SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MPG ASSOCIATES, INC., d/b/a THE KTI GROUP,	NASSAU COUNTY
Plaintiff,	Index No: 008057-10
	Motion Seq. No. 7
- against -	Submission Date: 9/18/13
BRIAN RANDONE,	
Defendant.	
----------x	

The following papers have been read on this motion:

Notice of Motion, Plaintiff's Rule 19(a) Statement,
Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibit.....x
Reply Memorandum of Law.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff MPG Associates, Inc., d/b/a The KTI Group ("KTI" or "Plaintiff") on July 25, 2013 and submitted on September 18, 2013. For the reasons set forth below, the Court denies the motion. In light of the parties' stipulation that this matter be tried on a hear and determine basis before a Special Referee, the Court directs counsel for the parties to contact Special Referee Frank N. Schellace (516-493-3084) on or before November 22, 2013 to schedule the trial of this matter before the Special Referee.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 3212, for an Order granting Plaintiff partial summary judgment against Defendant on the first cause of action in the Complaint, alleging

defamation.

Defendant Brian Randone ("Randone" or "Defendant") opposes the motion.

B. The Parties' History

The parties' history is set forth in a prior decisions ("Prior Decisions") of the Court and the Court incorporates those Prior Decisions by reference as if set forth in full herein. As noted in the Prior Decisions, the progress of this matter was delayed by Defendant's incarceration in the Los Angeles County Jail awaiting a jury trial for the crimes of murder and torture. Defendant was acquitted of those criminal charges and is now at liberty.

As noted in the Prior Decisions, Plaintiff seeks injunctive relief and special, general and punitive damages arising from Defendant's tortious conduct injuring KTI's business reputation by 1) publishing false, defamatory and misleading statements about KTI regarding its lack of trustworthiness and failure to pay sums due to subagents; and 2) encouraging KTI's subagents to terminate their contractual and other business relationships with KTI. The Complaint (Ex. 1 to Klein Aff. in Supp.) alleges that Defendant, who acted as a sales agent for KTI in California prior to September 15, 2009, engaged in this conduct following KTI's termination of Defendant for cause, following Defendant's arrest and incarceration for murder and torture charges. The Complaint contains three (3) causes of action. The first and second causes of action are for trade libel and tortious interference with business, for which Plaintiff seeks compensatory damages and punitive damages. The third cause of action is for *prima facie* tort, for which Plaintiff seeks an injunction permanently restraining Randone from engaging in any of the conduct alleged in the Complaint.

Plaintiff relies on, and provides copies of, the following exhibits in support of the motion now before the Court: 1) excerpts from the transcript of the deposition of Randone conducted on March 11-12, 2013 (Ex. 2 to Klein Aff. in Supp.), 2) the July 2005 Referral Partner Agreement between MPG and Randone (*id.* at Ex. 3), 3) excerpts from the transcript of the deposition of Gina Pigott ("Pigott"), Plaintiff's principal, conducted on March 18-19, 2013 (*id.* at Ex. 4), 4) the January 2007 Referral Partner Agreement between MPG and KTI West, Inc. ("KTI West") (*id.* at Ex. 5), 5) the 2007 marketing agreement between MGP and Verizon Services Corp. ("Verizon") (*id.* at Ex. 6), 6) the February 2009 Referral Partner Agreement between MPG and KTI West (*id.* at Ex. 7), 7) the February 2009 Referral Partner Agreement between

TeleDomani, Inc. ("Teledomani") (*id.* at Ex. 8), 8) MPG's termination letter to Randone dated September 15, 2009 (*id.* at Ex. 9), and 9) Randone's letter to "Jim Singer, Tommy, Dean, Carolyn and Michelle Boyd" (*id.* at Ex. 10).

Plaintiff also provides a Rule 19(a) statement in support of its motion. Paragraph 14 of Plaintiff's Rule 19(a) statement makes reference to statements made by Randone in a series of telephone calls from his jail cell. Randone admitted advising numerous individuals in the telecommunications business that MPG had failed to pay commissions due to him, that Pigott had stolen Randone's business and that they should "watch their back and be careful in dealing with Gina Pigott" (Randone Dep. Tr. at p. 261). Paragraph 15 of Plaintiff's Rule 19(a) statement makes reference to Randone's letter (Ex. 10 to Klein Aff. in Supp.) in which he advised the recipients, *inter alia*, that Pigott had retained his residual money, and that he was "really shocked and very disappointed by her actions and her acts of betrayal to me."

C. The Parties' Positions

Plaintiff submits that it has established its right to judgment on the first cause of action in the Complaint, alleging trade libel, on the grounds that there is no issue of material fact that 1) in or about March of 2010, Randone made oral and written statements to various individuals to the effect that MPG was untrustworthy because it failed and refused to pay its agents commissions due and owing them; and 2) such statements were false because MPG did not owe Randone or his companies any commissions at the time, as evidenced by the fact that, in accordance with the provisions of the parties' agreements, MPG was entitled to withhold and escrow commissions for twelve (12) months from September 15, 2009, when MPG terminated its agreements with Randone and his companies upon learning of Randone's arrest. Moreover, in light of the fact that Randone's false statements impugned the basic integrity of MPG's business, the statements constituted defamation *per se*, such that injury to MPG's reputation is presumed, and MPG should be awarded general damages.

In opposition, Defendant contends that it is undisputed that the "crux" of Defendant's allegedly defamatory statement is, in fact, true (Browne Aff. in Opp. at ¶ 6) because Plaintiff has, in fact, not paid Defendant and Plaintiff's claim of a legal justification for that failure does not render the statement untrue. Thus, Defendant submits, Plaintiff cannot establish even a prima facie case for trade libel because Defendant did not publish false information.

Defendant contends, further, that 1) to the extent that Defendant expressed his view that Pigott, the principal of Plaintiff, is untrustworthy, that statement constituted personal opinion that cannot be the basis of a defamation claim; 2) in light of the fact that Defendant's entitlement to payment from Plaintiff is the subject of ongoing litigation in the State of California, his allegedly defamatory statements, which relate to his legal claim, are protected under the judicial proceedings rule; and 3) Plaintiff cannot establish special damages, as is required to establish the tort of trade libel, as demonstrated by Plaintiff's failure to identify the people who ceased to be customers or to itemize its losses. Defendant also argues that Plaintiff's remaining causes of action are legally insufficient, and asks the Court to dismiss those.

In reply, Plaintiff submits that 1) the Court should reject Defendant's contention that summary judgment is inappropriate because the complained-of statements were true; Plaintiff submits that it is factually inaccurate that MPG contractually owed money to Randone that it was declining to pay; 2) the Court should reject Defendant's contention that Randone's statements are not actionable because they were pure opinion in light of the fact that the purported opinion was implicitly based on undisclosed facts that were untrue, specifically that MPG was contractually obligated to pay Randone; and 3) Defendant is incorrect in asserting that Plaintiff must plead and prove special damages because where, as here, the false statements impugned the integrity of Plaintiff's business, Plaintiff need not plead or prove special damages. Plaintiff also contends that there is no basis for Defendant's request that the Court dismiss the other causes of action in the Complaint, in light of the fact that Defendant has not formally moved for that relief.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Libel/Defamation

The tort of trade libel or injurious falsehood requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment. *Banco Popular North America v. Lieberman*, 75 A.D.3d 460, 462 (1st Dept. 2010), citing *Waste Distillation Tech. v. Blasland & Bouck Engrs.*, P.C., 136 A.D.2d 633 (2d Dept. 1988).

As falsity is a *sine qua non* of a libel claim and because only assertions of fact are capable of being proven false, a libel action cannot be maintained unless it is premised on published assertions of fact, rather than on assertions of opinion. *Sandals* Resorts *International Limited v. Google, Inc.*, 86 A.D.3d 32, 38 (1st Dept. 2011), quoting *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995). Distinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task. *Sandals* Resorts *International Limited v. Google, Inc.*, 86 A.D.3d at 39, quoting *Brian v. Richardson*, 87 N.Y.2d at 51. The approach now used in New York for determining which statements are protected opinion and which are unprotected factual assertions is based on a four-part formula enunciated in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. den.*, 471 U.S. 1127 (1985). *Sandals Resorts International Limited v. Google, Inc.*, 86 A.D.3d at 39. The four factors of the *Ollman* formula are: 1) whether the statement at issue has a precise meaning so as to give rise to clear factual implications, 2) the degree to which the statements are verifiable, *i.e.*, objectively capable of proof or disproof, 3) whether the full context of the communication in which the statement appears signals to the reader its nature as opinion, and 4) whether the broader context of the communication so signals the reader. *Id.* at 39-40, quoting *Ollman v. Evans*, 750 F.2d at 980-983.

The Court denies the motion in light of the Court's conclusion that there exist material issues of fact regarding, *inter alia*, whether the allegedly defamatory statements made by Defendant regarding Plaintiff's failure to pay Defendant money to which he is entitled are false, and/or whether those statements constitute actionable assertions of fact or, rather, protected

assertions of opinion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

In light of the parties' stipulation that this matter be tried on a hear and determine basis before a Special Referee, the Court directs counsel for the parties to contact Special Referee Frank N. Schellace (516-493-3084) on or before November 22, 2013 to schedule the trial of this matter before the Special Referee.

ENTER

DATED: Mineola, NY
October 30, 2013

HON. TIMOTHY S. DRISCOLL
J.S.C.