| **Suk Inc. v Flushing Workers Ctr.** |
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| 2015 NY Slip Op 30490(U) |
| April 2, 2015 |
| Sup Ct, New York County |
| Docket Number: 155192/2013 |
| Judge: Eileen A. Rakower |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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SUK INCORPORATED d/b/a RAINBOW LIMO and SEONGBAE DAN,

Plaintiffs,

Index No. 155192/2013

**DECISION AND ORDER**

- against -

Mot. Seq. #002

FLUSHING WORKERS CENTER, SARAH AHN, JUNE-IL KIM and KEVIN K. LEE

Defendants.

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

This is an action for defamation. Plaintiffs, SUK Incorporated d/b/a Rainbow Limo ("SUK") and Seongbae Dan ("Mr. Dan") (collectively, "Plaintiffs"), the CEO of SUK, commenced this action on June 5, 2013, by summons and complaint, alleging that defendants, Flushing Workers Center ("FWC"), Sarah Ahn ("Ahn"), June-Il Kim ("J. Kim"), and Kevin K. Lee ("Lee"), distributed a written press release containing allegedly defamatory statements regarding Plaintiffs, and that defendants, Lee, J. Kim, and Ahn, made further purportedly defamatory statements about Plaintiffs during a demonstration conducted in front of Plaintiffs' place of business.

Defendants FWC, Ahn, Kim, and Lee previously moved for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), and (g), dismissing Plaintiffs' original complaint on the basis of documentary evidence, failure to state a cause of action, and as a Strategic Law Suit Against Public Participation ("SLAPP") suit in violation of the anti-SLAPP statute. By Order dated February 4, 2014, this Court denied that motion.

Pursuant to a joint stipulation between the parties, Plaintiffs filed an amended complaint (the "Amended Complaint"), adding Hwa Ten Shih ("Shih"), Taw Soo Kim (a/k/a Clifford Kim) ("T. Kim"), Jung Sun Chung ("Chung"), and Richard Lim ("Lim") (and together with FWC, Ahn, J. Kim and Lee, collectively, "Defendants") as additional defendants in this action. Plaintiffs' Amended Complaint also adds additional claims of defamation arising from a letter, dated January 6, 2014 (the "January Letter"). Plaintiffs allege that the January Letter contains several defamatory statements about Plaintiffs, and that Defendants wrote and distributed the January Letter to Plaintiffs' business clients.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), and (g), dismissing Plaintiffs' Amended Complaint on the basis of documentary evidence, failure to state a cause of action, and as a SLAPP suit pursuant to the anti-SLAPP statute. Specifically, Defendants argue that Plaintiffs' Amended Complaint should be dismissed, in its entirety, on the grounds that the allegedly defamatory statements in issue are protected as statements of opinion under First Amendment to the U.S. Constitution and Article I, Section 8 of the New York State Constitution, as Plaintiffs' constitutional arguments were not explicitly addressed in Defendants' initial motion to dismiss. Additionally, Defendants, in their memoranda, ask this Court to reconsider its prior decision on the applicability of the fair report privilege and anti-SLAPP law, and to dismiss plaintiffs' claims on those bases as well. Alternatively, Defendants move to dismiss the new allegations in the Amended Complaint as constitutionally protected statements of opinion, as protected reports of litigation pursuant to the fair reporting privilege, and as retaliatory strategic litigation against public participation ("SLAPP") suits under New York's anti-SLAPP law.

Plaintiffs oppose.

Oral argument was heard on Defendants' motion. At oral argument, Defendants argued that Plaintiffs' Amended Complaint should be dismissed on the grounds that the challenged statements are constitutionally protected from suit under the First Amendment to the U.S. Constitution and Article I, Section 8 of the New York State Constitution.

As an initial matter, CPLR § 2221(d) requires that a motion for leave to reargue "shall be identified specifically as such" and "shall be made within thirty days after service of a copy of the order determining the prior motion and written

notice of entry." (CPLR § 2221[d][1],[2]). CPLR § 2221(e) similarly provides that a motion for leave to renew "shall be identified specifically as such." (CPLR § 2221[e][1]). Pursuant to CPLR § 2221(f), "[a] combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought." (CPLR § 2221[f]). Here, Defendants filed the instant motion more than thirty days after service of a copy of the Order determining the prior motion to dismiss Plaintiff's original complaint, together with notice of entry. Defendants do not specifically identify the instant motion as a motion to reargue or renew, nor do Defendants identify separately and support separately each item of relief sought. Rather, Defendants argue, in their memoranda of law, that the Court should reexamine issues previously determined on Defendants' prior motion to dismiss Plaintiff's original complaint. Accordingly, those portions of Defendants' motion which seek to reargue the original motion to dismiss are not properly raised and will not be addressed.

Turning now to Defendants' motion to dismiss the new allegations asserted in the Amended Complaint, CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (1) a defense is founded upon documentary evidence;
> >
> > (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep't 2007] [citation omitted]). In addition, in determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dep't 2003] [internal citations omitted]; *see* CPLR § 3211[a][7]).

As for Plaintiff's amended claims of defamation, "[t]he 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 A.D.2d 34 [1st Dep't 1999]). Defamation *per se* consists of statements: (i) charging plaintiff with a serious crime; (ii) tending to injure another in his or her trade, business or profession; (iii) asserting that plaintiff has a loathsome disease; or, (iv) imputing "unchastity" to a woman. (*Liberman v. Gelstein*, 80 N.Y.2d 429, 435 [1992]). Pursuant to CPLR § 3016, in an action for defamation, "the particular words complained of shall be set forth in the complaint." (CPLR § 3016[a]). The complaint must allege the time, place and manner of the allegedly defamatory statement, and specify to whom the statement was made, in order to support a defamation claim. (*Dillon v. City of New York*, 261 A.D.2d 34, 38 [1st Dep't 1999] [internal citation omitted]).

In order to support an action for defamation, a statement must be defamatory in meaning, and factual—i.e. not opinion—in nature. In evaluating whether a statement is defamatory in meaning, the allegedly defamatory 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 v City of New York*, 261 AD2d 34, 38, 704 N.Y.S.2d 1 [1st Dep't 1999]). A statement is defamatory if it exposes an individual "to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or . . . induce[s] an evil opinion of one in the minds of right-thinking persons, and . . . deprive[s] one of their confidence and friendly intercourse in society." (*Kimmerle v. N.Y. Evening Journal, Inc.*, 262 N.Y. 99, 102 [1933]). Where the allegedly defamatory words or statements are capable of multiple meanings, New York courts employ an ordinary person standard to determine if that statement is "reasonably susceptible [to] a defamatory connotation." (*James v. Gannett Co.*, 40 N.Y.2d 415, 419 [1976]). A statement that fails to rise to the necessary level of derogation is not actionable.

In distinguishing between opinion and fact, the following factors are to be considered: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and, (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are

such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact. (*Mann v. Abel*, 10 N.Y.3d 271, 276 [2008]). Additionally, "'courts must consider the content of the communication as a whole, as well as its tone and apparent purpose' and in particular 'should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the ... plaintiff.'" (*Mann v. Abel*, 10 N.Y.3d 271, 276 [2008] quoting *Immuno AG. v Moor-Jankowski* 77 N.Y.2d 235, 254 [1991]).

A statement that is an expression of "pure opinion" may not give rise to an action for defamation. (*Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 [1986]). Such statements receive the Federal constitutional protection accorded to the expression of ideas, "no matter how vituperative or unreasonable" they may be. (*Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 [1986]). A statement of opinion is protected as "pure opinion" where the statement in question is accompanied by a recitation of the facts upon which it is based. (*Id.*). Absent such factual recitation, a statement of opinion may is protectable as "pure opinion" if the statement in question does not imply that it is based upon undisclosed facts. (*Id.*). On the other hand, a statement of opinion that "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it," constitutes a "mixed opinion" and is actionable. (*Id.*). In a "mixed opinion" case, "the actionable element . . . 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." (*Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-90 [1986]).

As for the allegedly defamatory statements in issue in Plaintiffs' additional defamation claims in the Amended Complaint, Plaintiffs' Amended Complaint alleges:

> On or around January 6, 2014, the Defendants sent a letter addressed to the clients of SUK on FWC letterhead regarding SUK d/b/a Rainbow and Mr. Dan. A copy of the letter is annexed hereto as Exhibit 2 ("the January 6, 2014 Letter"). On information and belief, this letter was sent to at least 15 and perhaps as many as 50 of SUK's clients, at least one of which has its office in New York County.

Plaintiffs' Amended Complaint further asserts:

> In the January 6, 2014 Letter, the Defendants falsely accused Plaintiffs of committing serious crimes and/or actions that harm their professional reputation, including but not limited to the following: (a) "unscrupulously steal[ing] money from" black car drivers; (b) operating a black-car business "through intimidation [by] leadi[ing] a gang of drivers who uses [sic] physical violence and harassment to bully the other drivers"; and (c) "using drivers who have a history of attacking other drivers," which places passengers at risk.

The January 6, 2014 Letter provides:

> The company that you are doing business with, Suk, Inc. d/b/a Rainbow Limo, a publicly licensed company, is owned and operated by Seong Bae Dan. Since taking over the company, Dan has forcibly and unfairly taken away the rights of the drivers and continues to unscrupulously steal money from them.
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> ***
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> Seong Bae Dan operates an illegal franchise business. Some of us were forced to sign a franchise agreement to continue working with the company. We were all not given a change to read to documents or consult a lawyer before signing these agreements. To line his own pockets, Dan would force us again and again to sign new subcontract agreements changing the original terms to steal our tips or raise the franchise fee taken from the company. Dan operates the business through intimidation and leads a gang of drivers who uses physical violence and harassment to bully the other drivers. Drivers who speak up or question Dan have been fired or pushed out of the company. Dan has violated TLC regulations by using

> drivers who have a history of attacking other drivers and are putting you and your employees at risk.

The January 6, 2014 Letter references "a complaint filed with the New York State Department of Labor in 2010" and states that "the DOL has determined the drivers were employees of the company and not independent contractors as Dan asserts." The January 2014 Letter states that Dan "repeatedly" appealed the DOL's determination in that case. In addition, the January 2014 Letter references the instant action for defamation, and asks the letter's recipients to contact Dan and "demand that he change his business practices, repay what he has stolen from the drivers and that he also drops the lawsuit against the drivers and Flushing Workers Center" and to "discontinue your services with [Dan's] company until these matters are settled."

Here, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a cause of action for defamation based on the challenged statements contained in the January 6, 2014 Letter. The statements in issue are sufficiently defamatory in meaning to support a cause of action for defamation, at this early stage of the litigation. Although the January 6, 2014 Letter references a labor dispute between the parties as well as the instant action for defamation, the allegedly defamatory statements accusing Plaintiffs of violence go beyond the scope of either litigation. Such statements are capable of being proven true or false. Furthermore, the allegedly defamatory statements are directed towards Plaintiffs' clients, who might, in this context, conclude that the challenged statements convey facts about Plaintiffs.

Furthermore, viewing Plaintiffs' complaint in the light most favorable to the non-moving party, in the context of a letter addressed to Plaintiffs' clients, the challenged statements imply that Defendants, many of whom worked as drivers for Plaintiffs, know certain facts, unknown to the audience, which support the accusations that Dan "leads a gang of drivers who uses physical violence and harassment to bully the other drivers" or that Dan "use[s] drivers who have a history of attacking other drivers and are putting you and your employees at risk". Accordingly, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' amended complaint adequately plead additional claims for defamation for purposes of surviving a motion to dismiss at the pleadings stage.

Turning now to Defendants' motion to dismiss Plaintiffs' additional defamation claims under CPLR § 3211(g), this statute provides standards for a motion to dismiss in certain cases "involving public petition and participation", known as, Strategic Litigation Against Public Participation ("SLAPP") suits. (CPLR § 3211[g]; Civ. Rights Law § 76-a[1][a]). Pursuant to CPLR § 3211(g):

> [A] motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action . . . subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law . . .

(CPLR § 3211[g]).

The anti-SLAPP statutes, "protect citizen activists from lawsuits commenced by well-financed public permit holders in retaliation for their public advocacy." (*Guerrero v. Carva*, 10 A.D.3d 105, 116 [1st Dep't 2004] citing *Harfenes v. Sea Gate Assn.*, 167 Misc. 2d 647, 648 [Sup Ct. N.Y. Cnty 1995]). In order to establish that a cause of action is a retaliatory SLAPP suit, the moving party must show that the claim constitutes an "action . . . for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." (Civil Rights Law § 76-a [1][a]; *Guerrero v. Carva*, 10 A.D.3d 105 [1st Dep't 2004]). Additionally, "a SLAPP-suit defendant must directly challenge an application or permission in order to establish a cause of action under the Civil Rights Law." (*Guerrero v. Carva*, 10 A.D.3d 105 [1st Dep't 2004]). "[B]ecause the anti-SLAPP law is in derogation of the common law, it must be narrowly construed." (*Guerrero v. Carva*, 10 A.D.3d 105, 116 [1st Dep't 2004]).

Defendants argue that Plaintiffs' action for defamation is a SLAPP suit because Plaintiffs are "permittees" within the meaning of the anti-SLAPP law, and because the instant action for defamation is "materially related" to Defendants' prior and ongoing efforts to challenge Plaintiffs' labor practices. Defendants argue that this action is one "involving public petition and participation," for purposes of § 76-a(1)(a), because Plaintiffs conduct their business operations using a franchise system

that is registered with the Attorney General's Office, and pursuant to a license to operate a dispatch service for livery drivers through the New York City Taxi & Limousine Commission ("TLC"). Defendants argue that Plaintiffs' business operations are conducted only by permission of the State and the TLC, and that as a result, Defendants' efforts to challenge Plaintiff's labor practices through litigation before the Unemployment Insurance Appeals Board and in federal court, "directly challenges" these permissions.

Here, it is undisputed that Plaintiffs are "permittees" within the meaning of the anti-SLAPP law. SUK is a registered franchisor with a license to operate a dispatch service for livery drivers, as permitted through the Taxi and Limousine Commission ("TLC").

However, Defendants fail to establish that the instant action is a retaliatory SLAPP suit. Neither the statements at issue in the January Letter, nor the causes of action asserted in prior or pending litigation between the parties, go *directly* to Plaintiffs' ability to maintain their permissions to conduct their business operations. (*see Silvercorp Metals Inc. v Anthion Mgt. LLC*, 36 Misc. 3d 660, 667 [N.Y. Sup. Ct. 2012] [finding that even though Plaintiff cannot sell shares of stock on New York Stock Exchange without proper permission from SEC, Defendant's statements questioning accuracy of Plaintiffs' financial disclosures do not, without more, "rise to the level of a challenge to [Plaintiff's] permission to offer its shares publicly," for purposes of anti-SLAPP statute]).

Additionally, Defendants fail to demonstrate that the January Letter, which is addressed to Plaintiffs' private business clients, is materially related to any efforts of Defendants to report alleged violations to public agencies. That Plaintiffs' permits are up for renewal every three years does not, without more, establish that the statements relating to Plaintiffs' business practices in the January Letter directly challenge those permissions. Accordingly, Defendants fail to establish that the instant action for defamation is a SLAPP suit, within the narrow construction that the anti-SLAPP law requires.

Wherefore it is hereby,

ORDERED that Defendants' motion to dismiss is denied; and it is further,

ORDERED that Defendants are directed to serve an answer to Plaintiff's amended complaint within 20 days after service of a copy of this order with notice of entry.

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

Dated: April 2, 2015

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Eileen A. Rakower, J.S.C.