SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MG, MG

M.V.B. COLLISION INC. d/b/a MID-ISLAND COLLISION,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY and JOHN DIGIOSE,

Defendants.

Motion Sequence #1, #2
Submitted February 23, 2011
XXX

INDEX NO: 16931/10

The following papers were read on this motion to dismiss:

Notice of Motion and Affs.....1-3
Second Notice of Motion and Affs.....4-6
Affs in Opposition.....7-10
Affs in Reply.....11&12
Memoranda of Law.....13-16a

Upon the foregoing papers, it is ordered that these two motions by defendant John DiGiose and the second by defendant Allstate Insurance Company (Allstate) for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's complaint as to each defendant for failure to state a cause of action are granted. The requests for an award of sanctions pursuant to 22 NYCRR 130-1.1 are denied.

This action arises from an alleged defamatory statement made by defendant John DiGiose, a former Allstate claims adjuster, in the course of a telephone conversation on

September 13, 2009 with an Allstate policyholder, Karen Marquez, who had brought her vandalized vehicle to be repaired at plaintiff automotive repair shop. Defendant John DiGiose, who was employed by defendant Allstate at that time, informed the insured that the hourly labor rate charged by plaintiff exceeded the $45-$55 rate customarily paid by defendant Allstate and she would, therefore, be responsible for paying the difference between the amount charged by plaintiff and the amount offered by the insurer. When asked by Ms. Marquez why defendant Allstate would not pay the rate charged by plaintiff, defendant John DiGiose allegedly made the challenged statement at issue herein i.e., that "Allstate cannot give in to extortion."

In the complaint, plaintiff alleges that the subject statement regarding extortion was made with malicious intent, was damaging to its reputation and had a tendency to expose it to public ridicule. As a result of the statement, plaintiff claims it suffered significant and lasting damage to its reputation. Defendants seek dismissal of the complaint predicated on the grounds that, in the context in which it was uttered, defendant John DiGiose's statement that "Allstate cannot give in to extortion" cannot support an action for defamation because it constitutes a hyperbolic statement of opinion and not an objective statement of fact. Additionally, defendant Allstate argues that the purported defamatory statement is protected by qualified privilege.

In considering a motion to dismiss pursuant to CPLR 3211(a)7, the court must afford the complaint a liberal construction and determine only whether the facts as alleged fit within any cognizable legal theory. (*Reiver v Burkhart, Wexler & Hirschberg, LLP*, 73 AD3d 1149, 1150). Viewing the allegations of the complaint as true, and according plaintiff the benefit of every reasonable inference, plaintiff's defamation claim cannot be sustained.

The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se.* (*Salvatore v Kumar*, 45 AD3d 560, 563, *lv den.*, 10 NY3d 703). To be actionable, a statement of fact is required, and rhetorical hyperbole or vigorous epithet will not suffice. (*Greenbelt Co-op Pub. Ass'n v Bresler*, 398 U.S. 6, 14). A false, i.e., defamatory statement is libelous *per se* if it charges another with a serious crime or tends to injure another in his or her trade, business or profession. (*Matovick v Times Beacon Record Newspapers*, 46 AD3d 636, 637). Upon a finding that a false statement alleges a serious crime, a court may, absent any privilege, send the issue to a jury for a determination of damages. (*Geraci v Probst*, 61 AD3d 717, 718 *aff'd* 15 NY3d 336).

Whether particular words are reasonably susceptible of a defamatory meaning presents a question of law to be determined by the court in the first instance. (*Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076; *Kamalian v Reader's Digest Ass'n, Inc.*, 29 AD3d 527, 528). In making such a determination, the factors to be considered include: 1) whether the specific language at issue has a precise meaning which is readily understood; 2) whether the statement is capable of being proven true or false; and 3) whether either the full context of the communication in which the statement appears, or the broader social context and surrounding circumstances, are such that they signal that what is being read or heard is likely to be opinion, not fact. (*Brian v Richardson*, 87 NY2d 46, 51). Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, regardless of how offensive, cannot be the subject of an action to recover damages.

(*Mann v Abel*, 10 NY3d 271). Although an expression of opinion, is not actionable, when a statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading it or hearing it, it is a mixed opinion and is actionable. (*Steinhilber v Alphonse*, 68 NY2d 283, 289).

Content is key as assertions that a person is guilty of blackmail, fraud, corruption and the like in certain contexts have been found to be rhetorical hyperbole or vigorous epithet. (*Gross v New York Times Co.*, 82 NY2d 146, 155). Here, considering the content of the challenged statement and the context in which it was made, a reasonable listener would understand that the statement conveyed hyperbolic opinion rather than a factual statement about plaintiff.

It is well established that many statements that might otherwise be considered defamatory may be protected by a qualified privilege. A privileged statement is one which, but for the occasion on which it is uttered, would be defamatory and actionable. (*Park Knoll Associates v Schmidt*, 59 NY2d 205, 208). Good faith communication made by a party having an interest in the subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to a party having a corresponding interest. (*El-Hennawy v Davita, Inc.*, 50 AD3d 625, 626).

Defendant's use of the word "extortion" which is defined as a felony in Penal Law § 155.05(2)(e), does not necessarily make his remark an actionable statement of fact.

Although Ms. Marquez attests in an affidavit given in connection with a federal action brought by plaintiff herein against defendant Allstate Insurance Company that defendant John DiGiose's comment gave her the impression that he and defendant

Allstate had a grudge against plaintiff, and that Mr. DiGiose was trying to create a negative impression of plaintiff, it is clear that a reasonable listener would not have understood the statement to mean that plaintiff was guilty of the crime of extortion. Notwithstanding the comment, Ms. Marquez did not develop any negative impressions of plaintiff as a result. In fact, despite the comment, her car was repaired by plaintiff repair shop and should any future repairs done by plaintiff be necessary, Ms. Marquez would have them done at said shop.[1] Clearly, the challenged statement was construed as loose, figurative or hyperbolic speech by Ms. Marquez rather than as a statement of fact about plaintiff.

It is the opinion of this Court that the statement at issue herein does not constitute defamation *per se*. Rather, it falls into the category of rhetorical hyperbole. Moreover, given the context in which it was uttered, i.e., a conversation between an Allstate employee and an Allstate insured regarding charges for and/or the necessity of particular repairs, it is subject to qualified privilege. A qualified privilege applies, where as here, the communication is made to a person who has a common interest in the subject matter. (*Foster v Churchill*, 87 NY2d 744, 751). While the defense of qualified privilege is defeated by a showing that defendant spoke with malice *(Kondo-Dresser v Buffalo Public Schools*, 17 AD3d 1114, 1115), the record is devoid of any factual showing of malice beyond the conclusory assertion of same in the complaint.

Accordingly, the motions by defendant John DiGiose and defendant Allstate respectively to dismiss the complaint as to each defendant are granted and the complaint

---

[1]See Ms. Marquez's deposition testimony given pursuant to subpoena on November 3, 2010 in the federal action: M.V.B. Collision, Inc. d/b/a Mid-Island Collision against Allstate Insurance Company, Inc., United States District Court: Eastern District of New York No. 07-CV-187.

is hereby dismissed.

So much of the defendants' motions which seek an award of sanctions is denied. The action at bar is not so completely without merit in law, nor is there any basis to conclude that it was undertaken primarily to harass defendants so at to warrant the imposition of sanctions. Conduct is frivolous and can be sanctioned if it is completely without merit and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law or if it is undertaken primarily to delay or prolong the resolution of litigation or to harass or maliciously injure another. (22 NYCRR 130-1.1.).

Dated: April 1, 2011

UTE WOLFF LALLY, J.S.C.

TO: Steven F. Goldstein, LLP
Attorneys for Plaintiff
One Old Country Road, Suite 318
Carle Place, NY 11514

Miller, Rosado & Algios, LLP
Attorneys for Defendant John DiGiose
200 Old Country Road, Suite 590
Mineola, NY 11501

Seyfarth Shaw LLP
Attorneys for Defendant Allstate Insurance Company
620 Eighth Avenue
New York, NY 10018

mvbcollision-allstate&digiose,#1,#2/dismiss