

Ferrara v Patton

2011 NY Slip Op 31214(U)

April 26, 2011

Supreme Court, Nassau County

Docket Number: 0010518-06

Judge: Steven M. Jaeger

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

PERRY FERRARA,

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 0010518-06

Plaintiff,

-against-

MARTIN PATTON and BRENDA PATTON,

Defendants.

DECISION AND ORDER AFTER TRIAL

Plaintiff commenced an action against both defendants for plain slander (with special damages) and slander per se (and a cause of action for punitive damages) on or about June 30, 2006. A non-jury trial was held before the undersigned on January 10, 2011 and March 2, 2011.

Trial Testimony

James Baldo, a semi-retired builder from Oneonta, knew and did business with the defendants, Marin and Brenda Patton over many years. The Pattons were partners with plaintiff Perry Ferrara and others in the Cooperstown All Star Village in Oneonta. The All Star Village was a baseball park where teams came for a week of competitive baseball games. One of Baldo's companies, Westbury Estates Construction, helped to build the project between 2003 and 2005. Cat Construction, which Baldo believed Perry Ferrara owned, also did construction work on the project. Baldo acknowledged that he is still owed \$10,000.00, which is being held in escrow, that the Pattons will not release.

During June or July, 2005, construction was completed and a certificate of occupancy was received.

Baldo testified that, during the construction, meetings were held in a small house on the property or in Martin Patton's office, which also was in a building on the property. On July 25, 2005, Baldo met with both Pattons in the office. Martin Patton wanted Baldo to sign a letter or affidavit concerning a pending lawsuit between Martin and Perry Ferrara. Baldo did not sign it, because he felt unsure about "giving up whatever rights I may or may not have had in any future dealings" between Patton and Ferrara.

At that meeting, Brenda Patton said that Tim Traynor, who was the general contractor for Westbury Estates on the project, was a "coke head". Martin Patton agreed with her. Brenda also said that Perry Ferrara was the dealer or supplier of the cocaine. Again, Martin "confirmed" that statement, although Baldo could not recall his exact words.

Baldo also said that Martin Patton told him to sign the letter and then Martin would add an additional year to the exclusive five (5) year contract for photography at the park held by Baldo's son. Baldo asked for the extension because business was bad the first year of operation. After this meeting, Baldo said his relationship with the Pattons deteriorated as he also became friendly with Ferrara.

Baldo admitted that he has a felony larceny conviction from 2003 due to falsifying his expense account for the company he was then working for. Baldo denied that there was any pending litigation between him and the Pattons other than the

escrowed money. He admitted his son's company, Orbital Imaging, unsuccessfully sued the Pattons.

Baldo testified that he did not repeat Brenda Patton's comments to anyone, although he did discuss the issue with Traynor and Ferrara. He also told a woman during a phone call checking on Ferrara's references that there were "some issues" between Ferrara and his partners. He said he told her that Ferrara may be involved in something illegal.

Baldo testified that he used to own several radio stations in upstate New York and that he bartered advertising for Patton's restaurants in exchange for meals. At the end, Patton still owed a substantial amount of money that remains unpaid. Baldo also did reconstruction work on a Patton restaurant damaged in a fire and did not get paid for it, something he described as "typical".

Plaintiff Perry Ferrara testified that he is a contractor employed by Cat Construction Corp. for approximately 13 years. He has owned Cat for the past 3 or 4 years. Previously he practiced law until 1997 when he was disbarred after being convicted of the theft of approximately \$1.2 million from his escrow account. He had to make restitution and was sentenced to jail, but is no longer on parole.

Ferrara became involved in the Cooperstown All Star Village project in late 2003. He met with defendant Martin Patton a few times concerning investing in the project on behalf of his father, Joseph Ferrara. An agreement was made between Patton and Cooperstown Capital, LLC to develop the project and Perry was going to be there to represent his father's interests. Perry's family already operated a wax museum in Cooperstown.

Later, Perry discussed the construction plans with Martin and they agreed in January, 2004 that Cat Construction and Perry would act as the general contractor and construction manager on the project: Clark Construction was doing the fields; Westbury Estates Construction was doing the dormitories, both houses, and concession stands; Cat Construction was doing renovations on the hotel, gift shop, arcades, and other items.

While there was no written contract, Ferrara understood Cat was to be paid on a cost plus basis. Cat received credits against the investment by Cooperstown Capital as well as some small payments. At some point, Cat assigned its payments to Cooperstown Capital, LLC. Ferrara testified that litigation between Cooperstown Capital and the All Star Village and the Pattons has been ongoing for at least six (6) years.

In July, 2005, Ferrara stated that most of the work at the All Star Village was done. His relationship with Martin Patton however had "soured" in the summer of 2004. At that time, Jay Quinn of the Christopher Companies, a large developer, had contacted Ferrara to do work for him on a residential construction project in Patchogue. They agreed that Ferrara would manage the project in exchange for eight percent (8%) of the "hard construction cost", anticipated to be approximately \$15 million. However, Ferrara learned that while checking Ferrara's references, Quinn spoke to Baldo and, based on that conversation, to Patton. After that, Quinn sent Ferrara a letter withdrawing the offer.

At some point, Tim Traynor told Ferrara that Martin or Barbara Patton were making statements that he was involved in selling cocaine. Ferrara admitted that he

used cocaine, but denied selling or giving it to anyone else. Ferrara testified that he used Patton as a reference in 2006 even though there was ongoing litigation, they were not getting along, and Ferrara believed Patton stole money from All Star Village.

John J. Quinn testified that he was a principal in The Christopher Companies in 2006. They developed and constructed residential housing. His father and Perry's father knew each other for decades.

In 2006, Christopher Companies was developing Riverview of Patchogue, a 35 town house condominium project. Quinn and Ferrara discussed Ferrara becoming the construction manager on the project. Quinn sent Ferrara a letter agreement for a fee of eight percent (8%) of the total construction cost (approx. \$15 million) and requested Ferrara's references.

Quinn received a letter accepting the offer and a list of references from Ferrara. Quinn had his secretary speak to the references by phone. He learned that one of the references was negative. Based on that, he recalled speaking to Martin Patton, who told him Ferrara was "involved in drug dealing". Thereafter, Quinn sent Ferrara a letter withdrawing the job offer. Ferrara testified he called Quinn after receiving the letter withdrawing the job and denied selling drugs.

Quinn testified that the Riverview project of 35 homes was almost completed at the time of the trial, but gave no further details or information on the project. Quinn was not told by Ferrara and did not know that Ferrara was a disbarred attorney and felon.

Brenda Patton specifically denied making the statement set forth in the complaint to Baldo. She also denied saying anything similar to that in words or substance to

Baldo. Brenda also did not recall the meeting Baldo said took place on July 25, 2005. Nor did she recall a meeting or discussions with Baldo about his signing on affidavit.

Brenda identified Kelly Lewis as a former office employee of the All Star Village in late 2003 and early 2004. She worked in the main office, which was separated by a door from Martin Patton's office. She said he always kept his door closed.

Brenda also identified Sandra Fitch as a former office employee at the All Star Village who left in early 2004. Brenda denied firing either Fitch or Lewis. She also denied making any statements in either one's presence concerning Ferrara's involvement in selling drugs.

Martin Patton testified that there are 5 or 6 ongoing lawsuits between Patton and Joseph Ferrara. The Pattons own sixty-five percent (65%) of the All Star Village and Cooperstown Capital owns thirty-five percent (35%). He also said there is ongoing litigation involving Cat Construction and one of Patton's companies. He stated that at some point he believed Ferrara owned Cat, but now Ferrara's wife was the owner.

Martin Patton specifically denied being in any meeting with his wife and Baldo where Brenda made any statement concerning Tim Traynor being a "coke head" and Ferrara being his supplier. He also denied Brenda ever made such a statement in his presence nor had Martin ever made such a statement.

Further, Martin Patton denied ever having a phone conversation with Quinn or anyone else as a reference for Ferrara and denied making any statements about Ferrara being a drug dealer.

Martin recalled that Kelly Lewis might have been terminated for tardiness. He later corrected that to claim she was collaborating with Ferrara and causing problems in the operation of Patton's businesses.

Kelly Lewis testified that she worked for the Pattons' businesses from 2003 to 2004. She started as a front desk clerk at the hotel and then was promoted by the Pattons to work in the main office as a bookkeeper and assistant to the office manager. She was fired in June or July, 2004 by Martin because she did not want to write an All Star Village check for an expenditure for one of Patton's companies.

By that time, the relationship between Ferrara and Martin Patton had become bad. She said Patton badmouthed Ferrara to her, to other employees, and to clients. She overheard Patton on the phone saying to someone that Ferrara was a lowlife and not to be trusted because he was a drug dealer. On the day she was fired, Patton yelled at her that she should not tell Ferrara anything "because he was a no good drug dealer". Martin Patton denied Lewis' testimony concerning the check and the phone call.

Decision and Order

Defamation is the making of a false statement which "...tends to expose the plaintiff to public contempt, ridicule 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 & Wilson*, 42 NY2d 369, 379. Defamation may take the form of libel (written) or slander (spoken).

There are two types of slander alleged by plaintiff—slander per se and plain slander. In each, the gravamen of the action is an injury to reputation. However, for plain slander, the plaintiff must both plead and prove “special harm”, which is defined as the specific actual loss, usually monetary, of some gain or advantage which would have come to the plaintiff but for the defamation.

For slander per se, injury is presumed as a matter of law, if the alleged statement falls into one of the following categories:

1. Charging a person with a serious crime
2. Tending to injure another in his trade, business, or profession
3. Attributing to a person a loathsome disease
4. Imputing unchastity to a woman

In order to establish a cause of action for slander per se, plaintiff must prove the following elements:

1. The statement was defamatory
2. The statement referred to plaintiff
3. The defendant communicated the statement to someone other than plaintiff.

A cause of action for plain slander adds an additional element:

4. The statement was a substantial factor in causing plaintiff to suffer financial loss.

This loss must be proven with specificity. *Matherson v. Marchello*, 100 AD2d 233, 235.

A claim of damages in round numbers, with no itemization, is insufficient. *Drug Research Corp. v. Curtis Publishing Co.*, 7 NY2d 435, 440-41.

Plaintiff must also plead the alleged defamatory words exactly as stated. CPLR 3016(a). This requirement serves two purposes: to give defendant adequate notice as to the alleged wrongdoing and to discourage frivolous or vexatious action. Further, this requirement is to strictly enforced and any paraphrasing or use of qualifying words

makes the complaint defective. *Gardner v. Alexander Rent-A-Car Inc.*, 28 AD2d 667. Omission of the verbatim statement can be cured by amendment or in a bill of particulars. *Pappalardo v. Westchester Rockland Newspapers, Inc.*, 101 AD2d 830 (2 Dept. 1984), *aff'd* 64 NY2d 862 (1985); *Pernet v. Peabody Engineering Corp.*, 20 AD2d 781.

While the Court denied the eve of trial motion to dismiss as to defendant Martin Patton for failure to particularize the words attributed to him, the Court now finds that plaintiff has failed to offer persuasive proof that defendant Martin Patton defamed plaintiff in the conversation on July 25, 2005. Baldo testified that Martin “agreed with” or “confirmed” Brenda Patton’s statement, but Baldo could not recall the word or words he used to do so. This is insufficient as a matter of law.

The Court does not credit the testimony of Kelly Lewis due to her apparent bias. Further, the alleged statements made to or heard by her were not pleaded nor did defendant have notice of same. Moreover, the Court notes significant concerns as to the bias of James Baldo and as to the interest and bias of each of the parties to this action. Given the obvious hostility and the various lawsuits involving the parties, their related business interests, and family members, it is difficult to fully credit much of the testimony offered. Since it is plaintiff who bears the burden of proof herein, the Court is constrained to find he has failed to persuade the Court to find in his favor on any of his causes of action.

In any event, even if the Court found Barbara Patton’s statement to Baldo to be defamatory, the plaintiff has failed to prove any specific damages under the plain

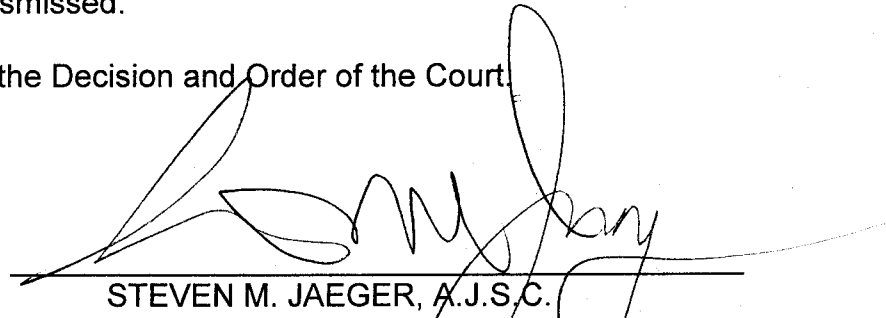
slander cause of action. The proof offered was speculative and vague. No proof of actual construction costs was offered by plaintiff as to the job he allegedly lost due to defendant's statements. This leaves the Court unable to calculate the amount of the claimed special damages.

Finally, there is no separate cause of action for punitive damages, and that cause of action should be dismissed. *Rocanova v. Equitable Life Assur.*, 83 NY2d 603, 616-17. In any event, there is no basis for an award of punitive damages in this case.

Accordingly, plaintiff having failed to satisfy his burden of proof on any cause of action, the complaint is hereby dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 26, 2011


STEVEN M. JAEGER, A.J.S.C.

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