

Sklar v New York Hosp. Queens

2010 NY Slip Op 32312(U)

August 16, 2010

Supreme Court, Nassau County

Docket Number: 4146/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ROD SKLAR,

TRIAL/IAS PART 32
NASSAU COUNTY

Plaintiff,

Index No.: 4146/10
Motion Seq. Nos.: 01, 02
Motion Dates: 04/22/10
06/04/10

- against -

NEW YORK HOSPITAL QUEENS, KRISTEN ERNST,
KEVIN CAMPBELL and MARCIA LEVINE,

XXX

Defendants.

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion, Memorandum of Law and Exhibit</u>	<u>1</u>
<u>Notice of Cross-Motion, Affirmation and Exhibits</u>	<u>2</u>
<u>Reply Memorandum of Law in Further Support of Motion to Dismiss and in Opposition to Cross-Motion</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR §§ 3211(a)(7) and 3016(a), for an order dismissing plaintiff's complaint in its entirety, with prejudice, for failure to state a viable cause of action. Plaintiff cross-moves for an order permitting him to serve an amended complaint. Defendants oppose plaintiff's cross-motion.

Defendants submit that "[a]ccording to Plaintiff, 'on or about October 6, 2009, defendants stated defamatory statements regarding plaintiff including, but not limited to, plaintiff harassed Marcia Levine, and plaintiff violated a 'New York Hospital Queens

Harassment Policy,' such that he was terminated, from defendant New York Hospital Queens Employment [sic]...Plaintiff does not provide the specific words used in these two statements. Plaintiff does not provide the time, place or manner in which these statements were allegedly made or published. Plaintiff does not indicate which defendant(s) made or published these statements and to whom. Plaintiff attributes these *two* statements to 'defendants' even though there are three individual defendants Plaintiff also alleges that, 'on or about October 13, 2009, Defendant's [sic] stated that plaintiff threatened the [sic] he was going to 'come in with a gun and kill everyone.' Plaintiff does not provide the time, place or manner in which these statements were allegedly made or published. Plaintiff does not indicate which defendant(s) made or published these statements and to whom. Plaintiff attributes this *one* statement to 'defendant's' even though there are three individual defendants. Plaintiff further states the 'the words published, written and/or spoken by defendants Kristen Ernst, Kevin Campbell, and Marcia Levine were stated as part of their official duties.'"

Defendants argue that plaintiff's defamation claim must be dismissed because he has failed to satisfy the pleading requirements of CPLR § 3016(a). In order to state a claim for defamation, a plaintiff must allege; (1) an oral or written false statement, (2) published without privilege or authorization to a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, which (4) causes special harm or constitutes defamation *per se*. Defendants contend that plaintiff has utterly failed to plead his defamation claim with the requisite particularity and, therefore, his complaint must be dismissed. Defendants submit that plaintiff failed to identify the persons to whom the October 6, 2009 and October 13, 2009 statements were allegedly made, nor does he even set forth by whom the statements were made. Plaintiff

additionally fails to specify the time, place or manner in which said statements were allegedly made. With respect to the October 6, 2009 statement, plaintiff fails to set forth the particular words of the alleged statement. Plaintiff fails to articulate the precise words about which he is complaining, but rather he sets forth his allegations in general and conclusory fashion.

Defendants further argue that plaintiff's defamation claim must be dismissed because he has failed to sufficiently plead special damages. As plaintiff does not allege that any of the allegedly defamatory statements constitute defamation *per se*, his complaint can only survive if he sufficiently pleads special damages. Defendants assert that plaintiff has failed to do so. Defendants submit that, in order to state a claim for defamation, special damages must be alleged with sufficient particularity to identify actual losses and be related to the alleged tortuous act. In the present action, plaintiff's original complaint states "[b]y reason of the foregoing plaintiff has suffered special damages and has been injured in his reputation and in said workplace, and has effected [sic] plaintiff physically. Plaintiff has been damaged in this sum that exceeds jurisdictional limits of lower courts." Defendants argue that this is insufficient in that plaintiff's vague allegation of injury or loss to his reputation is not sufficient to satisfy the requirement of pleading special damages, nor is his generalized allegation that his damages exceed the "jurisdictional limits of lower courts."

In opposition, plaintiff states that "[t]he original Summons and Complaint specifies the defamatory words. Nonetheless, in an effort to assure the summons and complaint falls with in case law Plaintiff has cross moved to amend the complaint. The plaintiff is now able to allege with specificity the time, location, speaker, and exact words of the defamatory statements. Plaintiff therefore submits that he has a cause of action against New York Hospital Queens,

Kristen Ernst, Kevin Campbell and Marcia Levine for defamation....It is respectfully submitted that there is no prejudice to defendant by allowing plaintiff to amend the complaint to reflect the addition of more specific allegation and permitting plaintiff to serve same.”

Defendants oppose plaintiff’s cross-motion to amend his complaint. Defendants state that “[i]n response to Defendants’ motion, Plaintiff failed to submit any opposition whatsoever, thereby conceding that his Complaint is deficient. Instead, Plaintiff filed a cross-motion, seeking leave from the Court to file an amended complaint, which, presumably he believes will address the multitude of deficiencies in his original Complaint.” Defendants submit that “[p]laintiff’s attempt to salvage his claim is futile. Plaintiff’s claims remain deficient and...should be dismissed.”

Defendants argue that plaintiff’s new allegations are without merit. Defendants contend that, while plaintiff’s proposed changes do provide additional details regarding the alleged defamatory statements, he still fails to set forth sufficient allegations to state a claim for defamation. Defendants contend that plaintiff’s new allegations provide additional grounds for dismissal of the claim and that plaintiff’s bare boned allegations also fail to state a claim for negligence *per se*.

Defendants state that “[r]ather than cure the deficiencies in Plaintiff’s initial Complaint, the Proposed Complaint provides further grounds for dismissal, as the October 6th Statement and the October 11th Statements are subject to a qualified privilege....courts have recognized a qualified privilege for communications ‘made by one person to another upon a subject in which both have an interest.’...This ‘common interest’ privilege has been applied to communications between ‘employees of an organization.’” Defendants argue that “[t]he allegedly defamatory statements that Plaintiff attributes to Defendants are precisely the kind of statements that are

subject to the qualified privilege. First, all of the alleged statements were made solely to, and in the presence of, co-employees of NYHQ....Second, the statements unequivocally concerned a matter of common interest to Ms. Ernst, Ms. Levine, Ms. Campbell, and Plaintiff, as co-employees of NYHQ, *i.e.*, allegations concerning Plaintiff's sexual harassment of a co-worker, uttering of violent statements, and policy violations in the workplace....Thus because the only recipients of these alleged communications were NYHQ employees, and because the topic of these communications concerned a matter of common interest to such employees, these statements are, as a matter of law, protected by a qualified privilege and cannot form the basis for a defamation claim."

Defendants further submit that once a qualified privilege applies, the allegedly defamatory statement is not actionable unless the plaintiff can produce proof in evidentiary form that the defendant acted with malice in making the statements. Defendants state that plaintiff has utterly failed to satisfy this burden. "In his Complaint and Proposed Complaint, Plaintiff does not offer a single factual allegation that could support his conclusory allegations that Defendants knew that the allegedly defamatory statements were false (or likely false), or that Defendants' sole motivation for making such statements was spite ill will. Rather, he provides nothing more than conclusory allegations of malice, based on his own surmise and conjecture."

With respect to their argument that plaintiff failed to adequately plead special damages, Defendants add that, "[i]n his Proposed Complaint, Plaintiff attempts to address this deficiency by adding additional allegations. Specifically, Plaintiff now alleges that he 'lost income of \$100,000 per year and lost benefits of \$50,000'...rather than simply that he had been 'injured and damaged in the sum that exceeds the jurisdictional limits of all lower courts.'" Plaintiff's vague allegation of injury and seemingly random selection of \$100,000.00 and \$50,000.00 as his

alleged damages is still not sufficient to satisfy the requirement of pleading special damages. Plaintiff has not itemized his alleged loss and therefore has not sufficiently pled special damages. Furthermore, lost income does not qualify as special damages.

Lastly, defendants submit that “[i]n Count III of the Proposed Complaint, Plaintiff attempts to assert, for the first time, a claim of negligence *per se*. ... This claim is similarly without merit. Indeed, Plaintiff fails to set forth any of the required elements of a claim for negligence *per se*.” Even if plaintiff had stated a claim for negligence *per se*, his claim is barred as against defendant New York Hospital Queens by the exclusivity provision of the New York Worker’s Compensation Laws.


In determining a motion to dismiss pursuant to CPLR 3211(a)(7) for plaintiff’s alleged failure to state a cause of action/to state a claim upon which relief could be granted, the court will afford the complaint a liberal construction, accept the facts contained therein as true, accord plaintiff every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys “R” Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001).

A motion for leave to serve an amended pleading will only be denied where the amendment is wholly devoid of merit or is significantly prejudicial to the non-moving party. *See Norman v. Ferrara*, 107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept. 1985). The merits of the proposed amended pleading will not be reviewed “... unless the insufficiency or lack of merit is clear and free from doubt.” *Id.* at 740, 741.

The Court finds that this is a case where plaintiff’s proposed amendment’s lack of merit is clear and free from doubt. It is evident from defendants’ arguments that plaintiff, in both his

original complaint as well as his proposed amended complaint, has failed to meet the pleading requirements of a defamation claim, failed to sufficiently plead special damages and failed to meet the pleading requirements of negligence *per se*. As stated previously, a motion for leave to amend must be denied where the court finds that the proposed amendment lacks merit. See *Giovinco v. Giovinco*, 276 A.D.2d 469, 713 N.Y.S.2d 700 (2d Dept. 2000); *Bonnen v. Chin Hua Chiang*, 272 A.D.2d 357, 707 N.Y.S.2d 365 (2d Dept. 2000); *McKiernan v. McKiernan*, 207 A.D.2d 825, 616 N.Y.S.2d 629 (2d Dept. 1994). Since plaintiff's proposed amended complaint lacks merit, his cross-motion (Motion Sequence No. 02) for leave to amend is hereby denied. Consequently, defendants' motion (Motion Sequence No. 01) for an order dismissing plaintiff's original complaint in its entirety, with prejudice, for failure to state a viable cause of action is hereby granted.

This constitutes the decision and order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
 August 16, 2010

ENTERED
 AUG 19 2010
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE