Wey v Global Consulting Group

2010 NY Slip Op 34083(U)

January 14, 2010

Supreme Court, New York County

Docket Number: 108299-2009

Judge: James A. Yates

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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

BENJAMIN WEY,

Plaintiff,

v

THE GLOBAL CONSULTING GROUP, GRAYLING GLOBAL, HUNTSWORTH PLC, ANNE MCBRIDE, and GONG CHEN a/k/a/ DIXON CHEN,

Defendants.

Decision and Order
Ind. No. 108299-2009

Hon. James A. Yates, J.

Defendants, in this action by plaintiff for defamation and other related causes of action, move to dismiss the complaint pursuant to CPLR 3211 (a) (1) based on a defense founded upon documentary evidenoe and CPLR 3211 (a) (7) for failure to state a cause of action (motion sequence 001). Plaintiff cross-moves for partial summary judgment pursuant to CPLR 2215 (motion sequence 002). Both motions are consolidated for disposition. For the following reasons, defendants' motion to dismiss is granted, and plaintiff's cross-motion for partial summary judgment is denied.

Background

Plaintiff has acted as an advisor to a diverse range of public and private institutions worldwide. In January 2008, plaintiff introduced defendant Global Consulting Group (GCG) to AgFeed Industries, Inc. (AgFeed), one of plaintiff's major clients and the largest commercial hog producer and premix feed company in China. Following the meeting, plaintiff recommended that AgFeed engage GCG to provide AgFeed with investor relations and financial communication services. As a result, AgFeed hired GCG to provide these services. Plaintiff then alleges that defendant Dixon Chen, GCG's account manager, defamed him in three instances by email, in person, and by telephone.

First, on February 4, 2008, Chen sent an email to executives at AgFeed. It reads:

> "I hope, by far, you are aware of the bad reputation of Ben Wey on Wall Street. He has

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> singled-handed the disater [sic] of Bodisen.[1] Many investors, until now, still remembered they got burned by Ben's promotion. Many people wonder why Ben is not in jail for what he did to investors two years ago.
>
> . . .
>
> I was extremely reluctant to take AgFEED when Ben Brought to us. My boss wanted to give Ben a chance. . . . But Ben's behavior last week was clearly the 'old promotional' Ben. He exposed the company to liability and shareholders who bought the stock based on Ben's mis-statement can file a lawsuit against AgFEED.
>
> If this gets reported to SEC, Ben will be in trouble AGAIN. We just don't want Ben's bad name to taint AgFeed's honest management team and good business operation. He repeatedly added my name into the press releases because he knows I have a good reputation among investors and his promotion will work better with my name on the cover. We want to take this opportunity to warn you.
>
> . . .
>
> Please do NOT take Ben's advices any more, if you want your reputation."

(Complaint ¶¶ 18, 23, 29.)

Second, in early February 2008, Chen met AgFeed board member Fred Rittereister. Chen said to Rittereister, "Ben has changed and is a controversial person in the business" (*id.* ¶ 34).

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[1] Bodisen Biotech Inc. (Bodisen) was a Chinese corporation for which plaintiff worked as a consultant when it went public in the United States. After becoming listed on the American Stock Exchange, Bodisen's stock declined, and the company became a defendant in a series of class action lawsuits. Plaintiff was not named a defendant in the consolidated class actions, and the United States District Court for the Southern District of New York dismissed the case in September 2008.

Third, on February 4, 2008, Chen told Rittereister that plaintiff was a "bad actor with a bad reputation," "should immediately be reported to the SEC," and "misleads the public as he secretly sells the stocks through his family and business friends and no one can trace it to him. He did this with a number of companies. Have you heard of Bodisen?" (*Id.* ¶¶ 38, 41.)

On June 10, 2009, plaintiff filed a complaint, seeking $5 million in damages and alleging eleven causes of action, including (1) libel; (2) libel per se; (3) slander; (4) slander per se; (5) damage to business reputation; (6) injurious falsehood; (7) tortious interference with business relations; (8) tortious interference with prospective business relations; (9) intentional infliction of emotional distress; (10) negligent supervising, training, and retention; and (11) punitive damages.

On July 27, 2009, defendants filed a motion to dismiss the complaint, and on September 2, 2009, plaintiff filed a cross-motion for partial summary judgment.

Discussion

"On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007] [internal quotation marks omitted]). Applying this standard, the Court addresses each cause of action in turn.

A. First Cause of Action: Libel
Second Cause of Action: Libel Per Se
Third Cause of Action: Slander
Fourth Cause of Action: Slander Per Se

Defamation is defined as the making of a false statement that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 [1977]). "Even though a statement is defamatory, there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter" (*Foster v Churchill*, 87 NY2d 744, 751 [1996]). "A qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the

communication is made to a person having a corresponding interest or duty" (*Santavicca v City of Yonkers*, 132 AD2d 656, 657 [2d Dept 1987]).

Here, the complaint and the documentary evidence clearly show that GCG and its client, AgFeed, had a common interest in the subject matter of the allegedly defamatory communications. AgFeed engaged GCG to provide it with investor and financial communication services, and therefore, part of GCG's job was to assist AgFeed in drafting, reviewing, and issuing press releases and protecting AgFeed in the investment community. Chen's overall goal was to warn AgFeed and protect its reputation, and his statements are protected by the qualified privilege (see *Lee v Weinstein*, 116 AD2d 700, 701 [2d Dept 1986] [finding statement by defendant "upon a subject in which his client had a financial interest[] to the custodian of his client's financial assets" was "cloaked with a qualified common-interest privilege"]). Further, plaintiff's conclusory assertions of malice are insufficient to overcome the privilege (*Gondal v N.Y. City Dept. of Educ.*, 19 AD3d 141, 142 [1st Dept 2005]).

Additionally, under New York law, expressions of opinion, as opposed to statements of fact, are not actionable defamation (*see Gross v N.Y. Times Co.*, 82 NY2d 146, 152 [1993]). New York courts consider three factors when determining whether a statement is opinion or fact: (1) whether the specific language has a precise meaning which is readily understood; (2) whether the statement can be proven true or false; and (3) whether readers or listeners would consider it opinion, not fact (*see Brian v Richardson*, 87 NY2d 46, 51 [1995]).

Here, in addition to being protected by the qualified privilege, several statements in the email and two conversations are also opinion, and not fact. Chen begins the email, "I hope, by far, you are aware of the bad reputation of Ben Wey on Wall Street" (Complaint ¶ 18). Chen continues that he "was extremely reluctant to take AgFEED when Ben [b]rought [you] to us," but his "boss wanted to give Ben a chance" (*id.* ¶ 23). Chen then states, "But Ben's behavior last week was clearly the 'old promotional' Ben" (*id.*). Ben concludes, "Please do NOT take Ben's advices any more, if you want your reputation" (*id.* ¶ 29). A reasonable reader would not believe that Chen's communication was intended to convey objective facts.

Similarly, the two conversations in which Chen allegedly told Rittereiser that "Ben has changed and is a controversial person in the business" (*id.* ¶ 34), and that plaintiff was a "bad actor with a bad reputation" (*id.* ¶ 38), are non-actionable

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expressions of opinion. These statements do not have a precise meaning which is readily understood. Accordingly, plaintiff's defamation claims for libel, libel per se, slander, and slander per se are dismissed.

B. Fifth Cause of Action: Damage to Business Reputation

"New York law does not recognize a cause of action for damage to reputation" (*M.D.T. 1984 Duplications Ltd. v Mark IV Indus.*, 283 AD2d 1001, 1002 [4th Dept 2001]). Thus, plaintiff's fifth cause of action for damage to business reputation is dismissed.

C. Sixth Cause of Action: Injurious Falsehood

Plaintiff's claims for injurious falsehood rely on the same statements that form his defamation claims and are dismissed as duplicative in that plaintiff, again, fails to allege injury (*O'Brien v Alexander*, 898 F Supp 162, 172 [SD NY 1995] [dismissing plaintiff's injurious falsehood claim as duplicative of plaintiff's defamation claim], *mod* 101 F3d 1479 [1996] [affirming dismissal of plaintiff's complaint, including injurious falsehood claim, and reversing one basis for imposing sanctions]).

D. Seventh Cause of Action: Tortious Interference With Business Relations
Eighth Cause of Action: Tortious Interference With Prospective Business Relations

To succeed on a claim for tortious interference, a plaintiff must plead: (1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair or improper means; and (4) the defendant's interference caused injury to the relationship (*Kirsch v Liberty Media Corp.*, 449 F3d 388, 400 [2d Cir 2006]).

Here, plaintiff fails to plead injury to his relationship with AgFeed. Plaintiff alleges that his relationship with AgFeed was "salvage[d]" and that he has an "existing contract with AgFeed." (Complaint ¶¶ 107, 113.) Thus, plaintiff's seventh and eighth causes of action for tortious interference are dismissed.

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E. Ninth Cause of Action: Intentional Infliction of Emotional Distress

Plaintiff's ninth cause of action for intentional infliction of emotional distress is dismissed because it falls within his defamation claims (*see Hirschfield v Daily News, L.P.*, 269 AD2d 248, 249 [1st Dept 2000] [dismissing intentional infliction of emotional distress claim because it fell within tort of defamation]), and the complaint fails to allege sufficient facts to demonstrate that defendants' conduct was so extreme and outrageous as to go beyond all possible bounds of decency.

F. Tenth Cause of Action: Negligent Supervision

"A claim for negligent . . . supervision can only proceed against an employer for an employee acting outside the scope of her employment" (*Colodney v Continuum Health Partners, Inc.*, 2004 WL 829158, *8, 2004 US Dist LEXIS 6606, *27 [SD NY 2004]). The plaintiff must establish, in addition to the standard elements of negligence, that (1) the tortfeasor and the defendant were in an employee-employer relationship; (2) the employer knew or should have known of the employee's propensity to cause the injurious conduct; and (3) the tort was committed on the employer's premises (*see Brady v Lynes*, 2008 WL 2276518, *13, 2008 US Dist LEXIS 43512, *40 [SD NY 2008]).

Here, the complaint fails to plead sufficiently that GCG knew or should have known of Chen's alleged propensity for defamation. Rather, the evidence shows that GCG did not know about the email and the conversations until after they were made. Defendant Anne McBride, Chen's direct supervisor, learned about the email when plaintiff first contacted her about it on February 12, 2008, more than a week after plaintiff alleges that the first and second conversations occurred (affirmation of Jennifer Tafet Klausner, July 23, 2009, exhibit 32 [email exchange between plaintiff and McBride]). Plaintiff, therefore, fails to adequately plead that GCG knew or should have known about Chen's alleged propensity to make the alleged defamatory statements. Thus, plaintiff's tenth cause of action for negligence supervision is dismissed.

G. Eleventh Cause of Action: Punitive Damages

"A demand for punitive damages may not constitute a separate cause of action for pleading purposes" (*Kantrowitz v Allstate Indem. Co.*, 48 AD3d 753, 754 [2d Dept 2008]). Thus, plaintiff's eleventh cause of action for punitive damages is dismissed.

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Conclusion

For the foregoing reasons, it is:

ORDERED, that defendants' motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED, that plaintiff's cross-motion for partial summary judgment is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: January 14, 2010

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ENTER: