Farm Fresh Gourmet Salads LLC v Sentinel Insur. Co., Ltd.
2014 NY Slip Op 30050(U)
January 9, 2014
Supreme Court, New York County
Docket Number: 155215/12
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice PART 15

Index Number : 155215/2012
FARM FRESH GOURMET SALADS LLC
vs.
SENTINEL INSURANCE COMPANY,
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ No(s). 4

Replying Affidavits _____ No(s). 5, 6

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/9/14

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

FARM FRESH GOURMET SALADS LLC, and
LEONARD SPADA,

Plaintiffs,

Index No.
155215/12

Seq No.:
001

- against -

Decision
and Order

SENTINEL INSURANCE COMPANY, LTD, THE
HARTFORD FINANCIAL SERVICES GROUP INC,
THE METROPOLITAN AGENCY, HUDSON VALLEY
AGENCY ALLIANCE LLC, and SHARON A. NELSON,

Defendants.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

This action arises from Sentinel Insurance Company, Ltd.'s ("Sentinel") disclaimer of insurance coverage for the damage caused by a November 9, 2011 fire at Plaintiffs' premises. Sentinel is a wholly owned company of The Hartford Financial Services Group Inc. ("Hartford").

The first claim is asserted on behalf of plaintiff Farm Fresh Gourmet Salads LLC for breach of contract against defendants Sentinel and Hartford. The second claim is asserted on behalf of plaintiff Farm Fresh as against Sentinel and Hartford for violation of New York General Business Law §349. The third claim is asserted on behalf of plaintiff Farm Fresh against defendants Metropolitan and Hudson Valley for negligence. The fourth claim is asserted on behalf of plaintiff Farm Fresh against Sentinel, Hartford and Nelson for defamation/libel based on Sentinel's disclaimer letter which was signed by Nelson and stated in relevant part:

"Sentinel's investigation has determined that the fire was the result of an intentional act caused or procured by the insured, or someone acting on its behalf." The fifth claim is asserted on behalf of plaintiff Leonard Spada as against defendants Sentinel, Hartford, and Nelson based on Sentinel's disclaimer letter.

Defendants Sentinel, The Hartford, and Sharon Nelson now move for an Order pursuant to CPLR §3212 as to Plaintiffs' defamation/libel and violation of New York General Business §349 claims (Second, Fourth, and Fifth Causes of Action).

The action has now been discontinued as against defendants The Metropolitan Agency and Hudson Valley Agency.

Plaintiffs' defamation/libel claim is based on the correspondence dated July 3, 3012, prepared by defendant Sharon Nelson, on The Hartford's letterhead, addressed to Plaintiffs, and carbon copied to Morris Fateha, Esq., Anthony Luperella of the NY Adjustment Bureau and Metropolitan Agency, which stated, in relevant part: "Sentinel's investigation has determined that the fire was the result of an intentional act caused or procured by the insured, or someone acting on its behalf." Plaintiffs' claim that this statement was defamatory in nature as it states that the plaintiff, the owner of Farm Fresh, or someone on his behalf intentionally caused a fire to be intentionally set at the subject Premises, thereby charging the Plaintiff with arson and the commission of a serious crime.

Defendants submit the affidavit of Sharon Nelson, an Associate General Adjuster, who investigates and adjusts insurance claims presented under policies issued by Sentinel. Nelson avers that she investigated and adjusted the insurance claim for reported damages from a November 9, 2011 fire that is the subject of this lawsuit. Nelson avers that by letter dated July 3, 2012, Sentinel disclaimed coverage for the claim because, among other reasons, its claim investigation determined that the fire was the result of an intentional act caused or procured by Plaintiffs or someone acting on Plaintiffs' behalf.

Nelson further avers that Sentinel disclaimed coverage, among other reasons, based on the investigation conducted by Ira Trow, Senior Fire & Explosion Consultant, of PT&C Forensic Consulting Services, P.A. which concluded that the fire was intentionally set, the investigation conducted by non-employee electrical engineer Robert H. Grueter, B.S.E.E. of Center Engineering, which concluded that

the fire was not set by an electrical malfunction, the fact that there was no forced entry to the Premises, the examination under oath of Spada, her belief that Spada was the last person at the premises and that he had locked up, and the business was under serious financial stress and that he was behind on lease payments.

Defendants also submit the attorney affirmation of Gerald P. Dwyer, which annexes the following: the Complaint, Answer, Request for Judicial Intervention, transcript of Examination Under Oath of Leonard Spada, relevant sections of the policy 16 SBA PK4415 DW to Farm Fresh, with a policy period of August 15, 2011 through August 15, 2012, Assignment and Assumption of Lease for the premises where the subject fire took place, and the Petition in Civil Court proceeding for past due rent at the subject premises.

Defendants argues that Plaintiffs' defamation/libel claims (second and fourth causes of action) fail as a matter of law because the alleged defamatory statement - which is the written disclaimer statement- was made only to the insured and to those entitled to hear about the disclaimer, the insured's attorney, public claim adjuster and insurance agent. Defendant also argues that the alleged defamatory statement was true, as Sentinel's investigation of the subject claim did in fact determine that the fire was intentionally caused by the injured or someone acting on the insured's behalf.

Defendants further contend that Plaintiffs' Section 349 claim amounts to a private contractual dispute over insurance coverage, and not, as required under Section 349, specific conduct affecting the consuming public at large.

In opposition, Plaintiffs submit the attorney affirmation of Stephen Jacobson, which annexes a transcript of Examination Before Trial of Nelson, the affidavit of plaintiff Leonard Spada, the owner and operator of Farm Fresh, the affidavit of Cedric Cannonier, an employee of Farm Fresh, and Cynthia DeSantos, an employee of Farm Fresh, a Sanitary Inspection Report from the NYS Department of Agriculture and Markets, Division of Food Safety and Inspection Services, dated 11/19/11 for Farm Fresh, and Sanitary Inspection Report from the NYS Department of Agriculture and Markets, Division of Food Safety and Inspection Services, dated 6/30/11.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce

sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Defamation arises from "the making of false statement which 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 persons, and to deprive then of their friendly intercourse in society." *Foster v. Churchill*, 87 N.Y. 2d 744, 751 (1996)(citations omitted).

The elements of 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, and, it must either cause special harm or constitute defamation per se." *Dillon v. City of New York*, 261 A.D. 2d 34, 38 [1st Dept 1999]. "Truth provides a complete defense to defamation claim." (*Id.*).

"Slander per se" "consist of statements (I) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992).

"Even though a statement is defamatory, there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter." (*Id.* at 751). "A privileged communication is one which, but for the occasion on which it is uttered, would be defamatory and actionable." (Id.). "The defense of qualified privilege will be defeated by demonstrating a defendant spoke with malice. Moreover, the conditional or qualified privilege is inapplicable where the motivation for making such statements was spite or ill will (common law malice) or where the statements [were] made with [a] high degree of awareness of their probable falsity (constitutional malice)." (*Id.*)(citations omitted).

Here, Defendants have established prima facie evidence of entitlement to summary judgment on the defamation/libel claims by establishing that the alleged defamatory statement was made to persons who share a common interest in the subject matter and therefore was subject to qualified privilege. The only persons that the allegedly defamatory statement was published to were Plaintiffs' lawyer, and Plaintiffs' agents handling their insurance affairs (Plaintiffs' public adjuster and insurance agent). In additionally, Plaintiffs have presented no evidence of malice to defeat this privilege.

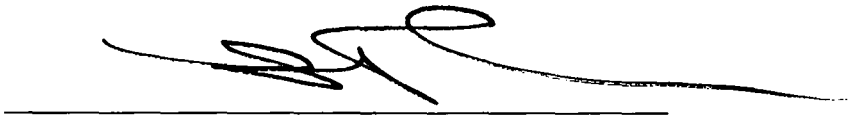
Defendants also seek summary judgment in Defendants' favor as to Plaintiffs' violation of the New York State General Business Law §349 claim on the basis that Plaintiffs have not sufficiently alleged the type of consumer-oriented deceptive practices that Section 349 was intended to eradicate. Plaintiffs' opposition does not address this portion of Defendant's motion, and therefore does not oppose the relief requested.

Wherefore, it is hereby

ORDERED that Defendants' motion for partial summary judgment is granted and Plaintiffs' defamation/libel and violation of New York General Business §349 claims (Second, Fourth, and Fifth Causes of Action) are dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 9, 2014



EILEEN A. RAKOWER, J.S.C.