[* 1]
SCANNED ON 5/30/2008

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

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Index Number : 112674/2007
KAISER, KEVIN
VS.
RAOUL'S RESTAURANT CORP.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
MAY 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 5/28/08

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

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

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KAISER, KEVIN,

Plaintiff,

Index No. 602895/05

-against-

RAOUL'S RESTAURANT CORPORATION, CINDY SMITH, GUY RAOUL and SERGE RAOUL,

Defendants.

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Louis B. York, J.:

Motion Sequence Numbers One and Two are consolidated for disposition and resolved as follows:

Background

Kevin Kaiser worked for Raoul's Restaurant Corporation ("Raoul's") from July 14, 2000 to September 29, 2006. Defendants Guy and Serge Raoul are both owners of Raoul's as well as vice-president and president respectively. Defendant Cindy Smith is the general manager of Raoul's. While plaintiff worked at Raoul's, his duties included managing the daily cash coming into the business, preparing employee payroll checks and paying invoices.

At the end of summer or early fall of 2005, Smith introduced Kaiser to Rob Houtenbos, the owner of Dutch Flowerline, Inc. ("Dutch"), a floral products business in New York. As a result of this meeting, Dutch hired Kaiser as a part-time bookkeeper.

Around the same time, Kaiser claims, Smith created a hostile work environment for Kaiser when she openly discussed her plans to replace senior staff. Allegedly, this made Kaiser, who was 49 years old, feel uncertain about his future at Raoul's.

On September 29, 2006, Smith fired Kaiser from his position at Raoul's. She alleges she did so because he stole cash from Raoul's office safe. Kaiser asserts that Smith contrived this excuse as a pretext for her age discrimination. Kaiser also alleges in his Complaint that Smith contacted Dutch owner Houtenbos and informed him "that Kevin Kaiser has been 'stealing' cash from [Raoul's]" (Verified Complaint, ¶ 62). Kaiser claims that as a result of Smith's statement, he was "encouraged" to leave his position at Dutch. However, according to Houtenbos, Smith only informed Houtenbos that *someone* at Raoul's was stealing and she suspected, but was not certain, that it was Kaiser. In additional, Houtenbos maintains that he told Kaiser that he was free to continue to work at Dutch, and it was entirely Kaiser's own choice to leave.

Plaintiff applied to the State Department of Labor for employment benefits but he was denied benefits, after a full hearing, on the ground that he was terminated for embezzling funds. This determination was affirmed on appeal before the State Unemployment Insurance Appeal Board.

Plaintiff Kevin Kaiser commenced this action around September 19, 2007, against Smith, Raoul's, and Guy and Serge Raoul, the restaurant owners. Kaiser argues, in the first cause of action, that Smith falsely accused him of stealing as a pretext for firing him based on his age, and this discriminatory motive violates New York State Executive Law § 290 *et seq.* and New York City Administrative Code § 8-101 *et seq.* In the second cause of action, Kaiser alleges that Smith created a hostile work

environment at the restaurant. In the third cause of action, defamation of character, Kaiser claims that (1) Smith falsely accused him of stealing in the presence of at least one other employee, (2) Smith repeated the false statement to Houtenbos, resulting in his termination, and (3) the statement caused further harm to Kaiser's reputation when it was republished in connection with hearings before the New York State Unemployment Board.

Currently in this action, defendants Guy Raoul and Serge Raoul move pursuant to CPLR 3211(a)(7), to dismiss the Complaint for failure to state a cause of action. Defendant Smith separately moves to (1) dismiss the Complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, (2) dismiss the third cause of action pursuant to CPLR 3016(a), on the grounds the Complaint fails to state the particular words complained of, or (3) in the alternative, to sever the third cause of action against Smith pursuant to CPLR 1003. For the reasons below, the Court grants Guy and Serge Raoul's motion in part and otherwise denies the motions.

Age Discrimination

As stated, the first cause of action alleges age discrimination. Defendants Guy and Serge Raoul argue that the Complaint fails to state a cause of action against them because Kaiser's employer was at all times Raoul's Restaurant Corp., and never Guy or Serge Raoul in their individual capacity. They argue that there is no legal basis for holding them vicariously liable, because only an "employer" may be liable under the theory of *respondeat superior* for the actions of its employees.

In asserting this argument, movants fail to take into account the scope of the State Human Rights Law, which forbids employers from terminating employees for

discriminatory purposes. Because of the policy purposes of these laws, the scope is broader than in the area of contractual or personal injury liability. Employers are subject to liability, and the term "employer" includes individuals having an ownership interest in the business. See Pepler v. Coyne, 33 A.D.3d 434, 435, 822 N.Y.S.2d 516, 517 (1st Dept. 2006)(quoting Patrowich v. Chemical Bank, 63 N.Y.2d 541, 543-544, 483 N.Y.S.2d 659 (1984)). Under this definition, the Raoul brothers are both liable as employers.

Moreover, as plaintiff explains, defendants' reliance on Hirsch v. Columbia University College of Physicians and Surgeons, 293 F. Supp. 2d 372 (S.D.N.Y. 2003) is misplaced. In Hirsch, the issue was whether the dean of the college was an employee with discretionary power and thus subject to liability. The Court found that the dean in question did not work at the university when the alleged discrimination took place. Therefore, he had no discretionary power during the period in question, and thus was not an "employee" who could be sued for the discrimination. The case is distinguishable on two grounds: 1) the Court examined employee rather than employer liability, and 2) unlike the Raoul brothers in the case at hand, the employee in question in Hirsch had no connection to Columbia University when the alleged discrimination occurred.

Utilizing the principles above, the Court concludes that movants are not immune from liability, as both Guy and Serge Raoul are employers within the meaning of the applicable laws and held their positions during the period in question. Therefore, the prong of Guy and Serge Raoul's motion seeking to dismiss the first and second causes of action for failure to state a cause of action is denied. As there is a cause of action

under the State law, the Court need not address whether there is a claim under the City law, an issue which has not been briefed thoroughly.

In addition, the prong of defendant Smith's motion to dismiss the first and second causes of action is denied. A corporate employee may be held liable if she has the requisite authority to be subjected to liability. Liability may be found where the employee has the authority "to do more than carry out personnel decisions made by others" Pepler v. Coyne, 33 A.D.3d at 435, 822 N.Y.S.2d at 517. Kaiser states that his duties were assigned to him by Guy Raoul, Serge Raoul and Cindy Smith. Smith allegedly held weekly meetings with Kaiser regarding the accounts payable, approved cash payroll distributions including distributions to the Raouls, and made various discretionary managerial decisions. In addition, he states, Smith made the decision to terminate him. The Complaint additionally states that Smith began sharing 10% of the net profits in 2004. Because Smith's authority as a general manager allegedly went beyond simply carrying out personnel decisions of others, the prong of her motion seeking to dismiss the first and second causes of action must fail.

Hostile Work Environment

To set forth a valid claim of hostile work environment, which is plaintiff's second cause of action, "a plaintiff must show that the workplace was permeated with discriminatory insults, ridicule, and intimidation and that the conduct complained of was severe and pervasive enough to alter the conditions of the victim's employment . . . . Unless the alleged conduct is extraordinarily severe, isolated remarks or occasional episodes of harassment will not merit relief . . . . Constantine v. Kay, 6 Misc.3d 927, 929, 792 N.Y.S.2d 308, 311 (Sup. Ct. Kings County 2004); see Espaillat v. Breli

Originals, Inc., 227 A.D.2d 266, 268, 642 N.Y.S.2d 875, 877 (1st Dept. 1996).

The cases in which courts have found a hostile work environment based on age conform to the above definition. In Anagnostakos v. New York State Div. of Human Rights, 46 A.D.3d 992, 993, 846 N.Y.S.2d 798, 800 (1st Dept. 2007), for example, the First Department refused to overturn respondent's finding that a waitress at petitioner, a Greek diner, was subjected to a hostile work environment. The Court found that the following conduct was sufficient to create such an environment: the restaurant owner called the waitress a stupid old yaya ("yaya" is the Greek term for grandmother) in front of her customers on a daily basis for several years; the owner frequently encouraged her to retire, occasionally accompanying his suggestion with threatening gestures; and, the owner forced the waitress to dress differently from the younger waitresses, also often in a physically threatening manner. The Court found the frequency of this conduct, coupled with the physical aggression, sufficient to sustain the finding of respondent.

In the complaint currently at issue, to support his claim that a hostile work environment existed, Kaiser alleges that (1) Smith told him she and the owners wanted to change the atmosphere of the establishment so it appealed to a younger crowd; (2) Smith asked him about periodically how long he planned to continue working at the restaurant; (3) on a few occasions, Smith discussed her intention to replace older senior staff, including a bartender, manager and maitre d', all in their 50s; (4) on a few occasions, Smith mentioned that plaintiff seemed concerned he was going to be fired; and (5) Smith – approximately the same age as plaintiff – confided that as she got older she wondered whether she would be able to stay at the restaurant, as it was a fast

paced business. When he describes these incidents, plaintiff also asserts that they created in him feelings of uneasiness, discomfort, and insecurity about his job status.

Based on the facts set forth in the complaint, plaintiff has not satisfied this high standard. The distinctions between the severity of the acts in Anagnostakos and the acts asserted here are too obvious to belabor. Moreover, the feelings of discomfort and uneasiness created in plaintiff by the actions are insufficient. See Dubois v. Brookdale University Hosp., Index No. 6062/04 (Sup. Ct. Kings County Dec. 1, 2004) (avail at 2004 WL 3196952, at *8) (generalized feelings of discomfort not enough). Moreover, the remarks are occasional but not constant. To be sufficient, this occasional conduct would have to be far more severe. See Constantine, 6 Misc.3d at 929, 792 N.Y.S.2d at 311. Instead of alleging that there was an atmosphere permeated with hostility sufficient to set forth a cause of action for hostile work environment, plaintiff has set forth contentions which, if true, lend support to his discrimination claim. Therefore, the second cause of action shall be dismissed.

Defamation

1. Guy and Serge Raoul

Defendants Guy and Serge Raoul also seek to dismiss the claim of defamation on the grounds that Guy and Serge did not actively participate in the alleged defamation and are not Smith's employers and therefore Guy and Serge cannot be vicariously liable for Smith's statement. Defendants also argue that the Complaint is fatally flawed because the re-publishing of documents in connection with court hearings does not constitute defamation.

Under the theory of *respondeat superior*, an employer is held to a level of

accountability for actions of its employees and may be vicariously liable if the employee commits slander in the scope of his employment. Murray v. Watervliet City School Dist., 130 A.D.2d 830, 830, 515 N.Y.S.2d 150, 151 (3rd Dept., 1987). However, this principle does not applicable to plaintiff's defamation claims. An employer is not generally held vicariously liable on the part of the employee for defamation. Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 435 N.Y.S2d 556 (1980). This is particularly true here, where plaintiff has not sued Smith for inquiring into his alleged theft in the course of her work – an inquiry for which she also would not be liable, see Priore v. New York Yankees, 307 A.D.2d 67, 70-71, 761 N.Y.S.2d 608, 611 (1st Dept. 2003) – but for telling a third party not affiliated with Raoul's that plaintiff was stealing. As that is not an action made within the course of employment, *respondeat superior* would not apply at any rate. Any suggestion that the Raoul brothers are liable as shareholders of the corporation also has no merit. See Abdurakhmanov v. Ruinsky, 273 A.D.2d 420, 710 N.Y.S.2d 606 (2nd Dept. 2000).

Defendants also cannot be liable for the re-publication of statements to the New York State Unemployment Board. "Statements uttered in the course of judicial or quasi-judicial proceedings are absolutely privileged so long as they are material and pertinent to the questions involved notwithstanding the motive with which they are made." Dunn v. Ladenburg Thalmann & Co., Inc., 259 A.D.2d 544, 545, 686 N.Y.S.2d 471, 472 (2nd Dept. 1999). Accordingly, the Court severs and dismisses the defamation claim against Serge and Guy Raoul.

2. Cindy Smith

Defendant Smith also moves to dismiss or in the alternative to sever the claim of

defamation asserted against her. First, the Court considers the application to dismiss the claim. The tort of defamation contains four essential elements: (1) a false statement (2) publication without privilege or authorization to a third party (3) by at least a negligence standard of fault and (4) the statement either causes special damages or constitutes defamation per se. Public Relations Soc. of America, Inc. v. Road Runner High Speed Online, 8 Misc. 3d 820, 822, 799 N.Y.S.2d 847, 850 (Sup. Ct. N.Y. County 2005). Smith argues that the defamation claim fails because the Complaint does not set forth with particularity the time, place and manner in which the statement was made. Smith also argues that Complaint does not set forth the alleged defamatory remarks with the requisite particularity. The Court rejects this argument.

Smith also argues that the defamation claim asserted against her must be dismissed because the alleged defamatory remarks are insufficiently specific. In particular, Smith argues they were alleged to have been made by unknown persons to certain unspecified individuals, at dates, times and places left unspecified. Bell v. Alden Owners, Inc., 299 A.D.2d 207, 208, 750 N.Y.S.2d 27, 27 (1st Dept. 2002), lv denied, 100 N.Y.2d 506, 763 N.Y.S.2d 812 (2003). As Smith argues, the pleading must be specific, under CPLR 3016(a), because a defendant must have adequate notice regarding the purported occurrence. Pappalardo, M.D. v. Westchester Rockland Newspapers, Inc., 101 A.D.2d 830, 475 N.Y.S.2d 487 (2nd Dept. 1984).

The paragraph setting forth the statement in question states, in full, that "On or about September 29, 2006, CINDY SMITH informed Rob Houtenbos, the owner of Dutch Flowerline Inc., that KEVIN KAISER had been terminated for "stealing" cash from RAOUL RESTAURANT INC." Complaint ¶ 62. In paragraph 63, plaintiff refers to the

above as a conversation. Although it is not artful or comprehensive regarding the alleged slander, the Complaint is sufficiently specific to avoid dismissal on this ground. It includes the date, place and individuals involved, and includes the defamatory word "stealing."

Smith also argues that the Complaint is insufficiently specific because it fails to specify the manner in which she made the communication – that is, whether she made it in person or by phone. However, as this Court explains earlier, plaintiff indicated in paragraph 63 of his complaint that Smith communicated to Houtenbos orally and not in writing, thus setting forth the general manner in which she made the communication. As plaintiff has set forth the defamatory words, "a general allegation suffices to plead that they were spoken of the plaintiff." Flacks v. New York City Bd. of Elections, (Civ. Ct. N.Y. County 2007)(2007 WL 2028189, at *4). In addition, the heightened requirement of CPLR 3016(a) should not be interpreted so strictly that it prevents an otherwise valid claim in situations where the plaintiff cannot provide the circumstances in such detail. See Gross v. Empire Healthchoice Assur., Inc., Index No. 602848/05, 12 Misc. 3d 1155(A) (Sup. Ct. N.Y. County 2006)(avail at 2006 WL 1358474, at * 6)(regarding fraud claim).

Moreover, by including the specific accusation complained of, plaintiff has satisfied the pleading requirement. In one case, in stating the trial court had improperly denied leave to amend the complaint, the First Department found that the amendment should have been allowed because, among other things, the allegation that the defendant said that the plaintiffs had been fired for "stealing" or "embezzling" stated a cognizable claim for slander. Schenkman v. New York College of Health Professionals,

29 A.D.3d 671, 673, 815 N.Y.S.2d 159 (2nd Dept. 2006). In another case, the statement that a specific employee "told management that I had pointed a gun at him and threatened him" was deemed sufficient although the words were not directly quoted. Kessler v. Time Warner Cable, Index No. 07/1179, 19 Misc.3d 1126(A) (Sup. Ct. Ulster County DATE 2008)(avail at 2008 WL 1883417, at * 4). The matter at hand also is distinguishable from cases such as Murganti v. Weber, 248 A.D.2d 208, 208, 669 N.Y.S.2d 818, 819 (1st Dept. 1998), in which the words are paraphrased in a manner and the substance of the statement is not evident from the face of the complaint. Smith's arguments to the contrary are not persuasive.

In addition, the main purpose of the specificity requirement – to provide notice of the circumstances of the alleged slander for the defendant's evaluation – is satisfied here as well. See Pappalardo, 101 A.D.2d at 830, 475 N.Y.S.2d at 487. In her motion papers, Smith includes an affidavit from Houtenbos acknowledging that there was a phone call from Smith about the matter at that time and that she mentioned that someone may have stolen from the restaurant, but disputing some of the specifics of the conversation. Thus, defendant has been able to identify the statement of which plaintiff complains and analyze its context.

Some of Smith's arguments – for example, she states it is not clear that the use of quotation marks indicates that the defamatory language is being quoted, as perhaps it means that plaintiff committed the theft but does not want to acknowledge it – are patently without merit. Therefore, the Court shall not discuss them. The Court does note that "plaintiff is specifically bound by the alleged defamatory words contained in the four corners of the complaint." Penn Warranty Corp. v. DiGiovanni, 10 Misc.3d 998,

1002, 810 N.Y.S.2d 807, 812 - 813 (Sup. Ct. N.Y. County 2005). Because of this, the scope of his defamation claim is limited.

Conclusion

Finally, the Court notes that in their motion Serge and Guy Raoul assert that the alleged defamation took place more than a year before plaintiff commenced the action and the claim is untimely. The statute of limitations for defamation is one year, and this period begins to run on the date of the first publication. Drakes v. Rulon, 6 Misc. 3d 1025(A), 800 N.Y.S.2d 345 (Sup. Ct. Kings County Jan. 20,2005)(avail at 2005 WL, at *2). The Raoul brothers do not elaborate or provide evidence supporting their argument. The complaint states that Smith defamed plaintiff on September 29, 2006, and the complaint is dated September 19, 2007. This is less than one year later and therefore the complaint appears to be timely. Movants have not stated that either date is inaccurate or provided evidentiary support showing untimeliness. As the argument lacks facial merit and movants have not supported their position, this argument is rejected.

Therefore, it is

ORDERED that the prong of Smith's motion seeking to dismiss the first and third cause of action and/or to sever the claim for defamation is denied; and it is further

ORDERED that the prong of Serge and Guy Raoul's motion seeking to dismiss the claim of defamation is granted and the third cause of action is severed and dismissed as to these defendants; and it is further

ORDERED that the prongs of both motions seeking to dismiss the second cause of action is granted and the second cause of action is severed and dismissed as to all

defendants; and it is further

ORDERED that the remainder of the motion is denied.

ENTER:

Dated: 5/23/08

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
MAY 30 2008
COUNTY CLERK'S OFFICE
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