

Stryker Sec. Group, Inc. v Elite Investigations Ltd.

2014 NY Slip Op 33732(U)

January 15, 2014

Supreme Court, New York County

Docket Number: 151183/2013

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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STRYKER SECURITY GROUP, INC.,

Index No. 151183/2013

Plaintiff,

Motion Seq. No. 004

-against-

ELITE INVESTIGATIONS LTD.,

Defendant.

-----X
ELITE INVESTIGATIONS LTD.

Defendant/Counterclaim Plaintiff,

-against-

WILLIAM MLYNARICK, ANTHONY ROMANO
and HOPLITE SECURITY GROUP, INC.,

Additional Counterclaim Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover monies owed for services rendered, defendant/counterclaim plaintiff Elite Investigations Ltd. (“Elite”) moves pursuant to CPLR 3211(a)(7) to dismiss the defamation counterclaims of additional counterclaim defendants William Mlynarick (“William”) and Anthony Romano (“Anthony”) for failure to state a cause of action.

*Factual Background*¹

Elite is in the security guard and private investigation business and subcontracts with licensed security guard companies throughout the United States to service its accounts.

¹ The Factual Background is derived from the Complaint; Elite’s Amended Answer and Counterclaims; William’s Answer and Counterclaims; Anthony’s Answer and Counterclaims; Elite’s Reply to William’s Counterclaims; and Elite’s Reply to Anthony’s Counterclaims.

Elite hired Anthony as an investigator in May 2006, who later became Vice President of Operations handling national accounts in 2007.

On December 2, 2009, Anthony, on behalf of Elite, retained Stryker Security Group, Inc. ("Stryker") (a company formed by Anthony's sister-in-law) pursuant to a written agreement (the "Service Agreement") for Stryker to provide management of security services on Elite's behalf on a per-project basis (the "Services"). Stryker, which is unlicensed, subcontracts with licensed security guard companies to provide security services to Elite's clients (Answer, ¶55). Anthony then allegedly removed the security companies with which Elite had subcontracted directly, and replaced those companies with Stryker, and Stryker, at an unusually high rate of compensation, eventually "took on the role of a middleman on most Elite national accounts," including Elite's account with Guess USA.

Then, in August 2010, Anthony (while still employed with Elite) and William formed Hoplite Security Group, Inc. ("Hoplite"), a security company.²

In March 2011, Anthony signed a Confidentiality, Non-Solicitation And Non-Compete Agreement (the "Non-Compete Agreement") with Elite, agreeing to refrain from soliciting Elite's clients during his employment and soliciting Elite's clients and/or participating in a competitor's business for 12 months subsequent to the termination of his employment.

In June 2012, Anthony allegedly purged his computer and shredded Elite's proprietary documents. At this time, Anthony resigned from Elite.

Two months later, Guess stopped using Elite's services for stores outside of New York.

² All claims against Hoplite were dismissed by the Court pursuant to a Decision and Order entered on August 8, 2013. Thus, Hoplite is no longer a party to this action.

Elite allegedly discovered that previously, in April 2012, Anthony solicited business from Elite's subcontractors for Hoplite. Allegedly, Anthony, while Elite's Vice President of Operations, introduced William to Guess representatives in July or August 2012, and as a result, Guess decided to give its security business to Stryker. Also, Hoplite, through Anthony and William, took for itself the security business for Equinox, a previously longstanding client of Elite.

Elite allegedly ceased paying Stryker, and as a result, Stryker commenced this action against Elite for breach of contract, unjust enrichment, and account stated.

In response, Elite denies that any balance is owed to Stryker and counterclaims against Stryker, and Stryker's President, William, Elite's former employee, Anthony, and Hoplite alleging, *inter alia*, breach of the duty of good faith and fair dealing, tortious interference with business relations, fraud and breach of contract. Elite also seeks to enjoin Stryker, William, Anthony, and Hoplite from soliciting Elite's clients and competing with Elite.

In response, William and Anthony deny Elite's counterclaims, and asserts two counterclaims against Elite for defamation and defamation *per se*.³

William and Anthony allege that on or about November 6, 2012, James Staveley ("Staveley"), of Vornado Realty Trust ("Vornado"), advised Anthony that Vornado was unhappy with Elite, and intended to put its security services contract with Bergen Town Center (a mall New Jersey) out to bid *via* a Request for Proposal (RFP) process. Staveley also stated that he wanted Hoplite to be included in the process.

Hoplite then applied for a New Jersey security company owner's license on November 6,

³ These facts are based on Elite's moving papers, William and Anthony's opposition, and Elite's reply, and are undisputed. Elite accepts, for purposes of its motion, the facts alleged by Anthony and William's Reply to Elite's counterclaims.

2012 in order to perform security services in New Jersey. Hoplite later received an official written invitation to participate in Vornado's RFP process regarding the Bergen Town Center.

On or about March 5, 2013, New Jersey State Police Private Detective Unit Investigator Suzanne M. Rowley ("Detective Rowley") telephoned Anthony, and advised that she was assigned to conduct a background investigation of Hoplite in connection with its license application. During this call, Detective Rowley informed Anthony that she would be contacting three (3) personal references and one (1) employment reference. Anthony consented for Detective Rowley to contact Elite's Executive Vice President Gary Weksler ("Weksler"), who Anthony listed as his employment reference. Detective Rowley called Elite, but did not speak to anyone at that time.

Thereafter, on March 12, 2013, Detective Rowley called Anthony, and advised him that Elite's president, Joseph Saponaro ("Saponaro"), returned her call and told her that William and Anthony had committed a theft of Elite's clients as well as a theft of millions of dollars of business. Detective Rowley also stated that Saponaro told her that William and Anthony were involved in a fraud for violating a non-compete agreement.

William and Anthony allege that Saponaro, acting within the scope of his employment with Elite, made statements he knew to be false and with malice and animosity, and, as a result, the process by which Hoplite could obtain a New Jersey security owner's license was hampered and unnecessarily extended. As such, Anthony and William allege that Hoplite did not receive its New Jersey security owner's license in a timely manner, and were therefore damaged. Anthony and William also allege that Elite made similar false, malicious, and defamatory statements about them to other actual and prospective clients of Hoplite, and to actual and

prospective clients of Stryker.

In support of dismissal of the defamation claims, Elite argues that: (a) William and Anthony fail to allege their counterclaims with sufficient specificity; (b) the statements are matters of opinion, not fact; (c) assuming the statements are false and verifiably harmful to William and Anthony's personal and/or business reputation, such statements are protected by the defense of qualified privilege and cannot be shown as made with malice to defeat the privilege.

Elite argues that the claims must fail because William's and Anthony's pleadings lack quotation marks, and lack specificity about the conversation between Detective Rowley and Saponaro. Elite avers that the counterclaims merely state, in broad terms, that it (by Saponaro's statements) accused William and Anthony of fraud and tortious business practices, and that beyond these contentions, the counterclaims assert generally that Elite made similar false, malicious and defamatory statements about William and Anthony to other actual and prospective clients of Hoplite, and to actual and prospective clients of Stryker. Elite argues that the latter statements provide no information about who made the statements, to whom the statements were made, when they were made, what precisely was said, and as to what actual impact they had.

Elite further contends that its statements were matters of protected opinion. Detective Rowley was seeking information about William and Anthony from people who had worked with them in the past, and such information would constitute the opinions of the individuals she interviewed. Elite maintains that Saponaro explained his personal background with both men as his employees. Detective Rowley, the only person to whom Saponaro's statements were made, was thus on notice that all of his conclusions were based upon his personal experiences.

With respect to qualified privilege, Elite notes that Saponaro's statements were made to a

New Jersey police detective, who *via* her investigation, had a common interest in the subject matter - the professional reputation of her subjects. Moreover, the public interest would be harmed by preventing a full prior evaluation of security guard licensee applicants. Elite argues that it had a duty to deliver its opinions to a police detective regarding its former employee and the entity which was being investigated. And, William and Anthony cannot establish that Saponaro made his statements with malice, knowing they were false, in order to overcome the qualified privilege. Saponaro had no doubts as to the truth of his accusations regarding Hoptite, William and Anthony, as he swore those same allegations in Elite's counterclaim against Stryker. William and Anthony cannot establish that Saponaro lied to Detective Rowley, and thus, cannot establish that he did so with malicious intent.

In opposition, William and Anthony argue that the words upon which a defamation claim is based need not be in quotations in order to be sufficiently specific. Saponaro, in his telephone conversation with Detective Rowley, said that William and Anthony had stolen clients and millions of dollars of business from Elite and that they committed fraud and violated non-compete agreements. Nothing in the counterclaims suggests that the defamatory statements were paraphrased, and the words that form the basis of the counterclaims are evident from the face of the pleadings. Alternatively, if this court finds that the claims are not sufficiently specific, William and Anthony request leave to replead.

William and Anthony further maintain that Saponaro's statements were not matters of opinion, but rather statements of asserted facts. Saponaro accused William and Anthony of being guilty of stealing millions of dollars of business and committing fraud. To a reasonable listener, these statements appear to be statements of fact, as the statements can be proven true or false, and

there is no indication that Detective Rowley would have known that Saponaro was expressing an opinion. Accusing individuals of criminal wrongdoing sounds to any reasonable listener like the speaker is asserting facts.

William and Anthony also contend that qualified privilege is inapplicable, as Saponaro had no “common interest” in returning Detective Rowley’s call and had no duty to speak to Detective Rowley. Nor has Elite identified any *bona fide* common interest. Had Saponaro called the police or reported William and Anthony’s alleged conduct to the district attorneys’ office upon learning of the alleged “theft of millions of dollars of business,” such conduct might be subject to a qualified privilege. However, long after the discovery of the alleged crimes, and after Anthony voluntarily left Elite’s employ, Saponaro chose, on his own, to return a phone call to a New Jersey detective (which was made to another Elite employee) with the sole purpose of maliciously harming William and Anthony by making slanderous statements.

William also denies that he was ever employed by Elite, and attests that neither his name, nor Stryker’s, was on Hoplite’s security license application. Thus, any statements made by Saponaro about William were unrelated to Detective Rowley’s inquiry regarding Hoplite’s application and were made solely for the purpose of defaming him and his business reputation.

Even if the qualified privilege applies, the privilege would be defeated, because Saponaro’s statements were made with malice and with the sole purpose of disparaging Anthony and William. Detective Rowley did not contact Elite to obtain information about William or Stryker, and she did not call Saponaro. Neither William nor Stryker’s name appeared on the application for the security license, and William was never an employee of Elite. Instead, Saponaro, when advised by Weksler that Detective Rowley called about Hoplite, unilaterally

took the opportunity and called Detective Rowley of his own accord, and had no reason or justification, much less any duty, to bring up William's name during his conversation with Detective Rowley. That Saponaro never contacted the local police upon his alleged discovery of William and Anthony's misconduct, but instead, laid in wait to sabotage their chances of competing with Elite by falsely stating to a detective in another state that they were criminals, is proof of malice. Such facts suggest the need for discovery on this issue. Such allegations that Saponaro acted with malice are sufficient to raise an issue of fact to defeat a motion to dismiss based on qualified privilege.

In reply, Elite reiterates that the defamation claims are insufficiently specific, and argues that repleading would be ineffective in light of Elite's remaining arguments and because neither counsel nor William and Anthony have any direct knowledge of Detective Rowley and Saponaro's conversation. There is no transcript or recording of the call, or affidavit from Detective Rowley or the New Jersey police to corroborate their accounts. As the accusations of defamation are not sufficiently specific, the counterclaims should be dismissed.

With respect to qualified privilege, Elite argues that it is immaterial that the officer who called Elite was from New Jersey. Moreover, that the specific corporate officer who called Detective Rowley back (Saponaro, and not Weksler) is irrelevant for purposes of the qualified privilege analysis, because William and Anthony's claims are against Elite, not Saponaro individually. Saponaro could not have known whom Hoplite listed on its application, and he apparently felt that he could adequately respond to Detective Rowley's inquiry. When he spoke with her in his official capacity, he was under a duty to give his own truthful recollections, opinions, and impressions regardless of his feelings. The responsibility for evaluating a

professional reference's statements would then fall to Detective Rowley and the New Jersey police.

Elite argues that common law malice, defined as spite or ill will, defeats the qualified privilege only if it is the one and only cause for the publication, and this must be affirmatively established by the plaintiff, and not merely alleged. To prove actual malice, a plaintiff must produce evidence that the publication was made with knowledge that the statement is false or with reckless disregard for its falsity. Even if Saponaro genuinely dislikes William and Anthony, there is no showing that malice was the only reason for his statements or that Saponaro spoke to Detective Rowley only because he wanted to harm William and Anthony. William and Anthony's allegations of malice are merely conclusory. Also, Elite claims that William and Anthony cannot show that any of Saponaro's statements are false. Thus, Elite remains protected by the doctrine of qualified privilege.

Discussion

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). The standard on such a motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v*

Blumberg, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see, CPLR §3026; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*) and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

The elements of a defamation claim 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 AD2d 34, 704 NYS2d 1 [1st Dept 1999] *citing* Restatement of Torts, Second § 558).

Slander *per se* refers to 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 (see, *Lieberman v Gelstein*, 80 NY2d 429 [1992]). When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven.

In evaluating whether a cause of action for defamation is successfully pleaded, “[t]he words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory

meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Dillon, citing Silsdorf v Levine*, 59 NY2d 8, 462 NYS2d 822 [1983], *cert. denied* 464 U.S. 831, 104 S.Ct. 109 [1983]).

As to Elite's claim that the defamation counterclaims were not pled with sufficient particularity, CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made (*Dillon, citing Arsenault v Forquer*, 197 AD2d 554, 602 NYS2d 653 [2d Dept 1993]). Generally, the complaint "must allege the precise words spoken or published, and not merely the tenor, effect, or purport thereof. In other words, the allegation in the complaint of defamatory words must not merely paraphrase the words allegedly spoken" (*see, Le Sannom Bldg. Corp. v Dudek*, 177 AD2d 390, 391, 576 NYS2d 133, 134 [1991] (rejecting plaintiff's attempt to use paraphrased statements of the alleged defamation in the complaint)).

However, the words upon which the defamation claim is based need not be in quotations (*see, Torres v Prime Realty Servs.*, 7 AD3d 343, 344 775 NYS2d 865 [1st Dept 2004] ("nor does it avail defendants that plaintiff does not specify exactly what words were spoken by which principal...plaintiff sufficiently sets forth the circumstances of the publication...and the offending words need not be in quotations"); *see also John Langenbacher Co. v Tolksdorf*, 199 AD2d 64, 605 NYS2d 34 [1st Dept 1993] ("the complaint sufficiently set forth the words upon which the claims were based, which need not be in quotations"); *Taub v Amana Imps., Inc.*, 140 AD2d 687, 689, 528 NYS2d 884 [2d Dept 1988]).

Here, William and Anthony's counterclaims allege, *inter alia*, that Elite (by Saponaro)

stated to Detective Rowley that William and Anthony had stolen Elite's clients, as well as millions of dollars of business that belonged to Elite, and that William and Anthony had committed fraud and violated non-competition agreements with Elite.

Elite's assertions -- in both the moving papers and its reply -- that the counterclaims allege no more than that Saponaro accused William and Anthony of fraud and tortious business practices in vague terms fail to acknowledge the more specific statements referenced above.

As such, while Saponaro's alleged statements are not surrounded by quotation marks, the counterclaims sufficiently set forth the words upon which William and Anthony's claims are based. Thus, dismissal of these claims for lack of specificity is unwarranted.

As to Elite's claims that the defamatory statements constitute non-actionable opinion, it has been held that a defamation claim cannot be premised upon an assertion of pure opinion, regardless of how offensive, vituperative, or unreasonable (*O'Loughlin v Patrolmen's Benev. Ass'n of City of New York, Inc.*, 178 AD2d 117, 576 NYS2d 858 [1st Dept 1991]; *Weiner v Doubleday & Co.*, 74 NY2d 586 [1989]; *see also, Konrad v Brown*, 91 AD3d 545, 937 NYS2d 190 [1st Dept 2012]). "Since falsity is a *sine qua non* of a libel claim and since 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 Intern. Ltd. v Google, Inc.*, 86 AD3d 32, 925 NYS2d 407 [1st Dept 2011] *citing Brian v Richardson*, 87 NY2d 46, 51, 637 NYS2d 347, 660 NE2d 1126 [1995]).

The factors to be considered in distinguishing between assertions of fact and nonactionable expressions of opinion 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" (*Sandals Resorts Intern. Ltd. v Google, Inc.*, *supra* 86 AD3d at 39-40 (internal citations omitted)). And, it has been stated:

"A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable. The actionable element of a 'mixed opinion' is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking" (68 N.Y.2d at 289–290, 508 N.Y.S.2d 901, 501 N.E.2d 550 [citations and footnote omitted] *Sandals Resorts Intern. Ltd. v Google, Inc.*, *supra* 86 AD3d at 40).

Here, William and Anthony established that Saponaro's statements were of asserted facts.

The statements that William and Anthony stole Elite's clients and millions of dollars of Elite's business, and that William and Anthony committed fraud and other torts are statements capable of being proven or disproven. Indeed, these statements relate directly to the allegations in Elite's counterclaims against Stryker, William and Anthony, which sound in fraud and breach of contract, and which will be litigated in this action. It is noted that Elite does not specifically address William and Anthony's arguments in this regard.

Further, Saponaro's statements imply that they are based upon facts, though supportive of his statements, are unknown to Detective and thus, constitute "mixed opinion" and are actionable. The statements imply that Saponaro knows certain facts, unknown to Detective Rowley, which support his "opinion" that William and Anthony stole clients and millions in revenue, and are detrimental to William and Anthony. Therefore, dismissal of the defamation counterclaims on the

ground that they are non-actionable opinion is also unwarranted.

As to Elite's claims that Saponaro's statements are protected by a qualified privilege, a qualified privilege is an affirmative defense to a defamation claim that arises when a person makes a good-faith, *bona fide* communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest (*see, Toker v Pollak*, 44 NY2d 211, 219, 405 NYS2d 1 [1978]). Generally, a statement is subject to a qualified privilege when it is made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned (*id.* at 219; *see also Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). Thus, statements allegedly made to a police detective in the course of an investigation are protected by a qualified privilege (*see, Toker v Pollak, supra* (noting that the majority of States afford a qualified privilege to a communication by an individual to a law enforcement officer); *Present v Avon Products, Inc.*, 253 AD2d 183, 687 NYS2d 330 [1st Dept 1999]; *Towne Ford v Marowski*, 251 AD2d 1075, 1076, 674 NYS2d 213 [4th Dept 1998]).

Corporate entities may utilize the privilege (*see, Lunney v Prodigy Services Co.*, 94 NY2d 242, 723 NE2d 539 [1999] (internet service provider afforded the privilege); *Carone v Venator Group Inc.* 2003 WL 25780905 [Sup. Ct., New York Cty. 2003]). Moreover, it is well-settled that corporations act solely through their officers (*see, Holloway v Ernst & Young LLP*, 82 AD3d 611, 918 NYS2d 726 [1st Dept 2011]; *Diamond v Oreamuno*, 29 AD2d 285, 287 NYS2d 300 [1st Dept 1968]).

And, the party desiring to assert the privilege must make a *prima facie* showing of

entitlement; if it is successful in so doing, the burden shifts to the adversary, who must show that the statements at issue were made with malice (*see, Liberman v Gelstein*, 80 NY2d 429, *supra*).

Elite, the target of William and Anthony's counterclaims, established *prima facie* that it is entitled to the protections of the qualified privilege, as the subject statements were made in the discharge of a public or private duty, legal or moral. Since the counterclaims are asserted against Elite, and not Saponaro individually, the question is whether "Elite" had a duty to respond to Detective Rowley's inquiry, and not whether Saponaro had such a duty, as Saponaro is not a party to this litigation.

Without explicitly saying so, William and Anthony essentially argue that Weksler was the only person who could have had a duty to respond to Detective Rowley. However, this argument overlooks the facts that Elite is the only target of their defamation counterclaims, and that Anthony gave Detective Rowley Weksler's name as an *employment* reference, not as a personal reference. Anthony does not allege that he was employed by Weksler; rather, he was employed by *Elite*, the entity against which the counterclaims are asserted. Thus, Saponaro, as Elite's president, had the prerogative to respond to Detective Rowley's phone call on behalf of his company, as did any other officer or member of the company with binding authority. William and Anthony provide no further argument or legal authority for their undeveloped assertion otherwise, and accordingly, Elite has established *prima facie* its entitlement to qualified privilege.

As noted above, since Elite established its *prima facie* entitlement to the qualified privilege, the burden shifts to the proponent of the defamation claim to show that the statements were made with malice (*Foster v Churchill*, 87 NY2d 744 [1996]).

Here, William and Anthony fail to make the requisite showing.

There are two forms of malice applicable to defamation claims that, if established, will defeat the privilege: constitutional malice and common law malice (*see Rosenberg v MetLife, Inc.*, 8 NY3d 359 [2007]; *Lieberman v Gelstein*, 80 NY2d 429, 437-438 [1992] (“the constitutional as well as the common-law standard will suffice to defeat a conditional privilege”). Constitutional, or actual, malice is established by a showing that the publication was made with knowledge that the statement is false or with reckless disregard for its falsity (*Lieberman*, 80 NY2d at 437-438). “In other words, there ‘must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication’” (*id.* at 438). Common law malice, on the other hand, is established by a demonstration that the statement was made solely out of spite or ill will (*id.*; *see also DeNaro v Rosalia*, 59 AD3d 584, 873 NYS2d 697 [2d Dept 2009] (defendants established, *prima facie*, that the allegedly defamatory acts were committed at least partly in furtherance of legitimate motives. In response, the plaintiffs failed to raise a triable issue of fact as to whether the defendants’ actions were motivated solely by disinterested malevolence)).

William and Anthony do not contest Elite’s argument that constitutional malice is lacking here. And, this court agrees with Elite’s conclusion in this regard, for there is no evidence indicating that Elite entertained any serious doubts as to the truth of the publication. If anything, the opposite would seem to be true, as Elite is actively pursuing claims grounded in fraud and breach of contract against William and Anthony in this litigation.

Further, William and Anthony’s assertions of common law malice are ineffective to

overcome the privilege, as the record indicates that the alleged statements were *not* made *solely* out of spite or ill will. At the outset, assuming the truth of William and Anthony's contentions, as this court must, William and Anthony fail to overcome the presumption afforded to Elite. The pleadings contain nothing more than conclusory allegations that Elite made the alleged defamatory statements with malice. The only support for this claim lies in arguments made by William and Anthony's counsel in the memorandum of law in opposition, which is speculative and fails to overcome Elite's *prima facie* showing. And, the undisputed evidence indicates that Elite had an alternate reason for making the statements to Detective Rowley; namely, to respond to her official police inquiry.

The argument that Elite acted maliciously in that Saponaro, instead of immediately contacting law enforcement, waited to defame William and Anthony to a detective in another state and contacted Detective Rowley of his own accord, is unpersuasive and asserted without any legal or other justification. The references to Stryker and William in Saponaro's conversation with Detective Rowley are devoid of malice. It is undisputed that (a) Detective Rowley reached out to Elite as part of its investigation of Hoplite; and (b) Hoplite is owned and governed entirely by William and Anthony. In other words, Detective Rowley's investigation did not pertain to whether New Jersey should grant Anthony a security license, but whether to grant Hoplite a license. As such, Elite had the right to supply any information it had regarding Hoplite and its corporate background, especially considering the size and structure of Hoplite, a two-member close corporation.

It is noted that the main issue is whether Elite is entitled to the qualified privilege, and William and Anthony do not argue that Elite as an entity should not be entitled to the privilege.

Instead, William and Anthony conflate the actions and duties of Saponaro with those of Elite, and unpersuasively argue that Saponaro should not be entitled to the privilege. The undisputed evidence indicates that Elite (*via* Saponaro) responded to Detective Rowley's inquiry, an action within Elite's purview.

The court also notes that the qualified privilege is an affirmative defense, and typically the question of qualified privilege is premature on a CPLR 3211 motion to dismiss (*see, Garcia v Puccio*, 17 AD3d 199, 201, 793 NYS2d 382 [1st Dept 2005]; *see also Demas v Levitsky*, 291 AD2d 653, 738 NYS2d 402 [3d Dept 2002]). Notwithstanding, courts have ruled on the issue in such motions (*see, Doherty v New York Tel. Co.*, 202 AD2d 627, 609 NYS2d 306 [2d Dept 1994]; *Bencosme v Rodriguez*, 2013 WL 3989030 [Sup. Ct., New York Cty. 2013]). This court is especially inclined to rule on qualified privilege here, as all factual allegations underlying this motion are not in dispute.

The critical justification supporting the general rule to refrain from ruling on the issue in a 3211 motion -- when the content and context of the alleged defamatory statements in the complaint or supporting materials on the motion are sufficient to potentially establish malice (*see Weiss v Lowenberg*, 95 AD3d 405, 944 NYS2d 27 [1st Dept 2012]) -- is absent. As indicated above, William and Anthony's allegations, even if accepted as true, fail to demonstrate the possibility of malice under the law, and therefore the privilege afforded to Elite remains intact. Given the undisputed fact that the alleged statements were made in response to an inquiry by Detective Rowley in her investigation of Hoplite's license application, and, as pointed out by William and Anthony, did not report the alleged crimes until the Detective inquired, it cannot be said that the alleged statements were made solely out of spite or ill will. Thus, contrary to William and

Anthony's contention, further discovery on the issue of malice is unnecessary.

Accordingly, Elite's statements are protected by the doctrine of qualified privilege, and dismissal of the defamation claims on this ground is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant/counterclaim plaintiff Elite Investigations Ltd. pursuant to CPLR 3211(a)(7) (sequence 004) for dismissal of additional counterclaim defendants Anthony Romano's and William Mlynarick's counterclaims is granted, and said counterclaims are hereby severed and dismissed with prejudice; and it is further

ORDERED that defendant/counterclaim plaintiff shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 15, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD