

Brown v Metro. Lumber
2011 NY Slip Op 30529(U)
February 16, 2011
Supreme Court, New York County
Docket Number: 106960/09
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

LOUIS B. YORK
J.S.C.

PART 2

Index Number : 106960/2009

BROWN, JAMES

vs

METROPOLITAN LUMBER & HARDWARE

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the accompanying decision.

FILED

FEB 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/16/11

Luy
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

LOUIS B. YORK
J.S.C.

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 2

-----x
JAMES BROWN,

Plaintiff,

Index No.: 106960/09

-against-

DECISION

METROPOLITAN LUMBER, HARDWARE & BUILDING
SUPPLIES, INC. and JEFFREY FIUGCH¹

FILED

Defendants.

FEB 23 2011

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LOUIS B. YORK, J.S.C.:

**NEW YORK
COUNTY CLERK'S OFFICE**

BACKGROUND

Defendant Metropolitan Lumber, Hardware & Building Supplies, Inc. (Metropolitan) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted as against it.

In the verified complaint, plaintiff alleges that Metropolitan made certain false statements and accusations against him, including, but not limited to, statements that plaintiff stole fuel and gas, acted illegally and improperly, acted to defraud Metropolitan, and acted with others to defraud Metropolitan, and accused plaintiff of criminal and immoral behavior. Plaintiff further avers that such statements were slanderous, libelous and defamatory. In addition, the complaint

¹The parties use various spellings of this name throughout their papers, but this is how the defendant's name is spelled on the filed caption.

alleges that defendant Jeffrey Fiugch, the alleged perpetrator of these accusations, is an employee of Metropolitan and was acting in furtherance and within the scope of his employment when making such accusations. These accusations were allegedly made to the New York City Police Department.

Plaintiff was an employee of Metropolitan, said employment ending on May 2, 2008, and he contends that the allegedly defamatory statements were made during the six month-period prior to and including May 19, 2008, when he was arrested.

In response to Metropolitan's demand for a verified bill of particulars, plaintiff admitted to not having any specifics with respect to the dates or occasions on which such defamatory statements were allegedly made, nor could he detail the specific words or phrases that were allegedly used. Motion, Ex. C. Plaintiff asserted, in his response to the demand, that all documents relating to the statements that are the subject of this lawsuit are in the possession of the New York City Police Department (*id.*), but plaintiff has failed to produce any such documents. Plaintiff further responded by stating that all of the statements that he alleges were defamatory were made to Detective Hicks (Hicks). *Id.*

Plaintiff has also failed to identify any specific damages that he allegedly suffered by Metropolitan's statements, either with respect to his social standing in the community or economic

loss.

The thrust of the statements that are the subject of this lawsuit involves plaintiff's allegedly fraudulent use of a gasoline credit card that was given to him by Metropolitan for his use in driving its delivery trucks. Plaintiff was arrested on May 19, 2008, based on a complaint filed by Metropolitan. The case was not prosecuted, and plaintiff was released from police custody on May 20, 2008.

At his deposition, plaintiff admitted that he had been convicted of several misdemeanors in the past. Plaintiff's EBT, at 15. Plaintiff also testified that, when he was arrested on the charges stemming from Metropolitan's complaint to the police, he wrote down a statement about his version of the accusations, but that he does not have a copy of that statement. *Id.* at 25. Plaintiff also said that he was only claiming lost wages as his monetary damages. *Id.* at 45. Plaintiff stated that he has been collecting unemployment ever since he was terminated by Metropolitan, that he has applied for other jobs but has not been hired, which, plaintiff assumes, is because of bad recommendations that prospective employers receive from Metropolitan. *Id.* at 31, 37.

In opposition to the instant motion, plaintiff has provided the deposition testimony of Kenneth Ferguson (Ferguson), Metropolitan's director of safety and security. The court notes

that this deposition transcript is neither dated nor signed by the deponent. According to this transcript, Ferguson testified that he filed a complaint with the New York City Police Department with a Detective Payne about plaintiff's use of Metropolitan's fuel credit cards. Ferguson EBT, at 15, 17.

Ferguson said that one of the truck drivers admitted that he, plaintiff and another driver gave their Metropolitan fuel credit cards to a specific gas station employee who would then swipe the cards and give cash to the truck drivers. *Id.* at 35. Ferguson further testified that he was told that the case would not be prosecuted because the police could not convict only on the testimony of an alleged co-conspirator. *Id.*

As part of his opposition, plaintiff includes a copy of the complaint filed by Ferguson with the police, dated May 13, 2008. Opp., Ex. C.

The crux of plaintiff's argument is that, because he denies the accusations, and because the criminal matter was dismissed, he was the subject of defamatory statements.

In reply, Metropolitan asserts, for the first time, that plaintiff's claims are time-barred, and that statements made to the police about another's suspected crimes are subject to a qualified privilege.

Metropolitan contends that, despite multiple discovery requests that plaintiff provide the statements that he claims are

defamatory, the first time that Metropolitan received such statement was the police report filed by Ferguson that appeared as part of plaintiff's opposition to the instant motion. According to this complaint, Ferguson filed his complaint with the police department on May 13, 2008. Opp., Ex. C. Metropolitan contends that, pursuant to CPLR 215, the complaint for the instant action needed to have been filed by plaintiff on or before May 13, 2009; however, the complaint was not filed until May 18, 2009, beyond the statutory period.

Additionally, Metropolitan avers that plaintiff has failed to evidence any malice on the part of Metropolitan, which, because of the qualified privilege afforded statements made to the police about suspected crimes, defeats any cause of action for defamation.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v*

City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Metropolitan's motion for summary judgment dismissing the complaint is granted.

Although plaintiff alleges that Metropolitan made defamatory statements about him during the six-month period up to and including May 19, 2008, the only specific evidence of such statements is a copy of the complaint made by Ferguson to the police on May 13, 2008. CPLR 215 (3) mandates that actions based on slanderous and libelous statements must be brought within one year of their utterances or publications. *Egleston v Kalamarides*, 58 NY2d 682 (1982). In the case at bar, plaintiff did not file the present lawsuit until May 18, 2009, more than one year after the police complaint was filed, which would thereby render any action based on that complaint, or any statements made prior to May 18, 2008, time-barred. Moreover, plaintiff has failed to evidence any other publication or utterance of a defamatory statement made after that date, aside from his generalized, conclusory assertions.

The court notes that Metropolitan's argument regarding the statute of limitations was raised for the first time in its reply to plaintiff's opposition to the instant motion.

[* 8]

"[O]rdinarily, courts do not consider issues first mentioned in reply in support of a motion for summary judgment. The reason behind this rule is to prevent the opposing party from being deprived of a fair opportunity to respond to the argument [internal citations omitted]."

Burlington Insurance Company v Guma Construction Corp., 66 AD3d 622, 624 (2d Dept 2009).

However, the court may consider such arguments when they are raised in direct response to the opposing party's opposition papers (*Home Insurance Company v Leprino Foods Company*, 7 AD3d 471 [1st Dept 2004]; *Davison v Order Ecumenical*, 281 AD2d 383 [2d Dept 2001]), provided that there is no showing that the opposing party was prejudiced thereby, and that the opposing party was afforded an opportunity to respond to the new theory of relief. *Held v Kaufman*, 238 AD2d 546 (2d Dept 1997), *affd as mod* 91 NY2d 425 (1998).

In the case at bar, there is no evidence with respect to plaintiff's desire to respond to the statute of limitations issue raised by Metropolitan in its reply. Equally, there is no evidence that the police complaint, of which Metropolitan must have been aware because it was filed by one of its own employees on its behalf, was not capable of being obtained by Metropolitan itself prior to plaintiff filing his opposition. Therefore, under these circumstances, the court cannot, in good conscience, dismiss the action based on Metropolitan's reply argument that the matter is time-barred.

However, Metropolitan's motion is granted based on the fact that the statements that are the subject of plaintiff's complaint were made under a qualified privilege, and plaintiff has failed to produce any evidence of malice on the part of Metropolitan or its employees acting on its behalf.

"A good faith communication upon any subject matter in which the speaker has an interest, or in reference to which he has a duty, is qualifiedly privileged if made to a person having a corresponding interest or duty. The common interest privilege covers statements by employees to management about another employee's job-related misconduct. ... This qualified privilege also extends to reports to the police or the District Attorney's office about another's suspected crimes. If the person passing on the information has a good-faith belief in its truth, he is shielded from liability for defamation, even if a more prudent person would not have reported it or the information turns out to be false [internal citations omitted]."

Present v Avon Products, Inc., 253 AD2d 183, 187-188 (1st Dept 1999) (summary judgment granted in case where a former employee sued his former employer and various co-workers for defamation resulting from a criminal complaint filed by the former employer, from which charges the plaintiff was subsequently acquitted); *Tokes v Pollak*, 44 NY2d 211 (1978).

The only specific statement made by Metropolitan of an allegedly defamatory nature provided by plaintiff is a complaint made to the police regarding plaintiff's possible criminal activities. Therefore, the statements made in the police report are protected as being qualifiedly privileged.

However, "[t]he shield provided by a qualified privilege may

be dissolved if plaintiff can demonstrate that defendant spoke with 'malice.'" *Lieberman v Gelstein*, 80 NY2d 429, 437 (1992). Once a qualified privilege is shown to exist, the burden of proof shifts to the plaintiff to establish that the communication was not made in good faith, but was motivated solely by malice. Mere conclusory allegations or charges based on surmise, conjecture and suspicion are insufficient to defeat a claim of qualified privilege. *Garson v Hendlin*, 141 AD2d 55 (2d Dept 1988). "Malice in this context has been interpreted to mean spite or a knowing or reckless disregard of a statement's falsity." *Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 (2007).

In the case at bar, no evidence has been presented that Metropolitan, or its employees acting on its behalf, filed the complaint with the police with spite or a reckless disregard of the statement's truth. The evidence presented by plaintiff himself, Ferguson's deposition, clearly states that Ferguson was acting on information and belief provided to him by one of plaintiff's co-workers, who was thereby admitting to his own wrongdoing as well as plaintiff's. "[T]he complained-of statements by defendant [Metropolitan]'s employees in furtherance of their employer's interests were qualifiedly privileged and there was no evidence that the statements were maliciously motivated." *Conteh v Sears, Roebuck and Co.*, 38 AD3d 314, 315 (1st Dept 2007) (action alleging libel and slander based on

detention of customer accused of theft dismissed).

As a consequence of the foregoing, Metropolitan's motion for summary judgment dismissing the complaint is granted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant Metropolitan Lumber, Hardware & Building Supplies, Inc.'s motion for summary judgment dismissing the complaint asserted as against it is granted and the complaint is dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendant.

Dated: 2/16/11

FILED

FEB 23 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:

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Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**