

M.V.B. Collision Inc. v Kirchner

2012 NY Slip Op 31284(U)

May 1, 2012

Sup Ct, Nassau County

Docket Number: 12373/11

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

M.V.B. COLLISION INC. d/b/a MID-ISLAND COLLISION
and ROBERT JESBERGER, Individually,

TRIAL/IAS PART 31
NASSAU COUNTY

Plaintiffs,

Index No.: 12373/11
Motion Seq. No.: 02
Motion Date: 03/02/12

- against -

XXX

GEORGE KIRCHNER,

Defendant.

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits and Memorandum of Law</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3211(a)(7), for an order: (1) dismissing plaintiffs' first cause of action alleging defamation and defamation *per se*; (2) dismissing plaintiffs' second cause of action alleging intentional infliction of emotional distress; (3) dismissing plaintiffs' demand for punitive damages; and (4) awarding defendant costs and sanctions as against plaintiffs and their counsel. Plaintiffs oppose the motion.

In this action, plaintiffs M.V.B. Collision Inc. d/b/a Mid-Island Collision, an automotive repair facility located in Nassau County and its president, plaintiff Robert Jesberger ("Jesberger") seek to recover damages for defamation and intentional infliction of emotional distress.

According to the Amended Verified Complaint, defendant, a claims adjuster employed by Allstate Insurance Company (“Allstate”), failed to properly adjust claims or offer a fair and reasonable amount to plaintiffs to repair damaged vehicles and allegedly used his position as an adjuster to impede and deny claims in order to harm plaintiffs’ business.

In the first cause of action for defamation, plaintiffs allege that, while discussing a claim with an independent adjuster, James Moy, and an individual insured by Allstate, Suren Marajh, who had retained plaintiff to repair his 2006 Mercedes Benz E35 automobile, defendant stated that: 1) plaintiffs were being investigated by Allstate, the Nassau County Police Department and the Nassau County District Attorney’s Office; 2) plaintiffs had been found guilty of two Allstate Special Unit investigations; and 3) plaintiffs had engaged in bad practices in the past.

In the second cause of action, plaintiffs allege that defendant intentionally engaged in a course of conduct for the sole purpose of causing distress to plaintiff Jesberger in order to curry favor with his employer and coerce plaintiffs into discontinuing and refraining from engaging in litigation with Allstate.

The Amended Verified Complaint references three claims by Allstate policyholders, to wit: Victor Verola, Sidney Katz and Gordon Mahon who had retained plaintiffs to repair their damaged automobiles. Although defendant referred their claims to Allstate’s Special Investigations Unit, Allstate ultimately offered to pay the claims without reduction for enhancement of damage or fraud and no further action was taken by the Special Investigations Unit. Moreover, plaintiffs fail to allege that defendant made any specific defamatory statements in their presence. As such, the allegations with respect to these individuals are irrelevant to plaintiffs’ defamation or intentional infliction of emotional damage claims.

Defendant seeks dismissal of the Amended Verified Complaint on the grounds that the statements allegedly made to Suren Marajh and James Moy were covered by a qualified privilege

as they related to a subject in which the insured, the independent adjuster and the insurer's employee had a common interest, *i.e.*, the extent of the damage to the insured's vehicle actually caused by the accident.

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts as true, accord the plaintiffs the benefit of every possible favorable inference and determine only if the facts as alleged fit within any cognizable legal theory. *See Noonan v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). While allegations of a complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions are not presumed to be true. *See Baron v. Galasso*, 83 A.D.3d 626, 921 N.Y.S.2d 100 (2d Dept. 2011).

Whether the statements at issue are reasonably susceptible of a defamatory connotation is, in the first instance, a legal determination for the court. *See Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 550 N.Y.S.2d 251 (1989). 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, which causes special harm or constitutes defamation *per se*. *See Salvatore v. Kumar*, 45 A.D.3d 560, 845 N.Y.S.2d 384 (2d Dept. 2007) (citation and quotation marks omitted). A defamatory statement is one which tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of people in the community. *See Knutt v. Metro Intl., S.A.*, 91 A.D.3d 915, 938 N.Y.S.2d 134 (2d Dept. 2010) (internal quotation marks and citations omitted). Imputing a serious crime to the plaintiff constitutes defamation *per se*. *See Geraci v. Probst*, 15

N.Y.3d 336, 912 N.Y.S.2d 484 (2010). It is for the court to determine in the first instance whether a particular publication, when considered as a whole, is susceptible of a defamatory meaning. *See Aronson v. Wiersma*, 65 N.Y.2d 592, 493 N.Y.S.2d 1006 (1985). A cause of action sounding in defamation which fails to comply with CPLR § 3016(a)¹ mandates dismissal. *See Simpson v. Cook Pony Farm Real Estate, Inc.*, 12 A.D.3d 496, 784 N.Y.S.2d 633 (2d Dept. 2004). Truth is an absolute defense to a defamation cause of action. *See Silverman v. Clark*, 35 A.D.3d 1, 822 N.Y.S.2d 9 (1st Dept. 2006).

In determining whether the alleged statements made by defendant are actionable, the statements must be considered in their applicable context and in terms of their effect upon the average listener. *See Sandals Resorts Intl. Ltd. v. Google, Inc.*, 86 A.D.3d 32, 925 N.Y.S.2d 407 (1st Dept. 2011). Even where a statement is defamatory, a qualified privilege exists where the communication is made to person(s) who shares a common interest in the subject matter. *See Liberman v. Gelstein*, 80 N.Y.2d 429, 590 N.Y.S.2d 857 (1992); *El-Hennawy v. Davita, Inc.*, 50 A.D.3d 625, 853 N.Y.S.2d 925 (2d Dept. 2008); *Kammerman v. Kolt*, 210 A.D.2d 454, 621 N.Y.S.2d 97 (2d Dept. 1994). The defense of qualified privilege, however, will be defeated where it is demonstrated that the defendant's statements were uttered with malice which includes either common law malice (motivated solely by spite or ill will – or desire to hurt plaintiff) or constitutional malice (statements made with a high degree of their falseness). *See Foster v. Churchill*, 87 N.Y.2d 744, 642 N.Y.S.2d 583 (1996). Conclusory allegations, surmise, conjecture and suspicion are insufficient to defeat the common interest privilege. *See Ferguson v. Sherman Sq. Realty Corp.*, 30 A.D.3d 288, 817 N.Y.S.2d 272 (2d Dept. 2006).

The communications at issue herein are entitled to a qualified privilege. It cannot be said that the subject communications were so vituperative or extravagant that an inference of malice

¹CPLR § 3016(a) requires that the particular words complained of must be set forth in the complaint, as well as the time, place and manner of the false statement and to whom the statement was made.

is possible or that defendant went beyond what was necessary to convey a message concerning a common interest. *See Berger v. Temple Beth-El of Great Neck*, 41 A.D.3d 626, 839 N.Y.S.2d 504 (2d Dept. 2007).

The alleged defamatory statements herein do not rise to the level of defamation *per se*. Given the context in which they were uttered, they are protected by a qualified privilege which is not defeated by any showing that defendant spoke with malice. *See East Point Collision Works v. Liberty Mut. Ins. Co.*, 271 A.D.2d 471, 706 N.Y.S.2d 700 (2d Dept. 2000).

A false statement constitutes defamation *per se* when it charges another with a serious crime or tends to injure another in his trade, business or profession. *See Geraci v Probst, supra* at 344. No such allegations exist here.


In the second cause of action, plaintiffs allege that plaintiff Jesberger has been forced to endure emotional pain and upset for a lengthy period of time as a result of defendant's conduct. This cause of action is untenable. The elements for a claim of intentional infliction of emotional harm are: extreme and outrageous conduct; intent to cause, or disregard of a substantial probability of causing severe emotional distress; a causal connection between the conduct and the injury; and severe emotional distress. *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993).

Here, none of the allegations of the Amended Verified Complaint, to wit: that defendant used his position as an adjuster to delay, impede and deny claims to plaintiffs' customers in order to harm plaintiff Jesberger, can serve as a basis for a claim of intentional infliction of emotional distress. The conduct alleged is not so extreme, outrageous, utterly reprehensible and intolerable (*see Fischer v. Maloney*, 43 N.Y.2d 553, 402 N.Y.S.2d 991 (1978)) in society so as to sustain a cause of action for intentional infliction of emotional distress. Moreover, it appears that all of the claims at issue were paid without reduction. Plaintiffs have failed to allege any manner in which their business and/or business reputation was harmed.

Accordingly, it is,

ORDERED the defendant's motion, pursuant to CPLR § 3211(a)(7), for an order (1) dismissing plaintiffs' first cause of action alleging defamation and defamation *per se*; (2) dismissing plaintiffs' second cause of action alleging intentional infliction of emotional distress; and (3) dismissing plaintiffs' demand for punitive damages is hereby **GRANTED**. Defendant's motion for an order awarding defendant costs and sanctions as against plaintiffs and their counsel is hereby **DENIED**.

This constitutes the Decision and Order of the Court.

ENTER:


DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
May 1, 2012

ENTERED
MAY 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE