SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

SEAN PATTERSON Plaintiff, -against- WILHELMINA INTERNATIONAL, LTD., WILHELMINA INTERNATIONAL, INC., and MARK SCHWARZ, Defendants.	Index No. 651489/2012 DECISION AND ORDER Motion Seq. No. 001

MELVIN L. SCHWEITZER, J.:

Sean Patterson (Mr. Patterson) was President of Wilhelmina International, Ltd., a company wholly-owned by Wilhelmina International, Inc. Mr. Patterson commenced this action on May 2, 2012. The complaint asserts the following claims. Mr. Patterson's First Cause of Action is for breach of an Employment Agreement, based on the failure to pay Mr. Patterson a bonus which he claims he was entitled to for calendar year 2011. Mr. Patterson's Second Cause of Action is for defamation. His Third, Fourth, and Fifth Causes of Action assert claims for declaratory relief with respect to the enforceability of the Employment Agreement's restrictive covenants. His Sixth Cause of Action seeks injunctive relief.

The Second Cause of Action, for defamation, is the subject of this motion. Defendants move to dismiss the Second Cause of Action on the grounds that it does not plead a cause of action for defamation with the particularity required by CPLR 3016 (a). Namely, the defendants claim that: (1) the complaint fails to set forth the allegedly defamatory statements *in haec verba,* and (2) the complaint fails to state the time at, and manner in which, and to whom, the allegedly defamatory statements were published.

The court agrees that the complaint, filed on May 2, 2012, in its un-amended form, does not comply with CPLR 3016 (a).

Background

The following facts are drawn from the complaint, and are accepted as true along with all reasonable inferences drawn from those facts.

Wilhelmina, Ltd. is a full service fashion model and talent management company with offices in New York, New York; Los Angeles, California; and Miami, Florida. In 1993, Mr. Patterson was hired by Wilhelmina, Ltd. as a junior agent. In 2003, Mr. Patterson, who had risen from junior agent to executive vice president, became president of Wilhelmina, Ltd. In addition to serving as president of Wilhelmina, Ltd., Mr. Patterson continued to work as an agent.

During Mr. Patterson's tenure at Wilhelmina, Ltd., which spanned nearly twenty years, he assembled a team of highly skilled agents that put Wilhelmina, Ltd. "on the map" with respect to the high-end women's modeling industry, artist management for celebrity endorsements and its highly esteemed men's modeling business. He also assembled teams in Los Angeles and Miami which created record earnings and growth and market leader positions in both cities.

Under Mr. Patterson's leadership, 2010 and 2011 were the most successful years in the 44-year history of Wilhelmina, Ltd., both from a volume and an EBITDA perspective.

In 2009, Wilhelmina, Ltd. was acquired by New Century Equity Holdings, Inc., a publicly traded company (the Acquisition). New Century Equity Holdings, Inc., subsequently changed its name to Wilhelmina, Inc. Wilhelmina, Ltd. is the principal operating subsidiary of Wilhelmina, Inc.

As a result of the Acquisition, Wilhelmina, Inc. was owned or beneficially owned in part as follows: 30% New Castle Partners L.P.; 23.6% Brad Krassner (Mr. Krassner); and 23.6% Mr. Esch (Mr. Esch). Also, as a result of the Acquisition and related restrictions on Mr. Esch's and Mr. Krassner's voting rights, New Castle Partners L.P. had control of the Board of Directors of Wilhelmina, Inc. (the Board). New Castle Partners L.P. used its Board control to install Mark Schwarz (Mr. Schwarz) as the Chairman and CEO of Wilhelmina, Inc. and the Chairman of Wilhelmina, Ltd.

At the time Mr. Schwarz was installed as Chairman of Wilhelmina, Ltd. (and CEO and Chairman of Wilhelmina, Inc.) he had virtually no experience managing a full service fashion model and talent management business. New Castle Partners L.P. has used its control of the Board to marginalize Mr. Esch and Mr. Krassner and substantially exclude them from the management of Wilhelmina, Ltd. and Wilhelmina, Inc. As a result, Wilhelmina, Ltd. and Wilhelmina, Inc. were dominated and controlled by Mr. Schwarz and used by Mr. Schwarz to, among other things, advance his personal interests rather than the best interests of Wilhelmina, Ltd. and Wilhelmina, Inc.

In connection with the Acquisition and as a condition of Mr. Patterson's continued employment as president of Wilhelmina, Ltd., Mr. Patterson was required by Wilhelmina, Ltd. and Wilhelmina, Inc. to sign an employment agreement effective as of February 13, 2009 (Employment Agreement). The Employment Agreement was drafted by Wilhelmina, Ltd. and/or Wilhelmina, Inc. and was presented to Mr. Patterson. Wilhelmina, Ltd. advised Mr. Patterson that the terms of the Employment Agreement were not negotiable. Wilhelmina, Ltd. was represented by counsel, while Mr. Patterson was not.

The Employment Agreement provides for a three-year term expiring on February 12, 2012. In the event Mr. Patterson's employment continued after February 12, 2012, the Employment Agreement provides for at will employment.

Paragraph 5 of the Employment Agreement provides:

> "Except as provided in Section 6, this Agreement shall commence on the Effective Date and shall continue until the third anniversary of the Effective Date and thereafter at the will of the parties . . ."

In addition to compensation at the annual rate of $475,000, Mr. Patterson was entitled to a mandatory annual bonus (Bonus). Paragraph 3(b) of the Employment Agreement provides:

> "The Employee shall be entitled to an annual bonus equal in amount to 7.5% of the excess of actual calendar year (i.e. full year 2009, 2010, or 2011, as applicable) EBITDA (earnings before interest, taxes, depreciation and amortization) of the Wilhelmina Entities over $4,000,000. The timing of the payment of the foregoing bonus shall be consistent with the Company's customary practices with respect to the timing of bonus payments to its employees, provided that payment of such bonus shall be made no earlier than following final determination of actual calendar year EBITDA based on the Company's annual audit. The parties understand and agree that Employee's 2008 year bonus will be in accordance with the terms of the 2003 Agreement."

Wilhelmina, Ltd.'s obligation to pay the Bonus is a material term of the Employment Agreement and the Bonus represents a significant portion of Mr. Patterson's total annual compensation.

During 2010 and 2011, Mr. Schwarz was essentially "missing in action." Indeed, Mr. Schwarz was in Wilhelmina, Ltd.'s New York, Los Angeles, or Miami offices less than six times in 2010 and 2011 and missed almost all management calls from June of 2011 to October of 2011 – the most lucrative months during this successful time period, according to Mr. Patterson.

In May 2011, in recognition of Mr. Patterson's outstanding performance as president of Wilhelmina, Ltd., the Board determined that it was in the best interests of Wilhelmina, Ltd. for Mr. Patterson to continue to serve as president of Wilhelmina, Ltd. after the expiration of the Employment Agreement.

Accordingly, the Board instructed Mr. Schwarz to enter into a new employment agreement with Mr. Patterson to be effective February 12, 2012 – the expiration date of the Employment Agreement.

In November 2011, the Board approved the structure and material terms of a new employment agreement between Wilhelmina, Ltd. and Mr. Patterson. In violation of the Board's directions, from November 2011 to February 2012, Mr. Schwarz delayed negotiations with Mr. Patterson and repeatedly changed terms to which he previously agreed. On February 12, 2012, the Employment Agreement expired without a new agreement in place. Notwithstanding the expiration of the Employment Agreement, Mr. Patterson continued to work for Wilhelmina as an employee at will in the role of President.

In further recognition of Mr. Patterson's superior performance, on or about February 20, 2012, Mr. Patterson was identified by certain Board members as a potential nominee for membership on the Board. Mr. Patterson's proposed nomination was supported by a majority of the shareholders of Wilhelmina, Inc.

Notwithstanding overwhelming shareholder support for Mr. Patterson and with complete disregard for Mr. Patterson's significant and widely recognized contributions to the success of Wilhelmina, Ltd., on February 24, 2012, Mr. Schwarz exploited his control of the Board to terminate Mr. Patterson's employment with Wilhelmina, Ltd.

On February 24, 2012, Mr. Schwarz defamed Mr. Patterson by stating to employees of Wilhelmina, Ltd. that Mr. Patterson had committed various acts of professional and financial misconduct. Mr. Schwarz's statements were intentionally false and motivated by malice.

On April 2, 2012, Wilhelmina, Ltd. informed Mr. Patterson that Wilhelmina, Ltd. would not pay the 2011 Bonus to Mr. Patterson despite the fact that the 2011 Bonus was fully earned by Mr. Patterson prior to the termination of his employment and was past due. Wilhelmina Inc.'s 2011 EBITDA was $5,500,000. Accordingly, Mr. Patterson's 2011 Bonus is $112,500.

Mr. Patterson alleges that Wilhelmina Ltd.'s failure to pay the 2011 Bonus is a breach of a material term of the Employment Agreement, and as a result of Wilhelmina Ltd.'s breach of the Employment Agreement, the Employment Agreement was terminated.

Mr. Patterson alleges that Mr. Schwarz's motivation for terminating and defaming Mr. Patterson was entirely personal in nature, malicious and unrelated to Mr. Patterson's performance as President of Wilhelmina. Among other things, from the outset of Mr. Schwarz's involvement with Wilhelmina, Mr. Schwarz sought to advance his personal interests in partying with celebrities and the female talent of Wilhelmina rather than the business interests of Wilhelmina. By way of example, Mr. Schwarz attempted to pressure both Laura Lightbody, a Wilhelmina, Ltd. agent, and Mr. Patterson to bring the musician Fergie to his home in Aspen for dinner because Mr. Schwarz wanted to take Fergie out to clubs.

Mr. Schwarz also insisted that female models attend the Merriman Capital Annual Investor Summit. No male models were asked to attend. In this regard, Mr. Schwarz had Wilhelmina, Ltd.'s CFO, without consulting with Mr. Patterson, instruct the Director of Wilhelmina, Ltd.'s Women Division – despite her resistance – to book the female models. Mr. Patterson and other Wilhelmina, Ltd. agents viewed Mr. Schwarz's personal interest in the

female talent and celebrities as inappropriate and refused to facilitate his requests to spend time with the female talent and celebrities.

Mr. Schwarz developed animosity toward Mr. Patterson because Mr. Patterson refused to accommodate or facilitate Mr. Schwarz's inappropriate requests. Mr. Schwarz's personal animosity toward Mr. Patterson also stemmed from his lack of experience in running a full service fashion model and talent management agency. Mr. Schwarz's inexperience was a source of embarrassment for him – and Wilhelmina, Ltd. – and resulted in the Board granting broad managerial authority to Mr. Patterson. In addition, Mr. Schwarz was jealous of Mr. Patterson's relationship with Mr. Esch – which spanned nearly twenty years. Mr. Patterson had tremendous respect for Mr. Esch's knowledge and experience in the fashion model and talent management business – knowledge and experience which Mr. Schwarz obviously did not possess.

In response to the foregoing, Mr. Schwarz retaliated against Mr. Patterson by terminating Mr. Patterson's employment, defaming Mr. Patterson and causing Wilhelmina, Ltd. to breach the Employment Agreement by refusing to pay the 2011 Bonus.

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

CPLR 3016 (a) requires: "In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Well-established case law has consistently interpreted this section to require that "the [alleged] defamatory words be set forth *in haec verba*." *Conley v Gravitt,* 133 AD2d 966 (3d Dept. 1987). "This requirement is strictly enforced and the exact words must be set forth." *Gardner v Alexander Rent-A-Car,* 28 AD2d 667 (1st Dept 1967). Paraphrasing and other descriptions or summaries of the alleged defamatory words, without stating the words themselves, have been held insufficient to satisfy the particularity requirement of CPLR 3016 (a). *See id.*, 28 AD2d 667 ("Any qualification in the pleading thereof by use of the words "to the effect", "substantially", or words of similar import generally renders the complaint defective."). *See also Romanello v Intesa Sanpaolo S.p.A.,* 97 AD3d 449 (1st Dept 2012) ("Plaintiff's allegations of "statements to the effect that" and "or other words synonymous therewith" were not sufficiently specific (CPLR 3016 [a]).").

Here, there is no doubt that Mr. Patterson did not meet the level of specificity required by CPLR 3016 (a) as the complaint contains no *in haec verba* recitation of the challenged statements. The complaint includes various references to the defamatory statements, but never sets the words forth verbatim. For example, the complaint states: "Schwarz defamed Patterson by stating to employees of Wilhelmina that Patterson had committed various acts of professional and financial misconduct." Nowhere does the complaint attempt to clarify whether these were Mr. Patterson's exact words, nor elaborate upon the exact words that were uttered. For these reasons, the court finds the assertions insufficient to meet the particularity requirement of CPLR 3016 (a).

The complaint also fails to state the time, manner, and to whom the alleged defamatory statements were made, which is a further requirement to withstand a motion to dismiss. *Romanello, supra,* 949 NYS2d at 352 (affirming dismissal where defamation claim "also failed to allege the time at which, the manner in which, and the persons to whom the publication was made."); *Murphy v City of New York,* 59 AD3d 301 (1st Dept. 2009) ("The complaint failed to establish all the elements of defamation inasmuch as plaintiff did not allege the time, the manner and the persons to whom the publication was made ..."). The complaint's allegations that Schwarz made unidentified comments to "employees of Wilhelmina" is plainly insufficient. *See Fuel Digital, Inc v Corinella,* 15 Misc 3d 1122(A), 2006 WL 4476202 (Sup Ct, NY County, 2006) ("A complaint for defamation that simply names 'various' people as recipients '...fails to comply with the requirements of CPLR 3016 (a)...'").

For these reasons, the complaint is dismissed pursuant to CPLR 3016 (a).

Motion to Amend

Mr. Patterson now seeks to amend the complaint by alleging additional facts in support of his claim for defamation. A decision to permit amendment of the pleadings is committed to the discretion of the court. *Edenwald Contr. Co. v City of New York,* 60 NY2d 957, 959 (1983). An amendment must be denied if it "plainly lacks merit." *Crimmins Contr. Co. v City of New York,* 74 NY2d 166, 170 (1989).

The proposed amended complaint contains the exact words which constitute the defamation, the time and place of the defamatory statements, the identity of the people who heard the defamatory statements, the identity of the speaker and the circumstances in which the defamatory statements were made. The additional factual allegations necessary to support a cause of action for defamation are contained in paragraphs 35 through 40 of the amended complaint, which read as follows:

35. On February 24, 2012, Schwarz announced in a morning telephone conference call to Esch, Krassner, Mark Pape, James Roddey, Clinton Coleman, James Dvorak and Evan Stone that Patterson "had been caught stealing" from Wilhelmina, Ltd.

36. On February 2012, Schwarz met with Lorri Shackelford, the Vice President of Wilhelmina, Ltd. and Director of the Men's Division, in the morning in Wilhelmina, Ltd's New York City office where Schwarz told Ms. Shackelford that he terminated Patterson because Patterson was "trying to improperly take bookings for himself and from the company."

37. At approximately 3:30 pm at Wilhelmina, Ltd.'s New York City office, Schwarz stated to Ellen Abramowitz, the Co-Director of Wilhelmina, Ltd.'s Artist Management division, and John Murray, the Chief Financial Officer of Wilhelmina, Ltd., that Patterson was terminated that day as President of Wilhelmina, Ltd. for, among other things, "stealing from the company"

and doing "other terrible things." Schwarz directed Ms. Abramowitz "to protect the business using all means necessary" including "letting the industry know what kind of person Patterson is."

38. For the next approximately three months Ms. Abramowitz systematically and routinely maligned Patterson professionally often justifying her actions by stating that it is "what the company wants." Among other things, on February 24, 2012 at approximately 4:30 pm at Wilhelmina, Ltd.'s offices in New York City Ms. Abramowitz, at the direction of Schwarz, stated to Juan Carlos Martinez del Cura, Sarah Danialla, Eunice Liriano and Jennifer Billet that, according to Schwarz, Patterson was terminated that day as President of Wilhelmina, Ltd., for, among other thigns, "stealing from the company" and "other terrible things."

39. On February 24, 2012, Erin Lucas, the Director of Wilhelmina, Ltd.'s Miami office, was also informed of Schwarz' assertion that Patterson was "stealing from the company.

40. In early March of 2012, Schwarz stated to David Sonneberg, the owner of DAS Management, a music management firm, that Patterson was "stealing bookings from Wilhelmina while in Brazil."

These allegations are sufficient under CPLR 3016 as they set forth clearly the exact defamatory words, as well as stating the time, manner, and to whom the alleged statements were made. Defendants' argument that the speaker in paragraphs 35 and 36 is unclear is plainly without merit.

Common Interest Privilege

Defendants further assert that the challenged statements alleged in paragraphs 35-36 are not actionable because they describe communications between corporate officers, directors, shareholders, and employees that are protected by the "common-interest privilege." The

privilege applies to communications "made to persons who have some common interest in the subject matter." *O'Neill v New York University,* 97 AD3d 199 (1st Dept 2012) (quoting *Foster v Churchill*, 87 NY2d 744, 751 (1996). The law recognizes the common interest privilege in light of "the desirability in the public interest of encouraging a full and fair statement by persons having a legal or moral duty to communicate their knowledge and information about a person in whom they have an interest to another who also has an interest in such person." *Shapiro v Health Ins. Plan of Greater New York*, 7 NY2d 56 (1959).

The common interest privilege clearly applies to statements – such as the statements challenged by Mr. Patterson – made by employers about their employees. *See e.g. Murganti v Weber*, 248 AD2d 208, 209 (1st Dept 1998) (common interest privilege applicable to "an employer's evaluation of an employee" and to statements "by management employees having responsibility to report on the matter in dispute"); *Carone v Venator Group, Inc.*, 11 AD3d 399 (1st Dept 2004); *Present v Avon Products, Inc.*, 253 AD2d 183 (1st Dept 1999); *lv dismissed*, 93 NY2d 1032 (1999); *LaScala v D'Angelo*, 104 AD2d 930 (2d Dept 1984) ("[A]ppellants, who were in authority, and responsible for the operations of a business had a qualified privilege to discuss adverse information about employees.").

Here, the challenged statements are statements allegedly made by Mr. Schwarz, as Chairman of Wilhelmina, Inc. and Chief Executive Officer of Wilhelmina International, Ltd., about the conduct of Mr. Patterson while a Wilhelmina employee and President of Wilhelmina International, Ltd. The proposed Amended Complaint alleges that Mr. Schwarz made the challenged statements to Wilhelmina employees, directors, officers, and a representative of a then-client of Wilhelmina's. According to defendants, the alleged defamatory statements are protected by the common-interest privilege.

"In order to render privileged statements actionable, it is "incumbent on the plaintiff to prove (they were) false and that the defendant was actuated by express malice or actual ill will." *Shapiro v Health Ins. Plan of Greater New York,* 7 NY2d 56 (1959). A plaintiff may overcome the qualified privilege "with allegations that the defendant made the defamatory statement with malice or reckless disregard for the truth or falsity of the statement." *O'Neill v New York University,* 97 AD3d 199 (1st Dept. 2012) (quoting *Foster v Churchill,* 87 NY2d 744, 751 (1996). "A triable issue of common-law malice is raised only if a reasonable jury could find that the speaker was solely motivated by a desire to injure plaintiff and there must be some evidence that the animus was 'the one and only cause for the publication.'" *Morsette v "The Final Call,"* 309 AD2d 149 (1st Dept 2003).

Defendants' argue that the complaint fails to allege that Mr. Schwarz was "solely motivated" by a desire to injure Mr. Patterson, and no facts are alleged that would justify any such conclusion. "If the defendant's statements were made to further the interest protected by the privilege, it matters not that the defendant *also* despised plaintiff." *Liberman v. Gelstein,* 80 NY2d 429, 439 (1992) (emphasis in original).

Here, Mr. Patterson has stated that "Schwarz' motivation for terminating and defaming Mr. Patterson was entirely personal in nature, malicious and unrelated to Mr. Patterson's performance as President of Wilhelmina, Ltd." He has also laid the groundwork of unrefuted facts in support of malice. For instance, the amended Complaint states Mr. Schwarz sought to advance his personal interests in partying with the celebrities and other female talent." "Patterson … viewed Schwarz' personal interest in the female talent and celebrities as inappropriate and refused to facilitate his requests to spend time with the female talent and

celebrities." "Schwarz developed animosity toward Patterson because Patterson refused to accommodate or facilitate Schwarz' inappropriate requests."

Mr. Patterson has alleged that Mr. Schwarz's defamatory statements were motivated by rage at him for interfering with his womanizing, which was an embarrassment to the company that Mr. Patterson had ably served for almost two decades. This is properly plead malice.

Conclusion

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the Second Cause of Action is granted; and it is further

ORDERED that plaintiff's motion to amend the complaint is granted.

Dated: April 23, 2014

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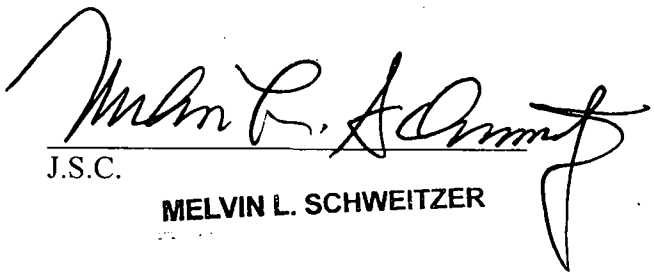

J.S.C.

MELVIN L. SCHWEITZER