

**Flomenhaft v Jacoby & Meyers, LLP**

2013 NY Slip Op 31346(U)

June 21, 2013

Supreme Court, New York County

Docket Number: 150293/10

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT:

[Redacted] *JAFFE*

PART 12

**BARBARA JAFFE**  
Justice  
J.S.C.

*Flomenhaft, Michael*

INDEX NO.

150293/10

MOTION DATE

- v -

*Jacoby & Meyers, LLP*

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Dismiss

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

29

34-36

37

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: JUN 21 2013

*[Signature]*  
\_\_\_\_\_  
**BARBARA JAFFE**  
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 : IAS PART 12

-----X  
MICHAEL FLOMENHAFT,

Index No. 150293/10

Plaintiff,

Mot. seq. no.: 002  
Subm.: 2/20/13

- against -

**DECISION AND ORDER**

JACOBY & MEYERS, LLP, *et al.*,

Defendants.

-----X  
BARBARA JAFFE, J.:

**For plaintiff:**  
Evan S. Rothfarb, Esq.  
Rothfarb Law, PLLC  
61 Broadway, Ste. 1900  
New York, NY 10006  
212-480-1010

**For defendants:**  
J. Richard Supple, Esq.  
Hinshaw & Culbertson LLP  
780 Third Ave., 4<sup>th</sup> Fl.  
New York, NY 10017  
212-471-6210

By notice of motion dated December 5, 2011, defendants Jacoby & Meyers, LLP, Finkelstein & Partners, LLP, Andrew Finkelstein, Francis Navarra, Michael Feldman, Sharon Scanlan, Victoria Lightcap and Antonio Grillo (defendants, collectively) move pursuant to CPLR 3211(a)(7) for an order dismissing plaintiff's second cause of action for slander per se and his demand for punitive damages. Plaintiff opposes.

I. BACKGROUND

Plaintiff is a lawyer who formerly worked for the law firm Jacoby & Meyers, LLP. (Affirmation of Katie M. Lachter, Esq., dated Dec. 5, 2011 [Lachter Aff.] Exh. B). He alleges in his first amended complaint that after he left the firm, defendants committed libel per se by circulating an internal email stating that plaintiff and his new firm, Flomenhaft & Cannata, had filed for bankruptcy. (*Id.*, Exh. E). Plaintiff also alleges that defendants committed slander per se by communicating this information orally to clients, and that they told clients, "in words or

substance,” that plaintiff had “declared personal bankruptcy” and that Flomenhaft & Cannata had “declared professional bankruptcy.” (*Id.*). The allegedly slanderous statements were allegedly made between late December 2009 and early January 2010. (*Id.*). Plaintiff asserts that these statements harmed his practice, which is typically financed by lines of credit. (*Id.*).

The justice previously presiding in this part dismissed the slander claim without prejudice, finding that the phrase “in words or substance” called into question the actual words at issue. (*Id.*, Exh. A). Plaintiff thereafter filed a second amended complaint with the phrase “in words or substance” removed, and changed the dates of the statements as having been uttered between December 28 and January 31. (*Id.*, Exh. B).

## II. CONTENTIONS

Defendants argue that pursuant to CPLR 3016(a), and except as to the allegation concerning defendant Scanlan, plaintiff’s slander claim is insufficiently pleaded. (Mem. of Law, dated Dec. 5, 2011). They argue that plaintiff’s allegation that the slanderous statements were made between December 28, 2009 and January 31, 2010 is not sufficiently specific and that plaintiff thus fails to state a claim for slander, and that the facts alleged, even if true, do not warrant the award of punitive damages. (*Id.* at 11).

Plaintiff denies that his slander claim is insufficiently pleaded. (Plaintiff’s Mem. of Law, dated Feb. 9, 2012). Citing *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 479 (1993), plaintiff maintains that he is entitled to punitive damages as the actions taken by defendants were not only deliberate and intentional but also “malicious, evil, wanton,” and “demonstrative of a conscious disregard for the interests of others.” (*Id.*).

In reply, defendants reiterate their prior arguments regarding the sufficiency of the slander

claim, and argue that plaintiff is not entitled to punitive damages as he has not shown that defendants' actions were motivated solely by a desire to injure the plaintiff or that the acts rise to the level of conduct that is so outrageous as to be akin to criminal activity, as is required for recovery of punitive damages. (Defendant's Reply Mem., dated Feb. 23, 2012).

### III. ANALYSIS

#### A. Plaintiff's slander claim

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149<sup>th</sup> Realty Corp.*, 104 AD3d 401 [1<sup>st</sup> Dept 2013]).

In order for a slander claim to survive a motion to dismiss, plaintiff must allege the following: "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." (*Dillon v City of New York*, 261 AD2d 34, 38 [1<sup>st</sup> Dept 1999]).

CPLR 3016(a) also requires that "the particular words complained of be set forth in the complaint." Paraphrasing is insufficient. (*Conley v Gravitt*, 133 AD2d 966, 968 [3d Dept 1987]). Plaintiff must also allege the time, place and manner of the false statement and specify the person to whom it was made (*Dillon*, 261 AD2d at 38), and upon its failure to do so, a slander claim

may be dismissed for failure to state a claim (*Bell v Alden Owners Inc.*, 299 AD2d 207, 208 [2d Dept 2002]).

In *Fuel Digital, Inc. v Corinella*, the court dismissed the plaintiff's slander claim where it was alleged that defamatory statements were uttered "on or about July 4, 2006" and "on or about the first week of August 2006," finding that "such ambiguous times and dates will not suffice to satisfy CPLR 3016(a)'s specificity requirements." (15 Misc 3d 1122[A], 2006 NY Slip Op 52590[U] [Sup Ct, New York County 2006]).

Plaintiff's allegation that the slanderous statements were made "[b]etween December 28, 2009 and January 31, 2010," or, in other words, at sometime within a 34-day period, does not satisfy the specificity requirement of CPLR 3016(a). In light of this result, I need not consider defendants' alternate argument that certain allegations are inherently incredible.

#### B. Punitive damages claim

In order to survive a motion to dismiss under CPLR 3211(a)(7), a claim for punitive damages must be supported by facts that, if true, would warrant such damages. (*See eg Varveris v Hermitage Ins. Co.*, 24 AD3d 537 [2d Dept 2005]).

Generally, an award of punitive damages is appropriate where "the conduct of the party being held liable evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness." (*Pellegrini v Richmond County Ambulance Serv., Inc.*, 48 AD3d 436, 437 [2d Dept 2008]). However, "[p]unitive damages are only available in limited circumstances where it is necessary to deter conduct which may be characterized as a fraud evincing a high degree of moral turpitude or such wanton dishonesty as to imply a criminal indifference to civil obligations

directed at the public generally.” (*Varveris*, 24 AD3d at 538).

In a defamation case, “[b]oth actual malice and common-law malice must be established to warrant an award of punitive damages.” (*Lewis v Newsday, Inc.*, 246 AD2d 434 [1<sup>st</sup> Dept 1998]). Actual malice, defined as an intent to make a statement with knowledge of its falsity or probable falsity (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 [1977]), “is insufficient by itself to justify an award of punitive damages, because that malice focuses on the defendant’s state of mind in relation to the truth or falsity of the published information” (*Prozeralik*, 82 NY2d at 479).

A showing of common law malice is also required. It is characterized by spite or ill will, as opposed to mere knowledge of probable falsity. (*Lieberman v Gelstein*, 80 NY2d 429, 438 [1992]). And, “a triable issue of common-law malice is only raised if a reasonable jury could find that the speaker was motivated solely by a desire to injure the plaintiff, and that there must be some evidence that the animus was ‘the one and only cause for the publication.’” (*Morsette v The Final Call*, 309 AD2d 249, 254 [1<sup>st</sup> Dept 2003], *lv denied* 5 NY3d 756 [2005], quoting *Stukuls v State of New York*, 42 NY2d 272, 282 [1977]).

Here, plaintiff’s allegations do not evidence any animosity on the part of the defendants in making the alleged statements, and even if there was evidence of animosity, it is reasonable to infer that defendants were acting principally in their own financial interest. Thus, plaintiff’s allegations could not lead a reasonable jury to conclude that defendants made the alleged defamatory statement for the sole purpose of injuring plaintiff. (*Kelleher v Corinthian Media*, 208 AD2d 477 [1<sup>st</sup> Dept 1994] [where plaintiff’s former employer allegedly stated falsely to plaintiff’s former clients that plaintiff was incompetent, punitive damages claim dismissed as

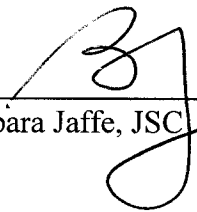
allegations did not rise to requisite level of high moral culpability aimed at public]; *Meadow Ridge Capital, LLC v Levi*, 29 Misc 3d 1224[A], 2010 NY Slip Op 51969[U] [Sup Ct, Nassau County 2010] [plaintiff's allegations that defendant's actions were motivated by economic considerations and self-interest did not establish that conduct was motivated solely by malice]; *Apex Equity Partners Inc. v Murray*, 18 Misc 3d 1137[A], 2008 NY Slip Op 50339[U] [Sup Ct, New York County 2008] [same]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss plaintiff's second cause of action for slander per se and demand for punitive damages is granted.

ENTER:

  
 \_\_\_\_\_  
 Barbara Jaffe, JSC

DATED: June 21, 2013  
 New York, New York