard of the falsity

of her reports.

MARTIN V. CURRAN

Defendants argue that, under Martin v. Curran, 303 N.Y. 276, 101 N.E.2d 683 (1951), the plaintiff's claims may not be brought against AFTRA unless each and every member has ratified the allegedly defamatory remarks. In opposition, the plaintiff contends that Martin does not apply because in communicating the reports, Ms. Best acted as the union's agent. Therefore, the rules of agency should determine AFTRA's liability; and under agency law, AFTRA is liable because Best acted within the scope of her employment when she made the allegedly defamatory statements.

As a procedural convenience, Section 13 of the General Associations Law provides that a plaintiff may bring suit against an unincorporated association by naming the officers as defendants, only if the "individual liability of every single member can be alleged and proven." General Associations Law § 13. In Martin v. Curran, the Court of Appeals interpreted Section 13 as codifying the common law principle that a voluntary unincorporated association is not a legal person and held that for a cause of action to exist against a union, the plaintiff must allege that all members have ratified an intentionally tortious act. 303 N.Y. 276, 282, 101 N.E.2d 683 (1951). Courts have carved out various exceptions to Martin which do not apply to the present case. For one, an exception exists for cases in which a union member sues his union for wrongful expulsion. Madden v. Atkins, 4 N.Y.2d 283, 174 N.Y.S.2d 633 (1958). Plaintiff points to Madden as a case where the laws of agency trump the unanimous ratification requirement in Martin. However, the claim in this case is not brought by a union member against his own union but by is a third-party claimant. Therefore, Madden does not apply.

Next, plaintiff contends that because Best was AFTRA's agent and she was engaged in an essential activity of the union, under Grahame v. Rochester Teachers Ass'n.,

unanimous member ratification is not required. 262 A.D.2d 963, 692 N.Y.S.2d 537 (4th Dept. 1999). The Grahame-court held that unanimous ratification is not required where a claim is brought against an authorized agent of the association who has acted negligently "in the course of performing an essential activity of the [union] and in furtherance of the existence of it, which is capable, on principles of agency, of binding all of its members." Torres v. Lacey, 5 Misc.2d 11, 12, 159 N.Y.S.2d 411 (N.Y.Sup. 1957) ("The liability of a voluntary unincorporated association for the commission or omission of an unintentional wrong by its agent is solely governed by the general rules of agency."). However, the court finds that the negligent agent exception does not apply to the present case because plaintiff must prove malicious intent or actual malice in order to overcome the qualified privilege that shields Best's communications with ABC. Therefore, Martin applies to AFTRA. Accordingly, the court dismisses all claims against AFTRA.

AT-WILL EMPLOYMENT

Finally, defendant argues that because plaintiff was an at-will employee at ABC, a showing of malice, fraud or other wrongdoing is required in order to bring a claim of tortious interference with prospective business relations. Plaintiff responds that there is a question of fact and law as to whether plaintiff was an at-will employee at ABC and that Best did, in fact, act with malice. The court already has found that a common interest qualified privilege attached to Best's communications with ABC regarding Hoesten's treatment of actors on the "One Life To Live" set. See, supra, at ¶ 19. Therefore, the plaintiff must prove malice in order to prevail in all claims based upon those communications. For the same reasons the court has found that plaintiff raised a triable issue as to malice with respect to other claims, therefore there is a triable issue here.

CONCLUSION

Accordingly, it is

ORDERED that the portion of the motion seeking to dismiss the actions as against AFTRA is granted and all claims as against AFTRA are severed and dismissed;

and it is further

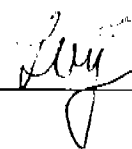
ORDERED that the portion of the motion seeking to dismiss the actions as against Best is denied;

and it is further

ORDERED that the portion of the motion seeking to dismiss all actions predicated upon statements other than those contained in the letter of July 24, 1998 is granted.

Dated: July 15, 2005

Enter:



J.S.C.

LOUIS B. VORK