SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

BENJAMIN WEY,

Plaintiff,

-against-

THE GLOBAL CONSULTING GROUP, *et al.*

Defendants.

INDEX NO. 108299/2009

MOTION DATE April 21, 2011

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to ____ were read on this motion to dismiss action

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, defendants' motion to dismiss the complaint is decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 20, 2011

O. PETER SHERWOOD, *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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BENJAMIN WEY,

Plaintiff,

-against-

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

Defendants.

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DECISION AND ORDER

Index No. 108299/2009

Hon. O. Peter Sherwood, J.

For purposes of this decision, Motion Sequence Numbers 005 and 006 are consolidated for disposition.

In August 2009, plaintiff Benjamin Wey a/k/a Benajamin Wei (Wey) brought the above-captioned action against defendants alleging state and common-law causes of action for libel, libel per se, slander, slander per se, tortious interference with prospective business relationships, and negligent supervising, training and retention. The action arises in connection with a press release, a telephone conversation and two e-mail messages.

In Motion Sequence 005, defendants seek dismissal of the amended complaint pursuant to CPLR 3211 (a) (1) (documentary evidence) and (7) for failure to state a cause of action. Defendant Huntsworth PLC (Huntsworth) moves to dismiss for lack of personal jurisdiction (*see* CPLR 3211 [a] [8]). In Motion Sequence 006, plaintiff moves for an order, pursuant to CPLR 2221 (a) modifying the Order of the Honorable James A. Yates dated and entered on May 17, 2010. In that Order, the court denied plaintiff's motion to reargue and granted plaintiff leave to amend the original complaint (the Reargument Order). For the following reasons, defendants' motion to dismiss is granted, and plaintiff's motion to amend the May 17 Order is denied.

BACKGROUND

The facts of this case, which are described in greater detail in Justice Yates' January 14, 2010 Opinion, can be summarized as follows: Wey is a self-described business and investment consultant to China-based companies listed on various American stock exchanges. Defendant, Global

Consulting Group (DCG), is an international investor relations firm doing business in New York. Defendant, Huntsworth, is the sole owner of DCG and defendant, Grayling Global (Grayling). Defendant, Anne McBride (McBride), is employed by GCG in its New York office as Chairperson of the World Wide Investor Relations Division. She is also Chair of World Wide Investor Relations and Financial Media and in this capacity, supervised Gong Chen a/k/a Dixon Chen (Chen). He is now a GCG managing director and serves as an investor relations adviser. Wey and Chen have known each other since 2003.

This is ultimately a defamation case. The real dispute here is between Wey and Chen. Wey alleges that he introduced his client, AgFeed Industries (AgFeed), a company that is the largest commercial hog producer and premix feed company in China, to GCG. A few months after initiation of a business relationship between the two companies, Wey alleges that he was defamed by Chen in several written and oral communications to AgFeed executives and AgFeed's American board members. Specifically, Wey alleges that Chen is responsible for three defamatory statements: (1) a press release issued on January 29, 2008 allegedly by Wey that contained information about the company's core business and made projections about hog production which Chen allegedly claimed were false and were meant to illegally inflate AgFeed's stock price, and would subject AgFeed to liability; (2) an e-mail reportedly sent to AgFeed's head of corporate development, the Chair of AgFeed, and another management-level employee of GCG at midnight on February 4, 2008 supposedly referring to the collapse of another Chinese company; and (3) a telephone conversation with Director Rittereiser, also on February 4, 2008, that allegedly blamed Wey for sending out the press release and then allegedly accused Wey of various securities violations. These three factual allegations of defamatory statements are the same as those in the original complaint. Essentially, Wey accuses Chen of committing multiple acts of defamation, specifically statements that plaintiff had a "bad reputation on Wall Street," was "controversial," was "single-handedly" responsible for the downturn of a publicly traded Chinese fertilizer company named Bodisen Biotech Inc. (Bodisen), was trading on inside information and conspiring with family and friends to profit from insider trading, and had committed a SEC violation by improperly authorizing the issuance of a press release containing material misstatements that could subject AgFeed to liability. As a result, Wey alleges that he lost AgFeed's business despite numerous attempts to repair his relationship with the

company. He seeks damages in an amount not less than $5 million to compensate him for injuries to his professional reputation. Wey further alleges that Chen made the statements solely to harm him and that "Chen's malicious motivation was based on jealousy of Plaintiff and envy of Plaintiff's success and stature in the business world." He names the other defendants on vicarious liability theories since Chen was allegedly acting within the scope of his employment when he made the alleged defamatory statements.

Defendants move to dismiss the Amended Complaint on various grounds. First, defendants argue that Chen's statements are non-actionable opinion. Second, defendants argue that the statements were substantially true and not defamatory. Accordingly, defendants argue that he Amended Complaint fails to state a ground upon which relief can be granted. Defendants also insist that Wey has not overcome the qualified "common interest" privilege. Lastly, defendants rely on the doctrine of law of the case.[1] The court immediately rejects this argument because "[w]here an amended complaint is served, the original complaint cannot in any manner constitute the law of the case" (*Berne Investors, Inc. v Wechsler*, 152 AD2d 804, 805 [3d Dept 1989]). Similarly, an order appealed from does not establish the law of the case (*id.*)

The original complaint was filed on June 10, 2009 and dismissed on January 14, 2010. The decision to dismiss was based on joint grounds of opinion and qualified privilege. As well, the court found that Wey had failed to adequately allege malice to overcome the privilege. At the same time, Wey's motion for partial summary judgment was denied. The January 14, 2010 Order has been appealed to the Appellate Division, First Department, but the appeal has not been perfected. The First Department has extended the deadline to perfect until the September 2011 term. Subsequently, the court also denied Wey's motion to reargue; however, the court granted his motion to amend the initial complaint.

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[1] The law of the case doctrine is a rule of practice which provides that once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation" (*Halloway v Cha Cha Laundry, Inc.*, 97 AD2d 385, 386 [1st Dept 1983]).

DISCUSSION

A. Motion to Dismiss

When considering a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Nonnon v City of New York*, 9 NY3d 825 [2007]). A complaint may be dismissed under CPLR 3211 (a) (1) where a defense is founded upon documentary evidence, such that the documents relied upon "definitively dispose of plaintiff's claim"(*Bronxville Knolls, Inc. v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept 1995]). Pursuant to CPLR 3211 (a) (7), a complaint may be dismissed as a matter of law where the allegations in the complaint "fail to state a cause of action." Consequently, the court may dismiss the complaint if it appears beyond doubt that Wey can prove no set of facts in support of his claims.

B. Defamation

Defamation consists of the torts of libel and slander. To succeed on his claims for defamation, Wey must allege: (1) a false oral or written statement of fact; (2) regarding the plaintiff, (3) that was either published or communicated without privilege or authorization to a third party by the defendant, (4) with injury to the plaintiff (*see Boyd v Nationwide Mutual Ins. Co.*, 208 F 3d 406, 409 [2d Cir 2000]; *see also Dillon v City of New York*, 261 AD2d 34 [1st Dept 1999]; *Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 1002 [Sup Ct, NY County 2005]). A defamatory statement of fact is one 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 people to deprive him of their friendly intercourse in society"(*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 [1977]; *see also Foster v Churchill*, 87 NY2d 744, 751 [1996]).

> "[I]f the language is not of such a nature, that is, if it merely constitutes a general reflection on a person's character or qualities, it is not a matter of such significance and importance as to amount to actionable defamation even though it may be unpleasant, annoying, or irksome, or may subject the plaintiff to jests or banter so as to affect his feelings" (NY Jur, Defamation § 5).

The court must decide whether the statements complained of are "reasonably susceptible of a defamatory connotation, thus warranting submission of the issue to the trier of fact"(*Silsdorf v Levine*, 59 NY2d 8, 12-13 [1983], *cert denied* 464 US 83 [1983]).

To be actionable, a provable statement of fact is required (*see Gross v New York Times Co.*, 82 NY2d 146, 153 [1993] [finding that only facts "are capable of being proven false"]). Opinions have absolute immunity. Expressions of pure opinion[2] are protected by the First Amendment of the United States Constitution on the theory that an idea or opinion cannot be said to be true or false and any harm which may be caused by an opinion can be corrected only through the competition of other ideas, and not through judicial intervention (*see Epstein v Board of Trustees*, 152 AD2d 534, 535-536 [2d Dept 1989] [letters to student newspaper criticizing a teacher's performance were clearly assertions of opinion and therefore they were constitutionally protected, however unreasonable or erroneous they might be]; *see also* Restatement [Second] of Torts § 566, Comment b]). While "a statement of opinion accompanied by a full recitation of the facts on which it is based will be deemed . . . pure opinion, . . . a statement of opinion that implies a basis in undisclosed facts is actionable 'mixed opinion'" (*Clark v Schuylerville Cent. School District*, 24 AD3d 1162, 1163 [3d Dept 2005]). In cases of mixed opinion, the false opinion is not actionable, rather "it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking" (*Steinhilber v Alphonse*, 68 NY2d 283 at 290 [1986]).

In *Gross v New York Times*, the Court of Appeals set forth a three-part test for distinguishing statements of protected opinion from those implying actionable facts: (1) whether the language at issue has a precise meaning which is readily understood or whether it is indefinite or ambiguous; (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 as to "signal . . . readers or listeners that what is being read or heard is likely to be an opinion, not fact" (*Gross,* 82 NY2d at 153; *see also Brian v Richardson*, 87 NY2d 46, 51 [1995]; *Steinhilber*, 68 NY2d at 292 [1986]).

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[2] A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based or does not imply that it is based upon undisclosed facts (*see Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]).

Categories of statements that may be considered defamatory per se include: (1) words that impute the commission of a criminal offense; (2) words that impute a lack of integrity in the discharge of duties of employment; or (3) words that prejudice a party, or impute lack of ability in her trade or business (*see e.g. Curry v Roman,* 217 AD2d 314 [4th Dept 1995] [statements by art gallery owner and its agent that auctioneer and his business were "crooks," "thieves" and "swindlers," and that there was "some sort of collusion somewhere along the line" were defamatory as a matter of law]).

Under New York law, in "an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally" (CPLR 3016 [a]). The particular defamatory words complained of must be quoted verbatim in the complaint (*see e.g. Varela v Investors Insurance Holding Corp.*, 185 AD2d 309 [2d Dept 1992]).

The court will now address, in turn, each of the three disputed statements.

1. The Press Release

Having examined the challenged statements in the context of in which they were made, the court finds that the statements are non-actionable opinion. Viewed as a whole, it is clear that Chen's statements were intended to be assertions of his suspicions. He believed that Wey's conduct could cause legal problems for AgFeed. As well, his statements of opinion were then followed by a recitation of the facts on which they were based.

2. The Conversation with Rittereiser and E-Mails to Corporate Executives

In his telephone conversation with Rittereiser and in the two emails to corporate executives, Chen expressly stated that Wey conspired with family and friends to "secretly sell" stocks, that Wey's business was a "front for illegal activities," and that Wey violated securities laws. He further stated that Wey 's actions "could be construed as "illegal and not in the best interest of the corporation," and specifically detailed alleged wrongdoing. These statements are reasonably susceptible of a defamatory connotation because the words impute the commission of a crime, impugn Wey's integrity and accuse Wey of conduct that affects a person injuriously in his profession. That statements can be viewed as defamatory, however, does not end the court's inquiry because defendants contend that the statements are true and are protected under a conditional privilege.

Truth is a complete defense to defamation claims *(see Fleckenstein v Friedman*, 266 NY 19 [1934]; *Present v Avon Prods.*, 265 AD2d 183 [1st Dept 1999]). Further, statements which are substantially true are sufficient to defeat a defamation charge *(see e. g. Leibowitz v St. Luke's-Roosevelt Hosp. Ctr.*, 281 AD2d 350 [1st Dept 2001]). Therefore, truth as a defense need not be established to a literal degree (*see Love v William Morris and Co.*, 193 AD2d 586 [2d Dept 1993]).

In *Montague v NYP Holdings* (No. 102472/05, 2008 NY Slip Op 50996 (U) at 1 [Sup Ct, Richmond County 2008]), the New York State Supreme Court of Richmond County dismissed a defamation claim against a newspaper by a small business owner who was the subject of a television consumer affairs report. The newspaper had published a profile on a Howard Thompson, a television consumer affairs reporter known for a segment on WPIX Channel 11, in which he helps people involved in disputes with local businesses. Prior to the newspaper story, the reporter helped an elderly woman resolve a dispute with plaintiff and his heating and air-conditioning company. The newspaper article on the reporter featured a small photograph of the reporter and plaintiff and a larger photo of the reporter with the caption: "Ch. 11's Howard Thompson has been confronting con artists and unsavory business people for more than a decade." Plaintiff's first suit against the television statement was dismissed. In a second suit, which was practically identical to the first, plaintiff argued that he was defamed in the newspaper caption. Plaintiff's defamation claim failed for several reasons. First, the court found that the statement must be read in the context of the entire publication and it was not proven that a reasonable reader would find the statement false and harmful. Second, an average reader would not view the statements as being about and concerning plaintiff. Third, the caption was substantially true because the underlying story was about a television reporter who has made a career confronting con artists and unsavory business people. As well. plaintiff had been the subject of criminal proceedings in the past.

In this matter, Wey alleges that Chen defamed him by making untrue allegations. The clear implication is that plaintiff had committed criminal offenses in his work. However, while appearing defamatory in nature, the statements, like those in *Montague,* also are substantially true. The documentary evidence provided to the court by defendants shows that Wey was suspended by NASD in 2002 and ordered to pay a fine for allegedly maintaining discretionary accounts with a member firm without giving his firm notice. He has never sought to be reinstated. In 2005, he was also

censured by the Oklahoma Department of Securities and he was barred from seeking to do any brokerage or investment advisory business in the state (*see* Defs. Notice of Motion to Dismiss First Amended Complaint, affirmation of Klausner, exhibit 5, Enforcement Div. Recommendation of the State of Oklahoma Dept. of Securities in *In re Benjamin Wei*, ODS File No. 02-166, filed on November 1, 2004). He allegedly recommended stocks to several persons without properly disclosing the risks, made unauthorized trades and failed to disclose that he had consulting agreements with the companies whose stock he was selling. Wey was the founder, majority shareholder and CEO of Benchmark Capital in Oklahoma. He moved his company to New York in 2002 through the purchase of his Oklahoma operations by a New York-based entity with the same name. Within six months, he was allegedly fired by the board as CEO and as a director. According to an affidavit by the then general counsel of Benchmark, Wey was fired "for cause" because he was believed to be involved in insider trading and misappropriating Benchmark funds (*see* exhibit 6, Class Action Complaint filed in action captioned *Stephanie Tabor v Bodisen Biotech, Inc. Qiong, Bo Chen, New York Global Group, Inc. and Benjamin Wey a/k/a Benjamin Wei*, 06 Civ 13220, in Southern District of New York on November 15, 2006).

Even if the statements were not true, they still warrant protection under the qualified "common interest" privilege. The privilege protects good faith communications "upon any subject matter in which the speaker has an interest, or in reference to which he has a duty, . . if made to a person having a corresponding interest or duty" (*Present*, 253 AD2d at 187; *see also Foster v Churchill,* 87 NY2d at 751). The essential elements for sustaining the privilege are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only (*see* 50 Am Jur 2d , Libel and Slander, § 195). Specifically, the "common interest" privilege covers statements by employees to management about another employee's job-related misconduct (*see Loughry v. Lincoln First Bank*, 67 NY2d 369, 376 [1986]) and statements by an outside vendor or independent contractor (*see Clark v Somers*, 162 AD2d 982 [4th Dept 1990]). Thus, a consultant is protected from suit by the qualified privilege when he shares evidence of misconduct by another business consultant with board members and company executives.

However, a party's good faith communication with a party having a common interest creates only a rebuttable presumption that a defamation action cannot be maintained. The presumption is rebutted if the statements were: (1) made for purposes beyond the scope of the privilege where a defendant does not exercise the privilege in a reasonable manner, abuses the occasion, or makes the statement in furtherance of an improper purpose; (2) made with common law malice, considering defendant's personal spite or ill-will; or (3) made with knowledge of falsity or reckless disregard of the truth (*see e.g. Brooks v Anderson*, 18 Misc 3d 1109 [A], 20-078 NY Slip Op 52482 [U] [Sup Ct, Bronx County 2007]). Absent evidence that Chen was motivated by malice in writing the e-mails or making the telephone call to a director, the claim should be dismissed.

The court rejects Wey's contention that if a qualified privilege existed, it is defeated by Chen's malice. A speaker exhibits constitutional malice, as defined in *New York Times Co. v Sullivan*, (376 US 254, 279-280 [1964]) when he makes a defamatory statement while knowing that it is false or recklessly disregarding whether it is false (*see also Sweeney v Prisoners' Legal Servs. of N.Y.*, 84 NY2d 786 [1995][involving letter concerning serious problem with unnecessary and excessive force at correctional institution and implicating plaintiff in three incidents believed to have involved unnecessary or excessive force]). Common-law malice is demonstrated when the speaker or writer was solely motivated by a desire to hurt the plaintiff (*Present*, 253 AD2d at 188). Plaintiff here offers no evidence tending to show that Chen wrote the e-mails and spoke with a board director with an ulterior motive. Wey's factual allegations are conclusory. There is no evidence in the complaint or supporting documents to support an inference of malice on Chen's part. Falsity alone is insufficient to raise an allegation of malice. Moreover, evidence of prior disputes is not evidence of malice, nor are "[s]uspicion, surmise and accusation" (*Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d at 64). Because he has not offered evidence that Chen was motivated solely by either common-law or constitutional malice, Wey has failed to meet his burden of raising an issue of malice sufficient to overcome the "common interest" privilege (*see id.*; *Carone v Venator Group, Inc.*, 11 AD3d 399 [1st Dept 2004]).

Accordingly, because all the statements Chen made were either opinions, substantially true or protected by a qualified privilege, the defamatory claims against the defendants are dismissed. In view of this determination, the court does not reach the sufficiency of the remaining causes of action raised by plaintiff.

C. **Motion to Modify the Reargument Order**

Wey also moves to (1) modify the Reargument Order so that it states that reargument was granted, rather than denied to preserve his rights on appeal of the original dismissal order; (2) vacate the judgment entered on the dismissal order; and (3) amend the Reargument Order to remove the directive for the Clerk to enter the judgment. In the absence of any applicable legal rationale for modifying the Reargument Order, plaintiff's motion for modification is denied.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint in its entirety is granted; and it is further

ORDERED that plaintiff's motion for a modification of the Reargument Order is denied; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: May 20, 2011

MAY 20 2011

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD J.S.C.

O. PETER SHERWOOD