

Bindela v Skye

2014 NY Slip Op 30936(U)

April 10, 2014

Supreme Court, New York County

Docket Number: 150035/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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IANCU BINDELA a/k/a JOHN BINDELA, d/b/a
BINDELA CONSTRUCTION, INC.,

Plaintiff,

- against -

Index Number: 150035/2012
Subm. Date: January 15, 2014
Motion Sequence: 003 and 004

LISA SKYE, JOSH DOYLE, and JASON CAMPBELL,

DECISION AND ORDER

Defendants.
-----X

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Papers submitted in support of both summary judgment motions:

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ELLEN M. COIN, A.J.S.C.:

Motion sequence numbers 003 and 004 are consolidated for disposition. Defendant Jason Campbell moves pursuant to CPLR 3212 for summary judgment dismissing the complaint (motion sequence number 003). Defendants Lisa Skye and Josh Doyle move for the same relief (motion sequence number 004).

Defendants base their motions on a previous court decision in motion sequences 001 and 002, dated July 24, 2012, and on plaintiff's failure to comply with the court's status conference order, dated July 24, 2013. Plaintiff Iancu Bindela sets forth eight causes of action, alleging that

defendants defamed him and interfered with his business pursuits. Previously, defendant Campbell moved pursuant to CPLR 3211 (a) (7) to dismiss the third, fourth, fifth, and seventh causes of action, while defendants Skye and Doyle moved to dismiss the entire complaint. The court's July 24, 2012 decision dismissed the third, fourth, fifth, and seventh causes of action as against all defendants, and the sixth and eighth causes of action as against Skye and Doyle.

The court declined to dismiss the first and second causes of action for defamation/slander per se and for libel. The complaint alleges that defendants made defamatory statements to members of Business Networking International (BNI), to which plaintiff and defendants belonged. Skye and Doyle argued that their alleged statements were protected by a qualified privilege referred to as a common interest privilege (*see Foster v Churchill*, 87 NY2d 744, 751 [1996]). The court determined that some statements were protected as having been made to BNI members. As to other statements allegedly made to non-BNI members, insofar as those statements appeared to be of mixed opinion, they were potentially actionable (*see Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]; *Glazier v Harris*, 99 AD3d 403, 404 [1st Dept 2012]). The court identified two such statements: that plaintiff Bindela "violated Rule no.3 of BNI" and that he "is not able to perform the way we would be expecting him to."

Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented. The movant must proffer admissible evidence to make a prima facie showing that establishes the cause(s) of action "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212 [b]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the moving party has made this

showing, the burden shifts to the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his [or her] failure to do so" (*Zuckerman*, 49 NY2d 560, 562). Summary judgment may be granted only if there is no triable issue of fact presented.

As a rule, a plaintiff alleging slander must plead and prove that he has sustained special damages (*Liberman v Gelstein*, 80 NY2d 429, 434 [1992]). Special damages contemplate "the loss of something having economic or pecuniary value" (Restatement [Second] of Torts § 575, comment b). "Special harm must result from the conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation" (*id.*). A plaintiff need not prove special damages, however, if he can establish that the alleged defamatory statement constituted slander per se. Among the four recognized categories of slander per se are statements which "tend to injure another in his or her trade, business or profession" (*Liberman*, 80 NY2d at 435).

Only the first and second causes of action remain against Skye and Doyle. Those and the sixth and eighth remain against Campbell. Defendants argue that the deadline for all disclosure has passed and that plaintiff has produced no evidence to support his claims of special damages or of communication to non-BNI members. Indeed, Skye and Doyle claim that the evidence plaintiff did produce shows that he was not damaged by the alleged remarks. They refer to emails in which plaintiff told BNI members that he was terminated from BNI and in which BNI members told him that they would continue to refer business to him notwithstanding the termination.

Defendants emphasize that plaintiff has been given every opportunity to respond to discovery requests and that he has failed to do so. Skye and Doyle served plaintiff with a

deposition notice and with their first set of interrogatories and document requests in October 2012. At a compliance conference on May 1, 2013, all parties were ordered to respond to all discovery demands within 60 days. On July 24, 2013, a status conference resulted in an order providing that if plaintiff did not respond to outstanding discovery demands within 30 days, he would be precluded on the issue of liability. All defendants claim that plaintiff failed to comply and is thus precluded as to liability. In addition, plaintiff did not appear for his scheduled depositions.

A conditional discovery order becomes absolute upon the failure of the defaulting party to comply with its terms (*Vazquez v Lambert Houses Redevelopment Co.*, 110 AD3d 450, 451 [1st Dept 2013]; *Casas v Consolidated Edison Co. of N.Y., Inc.*, 105 AD3d 471, 471 [1st Dept 2013]; see also *Samuels v Montefiore Med. Ctr.*, 49 AD3d 268, 268 [1st Dept 2008]). To be relieved from an order of preclusion, the party seeking relief must demonstrate timely compliance with the conditional order, or an excusable default and a meritorious cause of action or defense (*Casas*, 105 AD3d at 471).

In opposition to defendants' motion, plaintiff's counsel argues that he was "very recently" substituted and that outgoing counsel has relocated to another state and no longer practices law in New York. The attorney further states that plaintiff is in substantial compliance with all discovery demands and that defendants' complaints about not receiving answers are a "mystery." Plaintiff submits an unsigned copy of his response to Skye and Doyle's first set of interrogatories apparently authored by plaintiff's prior counsel, dated November 17, 2012, as well as a signed copy of plaintiff's response to Campbell's first set of interrogatories, dated November 17, 2012. In the email communication between opposing counsel, dated July 13,

2013, Skye and Doyle's attorney requested responses to discovery requests served on plaintiff in October 2012. Plaintiff's attorney emailed certain documents with a promise of a further exchange forthcoming. Plaintiff has not submitted any additional email communication containing the pledged disclosure. Nor does the record support an inference that plaintiff produced any discovery pursuant to the conditional preclusion order. Plaintiff offers no explanation for why the responses were not served or why they were not received by defendants, if in fact they were mailed or emailed.

Plaintiff's failure to produce necessary discovery not only undermines his ability to establish existence of a meritorious cause action with regard to the preclusion order, but also fails to provide any evidentiary support for the claim of special damages, on which plaintiff bears the burden of proof. The affidavit of Paul Sabaj, which states that he was a member of BNI from 2011 to 2013, that by dint of his involvement with BNI, he is familiar with the case, and that he was present at the meeting where the statements alleged in this action took place, is insufficient to raise a material issue of fact warranting a trial. Sabaj does not allege that the statements were made outside of the BNI meeting. As the court previously ruled, the common interest privilege would apply to statements made in his presence. Sabaj's affidavit is conclusory and lacks specific factual allegations addressing all elements of plaintiff's claims.

Therefore, defendants sufficiently show that the first and second causes of action sounding in slander and libel, respectively, should be dismissed as not supported by evidence of either special damages or injury to professional reputation and because the preclusion order bars plaintiff from producing evidence as to defendants' liability on those claims (*see e.g. Gilliam v Richard M. Greenspan, P.C.*, 17 AD3d 634, 635 [2nd Dept 2005]).

The previous decision dismissed the sixth cause of action for injurious falsehood against Skye and Doyle because plaintiff failed to allege facts sufficient to support malice (see *Mink Hollow Dev. Corp. v State of New York*, 87 Misc 2d 61, 63 [Ct Cl 1976]) and special damages (see *Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1660 [4th Dept 2009]). The eighth cause of action against those defendants for intentional or malicious harm to another's relations was deemed to sound in prima facie tort. The court decided that plaintiff failed to plead the elements for prima facie tort (see *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 [1983]). For the same reasons, the sixth and eighth causes of action must now be dismissed as against Campbell.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendant Jason Campbell (motion sequence number 003) and the motion for summary judgment by defendants Lisa Skye and Josh Doyle (motion sequence number 004) are granted and the complaint is dismissed against all defendants with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 10, 2014

ENTER:



Ellen M. Coin, A.J.S.C.