

**Mehmet v Scudieri**

2007 NY Slip Op 30612(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0100017/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Index Number : 100017/2006

MEHMET, B. DAVID

INDEX NO. \_\_\_\_\_

vs

SCUDIERI, MARY ANN

MOTION DATE \_\_\_\_\_

Sequence Number : 004

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

MOTION 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

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

**FILED**  
APR 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

APR 04 2007

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

B. DAVID MEHMET & AS ASSIGNEE OF  
MBK COMPANY, INC.,,

Plaintiff,

-against-

MARY ANN SCUDIERI,

Defendant.  
-----X

**DECISION/ORDER**

Index No.: 100017/06

Seq. No.: 004/006

Present:

Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Motion Seq. No. 004 - Papers**

**Numbered**

Def's motion [sj] w/ SL affirm in support, exhs .....	1
Pltf's affirm in opp (BDM), w/ exhs .....	2
Def's aff (SL) in further supp. ....	3

**Motion Seq. No. 006 - Papers**

**Numbered**

Pltf's OSC [sj] w/BDM affirm in support, exhs .....	1
Def's affirm in opp (SL), w/ exhs .....	2
Pltf's affid in support (BDM), exhs .....	3

**FILED**  
APR 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

*Upon the foregoing papers, the decision and order of the court is as follows:*

This action is for defamation. Before the court are two motions. Defendant moves (sequence number 4): (1) for summary judgment, against plaintiff, and for dismissal of the complaint, or in the alternative, (2) to strike plaintiff's pleadings for failure to comply with discovery.

Plaintiff moves (sequence number 006): (1) for summary judgment against defendant on the issue of liability and compensatory damages; (2) for reference to determine punitive and compensatory damages, if necessary; and (3) for sanctions

against defendant.

These motions are hereby consolidated for consideration since they are responsive to one another.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

### **Background**

Plaintiff, B. David Mehmet ("Mehmet"), is self-represented and commenced the instant action based on defamatory statements defendant allegedly made against him to third parties. The defendant, Mary Ann Scudieri ("Scudieri"), had a business relationship with Mehmet which terminated, for reasons unclear to the court, in September 2003.

Mehmet filed a federal action on September 2, 2005, against his sister, Valerie Thompson ("Thompson"), who he alleges stole his business files with Scudieri's help. Mehmet admits, in the complaint, that, at the time the offending statements were made, an Order To Show Cause was pending before Federal District Court Judge Lawrence McKenna to implead Scudieri into that case. The federal action is for: "1) Tortious Interference of Contract, 2) Aiding and Assisting in an intentional tort, **3) Defamation, 4) Defamation Per Se** and 5) Intentional Infliction of Emotional Distress" (emphasis added).

Mehmet claims that on December 6, 2005, Scudieri made a phone call to

Mehmet's lawyer. During that phone call, Scudieri allegedly told Mehmet's lawyer that Mehmet "committed [f]raud" when he gave his attorney business files to work on (emphasis omitted, citations omitted). Mehmet claims that Scudieri defamed him because she knowingly made a false statement which harmed him (first cause of action). However, Mehmet admits Scudieri made the statement "while the Federal lawsuit and motion were pending and while the Defendant knew she was about to be pleaded into the Federal action." For a second cause of action, Mehmet alternatively claims defamation *per se*.

In Mehmet's answer to Scudieri's Counterclaims, Mehmet further admits that Scudieri was made a defendant in the Federal action, along with Scudieri's attorney, Scott Lockwood, Esq. ("Lockwood").

Mehmet alleges several grievances against Lockwood and Beth Rosenthal, Lockwood's associate. However, these allegations are not relevant to the motions before the court. This decision does not impact such grievance or any grievance Mehmet has or may file, one way or the other.

Scudieri answered the complaint and asserted five counterclaims for defamation and interference with business contracts. Scudieri also set forth several affirmative defenses such as contributory negligence, lack of personal jurisdiction, failure to state a cause of action and that the plaintiff lacks standing. Plaintiff denies each counterclaim and opposes plaintiff's affirmative defenses.

Scudieri now moves for summary judgment for failure to provide discovery, failure to state a cause of action, and because Mehmet's claims are barred by the single instance rule.

In opposition to Scudieri's motion and by way of an Order to Show Cause, Mehmet moves for summary judgment on the basis that: (1) Scudieri's motion for summary judgment, as well as her Order to Show Cause to vacate, decided by order dated October 26, 2006, are and were frivolous, respectively; (2) Scudieri filed false affirmations and affidavits of service which were prejudicial to his interests; and (3) Lockwood has a personal interest in the instant action.

Mehmet also opposes Scudieri's motion, claiming that because her answer was stricken, she has admitted to the allegations contained in the complaint and therefore has "unclean hands."

In opposition to Mehmet's contentions that Scudieri filed false affirmations and affidavits of service, she argues that any mistake, omission, defect or irregularity should be excused by the court since plaintiff has not been prejudiced in any way.

### Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the

sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting the motions for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> dept. 2003).

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 N.Y.2d 453 (1967). The elements of libel are: [1] a false and defamatory statement of fact; [2] regarding the plaintiff; [3] which are published to a third party and which [4] result in injury to plaintiff. Idema v. Wager, 120 F.Supp.2d 361 (SDNY 2000); Ives v. Guilford Mills, 3 F.Supp.2d 191 (NDNY 1998). Certain statements are considered libelous per se. They are limited to four categories of statements that: [1] charge plaintiff with a serious crime; [2] tend to injure plaintiff in its business, trade or profession; [3] plaintiff has some loathsome disease; or [4] impute unchastity. Liberman v. Gelstein, 80 N.Y.2d 429 (1992); Harris v. Hirsh, 228 A.D.2d 206 (1<sup>st</sup> dept. 1996). Where statements are libelous per se, the law presumes that damages will result and they need not be separately proved.

Any statement, whether written or oral, is absolutely privileged, and therefore not

defamatory, if it may be considered pertinent to anything “possibly or plausibly” relevant, “with the barest rationality” to litigation. Martirano v. Frost, 25 N.Y.2d 505 (1969); Joseph v. Larry Dorman, P.C., 177 A.D.2d 618, 619 (2<sup>nd</sup> dept. 1991); see also Oguagha v. Ropes & Gray, 830 N.Y.S.2d 660 (1 Dept. 2007). Although the privilege will not protect a gratuitous statement that is wholly “outside the cause,” there is clear appellate authority that trial courts should broadly construe what constitutes an out-of-court communication relating to pending or contemplated litigation. Caplan v. Winslet, 218 A.D.2d 148 (1<sup>st</sup> dept. 1996); Lemberg v. John Blair Communications, Inc., 258 A.D.2d 291 (1<sup>st</sup> dept. 1999). The absolute privilege has been applied to statements by non-attorneys, such as accountants and the parties themselves. Joseph v. Larry Dorman, P.C., *supra*.

Here, Mehmet seeks relief for an allegedly defamatory statement the defendant made, on December 5, 2005, against him, during a phone call to Mehmet’s attorney. Scudieri allegedly stated that Mehmet committed fraud by giving his clients’ files to his attorney to work on. Assuming without deciding this statement is false, the court considers the subject matter of this statement pertinent to the federal court litigation. Therefore, the statement is absolutely privileged. Mehmet may not maintain this action based on such a statement, especially when he has impleaded Scudieri into a federal action based on the same subject matter.

The court does not need to reach the defendant’s other arguments as they are hereby rendered moot by the above conclusion.

Even if the court were to reach Mehmet’s other arguments, they would not change the result that Mehmet just has no viable claim of defamation under these facts,

and his complaint should be dismissed. Even if Mehmet had established that Scudieri filed two frivolous motions, Mehmet is not entitled to summary judgment because his underlying complaint wholly lacks merit. The court is also unpersuaded by Mehmet's arguments with respect to the timing of service. Assuming *arguendo* that Mehmet proved Scudieri filed a false affidavit of service, plaintiff has clearly had an opportunity to oppose the motion and has not otherwise demonstrated prejudice to any substantial right of his.

Further, that plaintiff contends Lockwood has a personal interest in the instant action is of no consequence to the court's disposition of the instant motion.

Accordingly, defendant's motion for summary judgment is hereby granted and the complaint is dismissed for failure to state a cause of action.

Defendant's counterclaims are not tied to the allegations in the complaint. Neither side has moved for summary judgment with respect thereto. Accordingly, defendant's counterclaims are hereby severed and the court hereby schedules a status conference in this case for **May 10, 2006 at 9:30 a.m.** in Part 10, 80 Centre Street.

### Conclusion

IN ACCORDANCE WITH THE COURT'S DECISION, IT IS HEREBY

**ORDERED** that plaintiff B. David Mehmet's motion for summary judgment is hereby DENIED; and it is further

**ORDERED** that defendant Mary Ann Scudieri's motion for summary judgment is hereby GRANTED in all respects; and it is further

ORDERED that the complaint is hereby dismissed; and it is further  
ORDERED that the defendant's counterclaims are hereby severed; and it is further  
ORDERED that this matter is hereby scheduled for a status conference for **May**  
**10, 2006 at 9:30 a.m.** in Part 10, 80 Centre Street.

Any relief not expressly addressed herein has nonetheless considered by the  
court and is denied.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York  
April 4, 2006

SO ORDERED:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
APR 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE