

**Kane v Geller**

2010 NY Slip Op 30571(U)

March 12, 2010

Supreme Court, New York County

Docket Number: 603555/05

Judge: Barbara R. Kapnick

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 603555/2005

*Justice*

KANE, MICHAEL

INDEX NO. 603555/05

vs

GELLER, ALFRED

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

Sequence Number : 007

MOTION SEQ. NO. 007

*Defendants Motion*  
SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

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  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**

MAR 17 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/12/10

**BARBARA R. KAPNICK**

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: IAS PART 39

-----X  
MICHAEL KANE,

Plaintiff,

-against-

ALFRED GELLER and GELLER MEDIA  
MANAGEMENT, INC.,

Defendants.  
-----X

BARBARA R. KAPNICK, J.:

Motions sequence numbers 007 and 008 are consolidated for  
disposition.

Plaintiff Michael Kane's First Amended Complaint seeks to recover damages for alleged defamation (first cause of action) and intentional infliction of emotional distress (second cause of action) against defendant Alfred Geller ("Geller"), individually and acting in his official capacity as Chairman of the Board of plaintiff's former employer, Geller Media Management, Inc. ("Geller, Inc." or "GMM"), a career management agency which specializes in representing news broadcasters and related television personalities.<sup>1</sup>

---

<sup>1</sup> Pursuant to Stipulation dated April 15, 2008, plaintiff withdrew his additional claims for breach of contract, breach of covenant of good faith and fair dealing, restitution and negligent misrepresentation.

DECISION/ORDER  
Index No. 603555/05  
Motions Seq. Nos.  
007 and 008

**FILED**

MAR 17 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants have asserted, inter alia, the following affirmative defenses: (i) the Complaint fails to state a cause of action upon which relief may be granted; (ii) any allegedly defamatory statements made by the defendants were true or substantially true; (iii) any allegedly defamatory statements made by the defendants were protected as opinion under the United States and New York State Constitutions; (iv) any allegedly defamatory statements made by the defendants are protected by the qualified privilege that applies between persons having a common interest; (v) any allegedly defamatory statements made by the defendants constitute a privileged and reasonable response to his sudden resignation from employment without notice and without a transition plan; and (vi) defendants did not act willfully, wantonly, outrageously or recklessly in an effort to cause damage or harm to plaintiff.

Defendants have also asserted counterclaims against plaintiff for: (i) breach of contract, alleging that plaintiff has revealed confidential information to several of Geller, Inc.'s clients, thus breaching the confidentiality provision of his contract in an effort to convince them to terminate their management agreements with the company (first counterclaim); and (ii) tortious interference with contractual relations, alleging that plaintiff

intentionally procured the breach or termination of management agreements between Geller, Inc. and several of its clients.

Defendants now move, under motion sequence number 007, for summary judgment dismissing plaintiff's First Amended Complaint in its entirety.

Plaintiff opposes defendants' motion and moves, under motion sequence number 008, for partial summary judgment dismissing defendants' affirmative defenses and counterclaims.

#### Background

Plaintiff, the son of a former client of Geller, Inc., left his allegedly lucrative employment as a Producer at WCBS-TV and commenced work at Geller, Inc. on or about February 3, 2002. Soon after starting at Geller, Inc., plaintiff assumed responsibility for the company's largest client, Al Roker and Al Roker Productions, Inc.

Plaintiff alleges that in or around the Spring of 2004, defendant Geller, feeling threatened by the fact that plaintiff was seen by individuals both inside and outside of the company as the true leader of Geller, Inc. began a process of undermining plaintiff's position in the workplace. For instance, plaintiff

claims that in June 2004, defendant Geller made it difficult for him to continue his position as Executive Producer of a television program which was providing both visibility for him in the industry and profitability for Geller, Inc.

Plaintiff further claims that in the Fall of 2004, defendant Geller began a course of conduct designed to embarrass and humiliate him, including but not limited to, berating him in front of others, raising his voice and addressing him in a demeaning manner, barring him from entering Mr. Geller's office, and denigrating his abilities in conversations with clients and others in the industry.

Defendants, on the other hand, contend that plaintiff's relationship with them began to deteriorate around this time as a result of their hiring of another client representative and the intense rivalry that developed between plaintiff and that individual. Defendants contend that plaintiff was barging into meetings that Geller was having with others which did not involve him, and claim that Mr. Geller wanted to talk to Kane about the situation, but that Kane refused to meet with him. Mr. Geller wrote a lengthy memo to Kane on February 28, 2005 detailing his "unacceptable pattern of behavior" and again requesting that Kane meet with him. He stated that one of the purposes for his writing

the memo was to save Kane's relationship with GMM "if that is possible".

By e-mail dated March 2, 2005, plaintiff protested the treatment he had allegedly been receiving from defendant Geller and stated in closing that "I would prefer that we find a way to end my relationship with GMM amicably." Plaintiff claims that defendant Geller immediately terminated him, locked him out of his offices, and barred his access to the company computer.

Geller, however, contends that plaintiff "refused to meet with [him] to address the problems he was having at work, quit precipitously without any notice or warning whatsoever and without even the slightest effort to transition the work he had been assigned, thereby causing GMM significant client issues and problems." Geller claims to have responded to Kane's March 2, 2005 e-mail on March 7, 2005, but asserts he never heard back directly from Mr. Kane.

Plaintiff alleges in the First Amended Complaint that defendant Geller sent an e-mail to Geller, Inc.'s clients in which he stated that plaintiff had "quit without notice creating obvious problems that were handled by reassignment throughout the end of

that week" and encouraged the clients to call him and talk to him about Kane.

The First Amended Complaint further alleges that Geller made the following additional statements: (i) "Michael has behaved in an unprofessional manner"; (ii) "For a period of three weeks prior to his termination, Michael refused to report to the office, abandoning his responsibilities and duties to the company and clients"; (iii) "Michael has severe psychological problems which requires counseling"; and (iv) "Michael has a drug and substance abuse problem."

Plaintiff claims that Geller's statements were false and were made with an intent to injure his reputation and cause him severe emotional and physical distress.

Geller acknowledges that he

called some of our clients to explain [plaintiff's] bizarre behavior and to assure them that their needs would be served by reassignment - during these brief conversations, I expressed my feeling and opinion that Michael Kane had psychological problems based upon the odd behavior he had exhibited during the last few months of his employment at GMM. I genuinely believed that he acted irresponsibly and unprofessionally, but I limited my opinion to a small group of clients that I felt needed to be assured of GMM continuity in order to preserve our business relationships with those clients.

Geller denies that he was motivated by "ill will, malice, spite or hatred toward Michael Kane", and claims that he "never lifted a finger to harm him" by "preventing or at least interfering with [plaintiff's] ability to secure employment in the industry."

Defendants also deny that Mr. Geller made any reference to a purported drug problem, and argue that plaintiff has not produced an affidavit or other evidence substantiating that such a statement was made.<sup>2</sup>

### Discussion

#### *Plaintiff's Claims*

"Slander as a rule is not actionable unless the plaintiff suffers special damage (citations omitted). Special damages contemplate 'the loss of something having economic or pecuniary value' (citations omitted)." *Liberman v Gelstein*, 80 NY2d 429, 434-435 (1992). See also, *Rufeh v Schwartz*, 50 AD3d 1002 (2nd Dep't 2008); *Lloyd v Cardiology & Internal Medicine of Long Island, PLLC*, 16 Misc3d 1129(A) (Sup Ct, Nassau Co. 2007).

---

<sup>2</sup> At least one client, Edie Lambert, a news broadcaster in Sacramento, California, testified that Mr. Geller never made such a statement.

In the instant case, the First Amended Complaint does not allege that plaintiff suffered special damages. However, a plaintiff need not prove special damages, if, as plaintiff argues is the case here, he can establish that the alleged defamatory statements constituted slander per se. *Liberman v Gelstein, supra* at 435.

Among the four recognized types of slander per se are statements "that tend to injure another in his or her trade, business or profession". *Liberman v Gelstein, supra* at 435.

That exception, however, is "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 plaintiff's character or qualities" (citation omitted). Thus, "charges against a clergyman of drunkenness and other moral misconduct affect his fitness for the performance of the duties of his profession, although the same charges against a businessman or tradesman do not so affect him (Restatement § 573, comment c).

*Liberman v Gelstein, supra* at 436. See also, *Rufeh v Schwartz, supra*; *Zysk v Fidelity Title Ins. Co. of New York*, 14 AD3d 609 (2nd Dep't 2005).

Defendants argue that the first cause of action for defamation must be dismissed on the ground that the alleged statements are not

defamatory per se because they do not relate directly to plaintiff's fitness to perform his job.

Plaintiff, on the other hand, claims that Geller's statements about him do constitute slander per se because they relate to his business/professional relationship and, in particular, relate to his mental capacity in relation to his profession. See, e.g., *Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 261 (1st Dep't 1995) in which the Appellate Division, First Department, held that alleged anti-Semitic statements attributed to plaintiff, who was in charge of recruiting and supervising volunteers for the Museum, referenced "a matter of significance and importance to plaintiff's profession."

However, in the instant case, plaintiff cannot point to any evidence showing that any of the company's clients considered Mr. Geller's alleged statements that Kane "has severe psychological problems which requires counseling" to be analogous to a clinical diagnosis by a psychologist or to otherwise constitute a statement of fact, as opposed to an expression of personal opinion. See, *Lacher v Engel*, 33 AD3d 10, 16 (1st Dep't 2006), in which the Appellate Division, First Department held that the statement by a lay, non-medical individual that plaintiff was a "pathological

character" was "more accurately characterized as an opinion, and thus not actionable".

Likewise, the Appellate Division, Second Department held in *O'Brien v Lerman*, 117 AD2d 658 (2nd Dep't 1986), that

[t]he words "went crazy", when construed in the context of the letter and its tenor, indicating plaintiff's extremely angry reaction, cannot reasonably be understood by the mind of the ordinary intelligent reader as imputing to plaintiff insanity or mental instability and, thus, do not constitute libel per se.

*O'Brien v Lerman*, supra at 659. See also, *Lloyd v Cardiology & Internal Medicine of Long Island, PLLC*, supra at \*6 which found that the alleged statements that "plaintiff had a 'mental breakdown' and that she left her employment 'without warning or explanation' and that all anyone knew was that 'it had something to do with [Plaintiff's] son'", did not specifically implicate the professional activities or qualifications of plaintiff, a Physician's Assistant, and thus did not qualify as slander per se.

In addition, plaintiff has not submitted any evidence showing that Geller made any statement regarding an alleged drug problem.<sup>3</sup>

---

<sup>3</sup> Significantly, the allegation that a statement accusing plaintiff of having a substance abuse problem is set forth in the Complaint only, and is not set forth in plaintiff's Rule 19-A Statement of Undisputed Facts.

Finally, although the parties dispute the truth of the statement that Kane "quit" without any notice, such a statement by itself does not constitute defamation. See, *Chang v Fa-Yun*, 265 AD2d 265 (1st Dep't 1999); *Davis v Ross*, 754 F2d 80 (2nd Cir. 1985). The first cause of action must, therefore, be dismissed.

Plaintiff's second cause of action for the intentional infliction of emotional distress must also be dismissed because said claim is duplicative of plaintiff's defamation claim. See, *Herlihy v Metropolitan Museum of Art*, *supra* at 263; *Butler v Delaware Otsego Corp.*, 203 AD2d 783 (3rd Dep't 1994). Moreover, the alleged conduct is "neither sufficiently extreme nor outrageous to support a claim for intentional infliction of emotional distress." *Como v Riley*, 287 AD2d 416, 417 (1st Dep't 2001).

Accordingly, based on the papers submitted and the oral argument held on the record on December 8, 2008, defendants' motion to dismiss plaintiff's First Amended Complaint is granted in its entirety.

#### *Defendants' Counterclaims*

In the first counterclaim for breach of contract, defendants allege that plaintiff disclosed confidential information by telling one of Geller, Inc.'s clients that the company had previously

accepted reduced commission schedules from other (unidentified) clients.

One of Geller, Inc.'s clients, Vince DeMentri, who is currently a news broadcaster in Philadelphia, has submitted an Affidavit stating, in relevant part, as follows:

3. At some time after Michael Kane left the employment of GMM, I had lunch with Mr. Kane during which time he informed me that several GMM clients had successfully reduced [the] 10% commission to 5%. At our luncheon, Mr. Kane gave me specific examples of clients who had been able to reduce their commissions with GMM to 5%, but I cannot recall their names now.

4. In 2007, I negotiated a reduced rate agreement with Alfred Geller, the principal of GMM. We agreed to modify the Agreement to provide for only a 5% commission rather than a 10% commission. I have since been paying GMM only 5% of my gross salary rather than the 10% originally provided for in the Agreement.

Defendants contend that the disclosure of this confidential information by plaintiff was thus directly related to the renegotiation of DeMentri's contract.

Plaintiff, however, denies that he revealed any confidential information. He contends that Mr. DeMentri's request was the result of ongoing difficulties in Mr. DeMentri's personal and financial life, and was not motivated by any confidential

information Mr. DeMentri received from plaintiff. Plaintiff thus argues that the first counterclaim must be dismissed on the ground that defendants cannot demonstrate that they sustained damages as the result of the disclosure of information by Kane.

Plaintiff likewise argues that defendants' second counterclaim for tortious interference with contractual relations must be dismissed because there is no evidence that any client, including DeMentri, renegotiated or terminated his/her contract as a result of conduct attributable to the plaintiff. *See, Cantor Fitzgerald Associates, L.P. v Tradition North America, Inc.*, 299 AD2d 204 (1st Dep't 2002), lv to app. denied, 99 NY2d 508 (2003) which held that an essential element of a claim for tortious interference with contract "is that the breach of contract would not have occurred but for the activities of the defendant (citation omitted)."

In the instant case, defendants have made no showing that Geller was obligated to agree with Mr. DeMentri's request and renegotiate his contract.<sup>4</sup> Thus, defendants have not established a causal connection between plaintiff's alleged conduct and defendant's purported damages.

---

<sup>4</sup> When Mr. Geller was asked at his deposition, "And the relief that you gave him was because Vince is in a sad situation these days?", Mr. Geller responded, "Yeah, and he's a nice guy and I like him. We've been through hell together..."

Plaintiff's motion to dismiss defendants' counterclaims is, therefore, granted.

Accordingly, the Clerk may enter judgment dismissing plaintiff's Complaint and defendants' counterclaims with prejudice and without costs or disbursements to either party.

This constitutes the decision and order of this Court.

Dated: March 12, 2010

  
\_\_\_\_\_  
BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.

**FILED**  
MAR 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE