

**Powers v Package All Corp.**

2013 NY Slip Op 31635(U)

July 11, 2013

Sup Ct, Suffolk County

Docket Number: 12-1975

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 3-23-12  
ADJ. DATE 4-2-13  
Mot. Seq. # 001 - MG; CASEDISP  
# 002 - MG; CASEDISP

-----X  
JAMES J. POWERS,

Plaintiff,

- against -

PACKAGE ALL CORP., RITA DiSTEFANO,  
and WILLIAM MACHOVER,

Defendants.  
-----X

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Upon the following papers numbered 1 to 20 read on these motions to dismiss; Notices of Motions/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 11- 13; Replying Affidavits and supporting papers 15 - 20; Other Pltf's Memorandum of Law - 14; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion sequence #001 and #002 are combined herein for the purpose of this determination; and it is

**ORDERED** that motion sequence #001 by defendants Package All Corp. and William Machover, and motion sequence #002 by defendant Rita DiStefano to dismiss the plaintiff's complaint are considered under CPLR 3211(a)(5), CPLR 215(3), CPLR 3211(a)(7) and CPLR 3016, and are granted.

Plaintiff commenced this action on January 9, 2012 seeking to recover damages as a result of allegedly defamatory statements made by the defendants in connection with his termination on October 11, 2009 as IT Manager at defendant Package All Corp. ("Package All"), and for alleged tortious interference with prospective business advantage. In his complaint, plaintiff alleges that the defendants defamed him when, in response to an inquiry from the Department of Labor (the "DOL") on the plaintiff's application for unemployment benefits, they indicated that he had been terminated for cause, i.e., gross misconduct. The DOL determined that the plaintiff was eligible to receive unemployment benefits effective October 12, 2009. The defendants appealed to the Unemployment Insurance Appeal Board (the "UIAB"), and several hearings were held before an Administrative Law Judge ("ALJ"), the last of which occurred on March 20, 2011. According to the complaint, the testimony and proffered evidence by the defendants included the contents of a memorandum dated October 13, 2009, entitled "Documentation to File" from defendant Rita DiStefano ("Memorandum"), to which is attached a list of missing and unaccounted for hardware and software licenses ("List"). Plaintiff alleges that DiStefano is an employee or principal of Package All and set forth the following information in the Memorandum which is quoted verbatim from the complaint:

This correspondence will serve to document incident leading up to termination of James Powers from Package All Corporation.

James Powers was the IT Manager at Package All Corporation. During an audit of the IT system at Package All, being conducted by William Machover, Vice President of Operations for Package All, the following issues were discovered:

1. Inventory of hardware and software is not accounted for.
2. Non licensed software is on the network illegally.
3. Purchases of services from vendor, Paytech, is not clean and is significantly over paid. This seems to be gross misuse of our purchasing policy and it is suspiciously illegal.
4. James Powers was not able to supply passwords and log ons to servers/switches/routers and firewalls.
5. James was not supportive during the audit project and consistently supply [sic] list of information requested over a month ago.
6. The "Log Me In" program, which gives remote access to whomever does the program, was controlled by James Powers on his personal e-mail account. This is not a normal practice anywhere.
7. A list of every user and log in is in James Powers possession. Not an ethical or normal practice.
8. No inventory of any hardware:
  - a. Servers
  - b. Routers
  - c. Computers
  - d. Cell phones
  - e. Blackberrys
  - f. Webcards

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- g. Monitors  
9. No control over the wireless accounts.

In addition, attached to this documentation is a list of hardware and software licenses that are missing and unaccounted for at Package All.

It should be noted that all purchasing history on the Package All e-bay account was deleted and password changed on October 11th, the day James Powers was let go via voice message from me.

#### CONCLUSION:

We have initiated an investigation with Pay Pal, E-bay, Orange Computers and American Express.

James Powers was terminated from Package All on October 11, 2009 for gross misconduct.

According to the plaintiff's complaint, at the completion of the hearings, the ALJ sustained the initial determination that he was entitled to receive unemployment benefits, and quotes the following language from the decision:

There is insufficient evidence to conclude that the claimant placed the illegal software on the system. It's significant that there was a previous administrator and that other individuals had authority to place software on the system. Therefore the claimant's testimony that he did not place illegal software on the employer's system is accepted.

In his first cause of action for defamation per se, plaintiff alleges that the Memorandum and List contain false defamatory statements were published to the ALJ, the UIAB and others present at the hearings. Plaintiff alleges that the statements concerned him, that the defendants were responsible for making the statements which accused him of illegal and unethical acts and of gross misconduct which were objectively false, injured his reputation, impaired his business and darkened his moral standing. In his second cause of action for defamation, plaintiff relies on the same allegations and claims that the defamatory statements caused special damages. In the third cause of action for tortious interference with prospective business advantage, plaintiff reiterates the allegations contained in the first cause of action, adding that the defendants' conduct interfered with his employment prospects, was undertaken for the sole purpose of harming him, and that the "defendants' conduct was wrongful and/or improper, independent of the interference caused thereby."

It is further alleged in the complaint that defendant William Machover is an employee and principal of Package All. Plaintiff alleges, upon information and belief, that after October 11, 2009 Machover provided the District Attorney's office with the Memorandum and List, and that Machover

also told more than one Assistant District Attorney that plaintiff had been terminated for illegal and unethical actions.

By the instant pre-answer motion, defendants Package All and Machover, and separately defendant DiStefano, maintain that plaintiff's defamation causes of action are time-barred by the statute of limitations. Additionally, the defendants maintain that the contents of the Memorandum and List are protected by an absolute and qualified "common interest" privilege. Further, the defendants allege that the complaint fails to sufficiently plead the elements of a claim for defamation and of a claim for tortious interference with prospective business advantage.

In opposition, the plaintiff argues that the defendants are not entitled to the protection of any privilege as the statements were not based on facts, that the defendants knew the statements were false, and in reckless disregard of the truth, and accused him of serious crimes, defaming him in his trade, business and profession. Plaintiff also argues that the causes of action in his complaint are succinctly set forth. He maintains that from October 13, 2009 and continuing through March 2011, the defendants accused him of committing a crime and published the defamatory language contained in the Memorandum and List to employees of Package All, the UIAB, the DA's office, Ebay, Orange Computers and American Express. He also argues that the motions are premature because the "common interest" qualified privilege is an affirmative defense and thus cannot form the basis for dismissal in a pre-answer motion.

The statute of limitations for an action to recover damages for defamation is one year measured from the date the allegedly defamatory statements were published (*see* CPLR 215[3]; **Sethi v Morrissey**, 105 AD3d 833, 961 NYS2d 809 [2d Dept 2013]). The plaintiff commenced this action more than two years after the initial publication of the challenged statements contained in the Memorandum and List, therefore, the causes of action for defamation are time-barred (*see* **Sethi v Morrissey**, *supra*). To the extent that the plaintiff attempts to allege that the Memorandum and the List were republished during the UIAB hearings which concluded in March 2011, such allegation is unavailing. It is well settled that statements made during the course of a judicial or quasi judicial proceeding are clearly protected by an absolute privilege (**Rosenberg v MetLife, Inc.**, 8 NY3d 359, 365, 834 NYS2d 494 [2007]; **Wiener v Weintraud**, 22 NY2d 330, 331, 292 NYS2d 667 [1968]; **Allan & Allan Arts Ltd v Rosenblum**, 201 AD2d 136, 615 NYS2d 410 [2d Dept 1994]). The UIAB hearings are quasi-judicial proceedings, thus any testimony given or publication of the Memorandum and List are privileged (*see* **Phillip v Sterling Home Care, Inc.**, 103 AD3d 786, 959 NYS2d 546 [2d Dept 2013]; **Allan & Allan Arts Ltd v Rosenblum**, *supra*; **Noble v Creative Tech. Servs.**, 126 AD2d 611, 511 NYS2d 51 [2d Dept 1987]).

Furthermore, the allegations in the complaint set forth "the particular words complained of" as required by CPLR 3016 (a), nevertheless, plaintiff has failed to specify the individuals to whom the defamatory statements were made, or the dates, times and places the statements were purportedly made to the employees of Package All, Ebay, Orange Computers and American Express (*see* **Simpson v Cook Pony Farm Real Estate, Inc.**, 12 AD3d 496, 784 NYS2d 622 [2d Dept 2004]; *see also*, **Bell v Alden Owners, Inc.**, 299 AD2d 207, 750 NYS2d 2 [1st Dept 2002], *lv denied* 100 NY2d 506, 763 NYS2d 812 [2003]). Similarly, plaintiff failed to give specifics as to Machover's publication to the District

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Attorney's office, which communication, if sufficiently pled would be entitled to the protection afforded by a qualified privilege (*see Toker v Pollack*, 44 NY2d 211, 405 NYS2d 1[1978]). Thus, assuming, without deciding that the language in the Memorandum and List could be construed as defamatory, the first and second causes of action against the defendants cannot be sustained for lack of specificity (*see Simpson v Cook Pony Farm Real Estate, Inc.*, *supra*; *see also Martin v Hayes*, 105 AD3d 1291, 963 NYS2d 773 [3d Dept 2013]; *Bell v Alden Owners, Inc.*, *supra*).

In view of the foregoing, it is determined that the challenged defamatory statements are time-barred by the statute of limitations, protected by an absolute privilege and lack specificity, thereby warranting dismissal of plaintiff's first and second causes of action.

As to the third claim, in order to state a cause of action for tortious interference with prospective business advantage, a plaintiff must plead that the defendant directly interfered with a third-party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff or by using unlawful means, resulting in injury to business relationships (*Carvel Corp. v Noonan*, 3 NY3d 182, 189-190, 785 NYS2d 359 [2004]; *North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 21, 953 NYS2d 96 [2d Dept 2012]). Here, plaintiff has not alleged any facts suggesting that the defendants violated the law or undertook actions with the sole purpose of harming him. Plaintiff has also failed to allege any facts suggesting that defendants' actions were criminal or independently tortious. Thus, the third cause of action is insufficiently plead and is also dismissed.

Accordingly, the motions are granted and the complaint is dismissed in its entirety.

Dated: 7/11/13

  
\_\_\_\_\_  
A.J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION