Leffler v Kotick
2019 NY Slip Op 32851(U)
September 20, 2019
Supreme Court, New York County
Docket Number: 155820/2018
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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MARC LEFFLER

Plaintiff,

- v -

JOEL KOTICK,

Defendant.

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INDEX NO. 155820/2018

MOTION DATE 05/30/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

Upon the foregoing documents, the cross-motion for summary judgment is granted.

Plaintiff commenced this suit alleging libel and prima facie tort based upon the defendant's accusation that plaintiff, an attorney, bribed a witness and suborned perjury by producing a trial witness who lied under oath. In addition, defendant filed a disciplinary complaint against plaintiff with the First Judicial Department, and then publicized that fact (and the complaint itself) to an insurance company which was a client of plaintiff's law firm.

Plaintiff and defendant were adversaries in a dental malpractice case. Plaintiff represented the defendant in that action. Plaintiff obtained a directed verdict for his client in that case. Thereafter, defendant made a complaint to the First Department Disciplinary Committee about plaintiff. Defendant the forwarded the complaint with the defendant dentist's insurance company, accusing plaintiff of bribing an expert witness and suborning perjury by that witness.

Defendant now moves for summary judgment arguing that truth is an absolute defense to defamation. Defendant asserts that plaintiff misrepresented the facts and issues in the dental malpractice trial. Defendant also claims that plaintiff "bought" the testimony of witnesses during the trial.

Plaintiff cross-moves for summary judgment on his first cause of action as to liability denying defendant's allegations and claiming that defendant's statements are defamatory *per se.*

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. *Alvarez v. Prospect Hospital,* 68 NY2d 320; *Zuckerman v. City of New York,* 49 NY2d 557. Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gas in plaintiff's proof. *Mondello v. DiStefano,* 16 AD3d 637; *Peskin v. New York City Transit Authority,* 304 AD2d 634. There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form. *Muniz v. Bacchus,* 282 AD2d 387, *rev'd* on other grounds *Ortiz v. City of New York,* 282 AD2d 387.

Once the movant meets his initial burden on summary judgment, the burden shifts to opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact, *Zuckerman* at 562. It must be noted that when deciding a motion for summary judgment the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. *Knepka v. Talman,* 278 AD2d 811. Moreover, the Court's function when determining a motion

for summary judgment is issue finding not issue determination. *Sillman v. Twentieth Century Fox Film Corp.*, 2 NY2d 395.

It has been held that a false accusation of a serious crime is defamatory *per se*, and that damages for libel are presumed without proof of special damages. *Liberman v. Gelstein,* 80 NY2d 429 (1992). Moreover, statements which tend to injure a plaintiff in his trade, business or profession are also libelous *per se. Golub v. Enquirer/Star Group,* 89 NY2d 1074. Here, defendant accused plaintiff of bribery of a witness and of suborning perjury. Such accusations are "incompatible with the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities." *Liberman, supra* at 436.

In the case at bar, defendant accuses plaintiff of suborning perjury, a felony and a disbarrable offense. The statements accuse plaintiff of crimes and unethical conduct which go to the core of plaintiff's professional reputation. To prove that plaintiff suborned perjury, defendant would have to prove that plaintiff knew that the witness would lie under oath and that plaintiff intentionally produced him with knowledge that he would do so. However, defendant has failed to present any evidence in admissible form to support these allegations. Thus, his motion for summary judgment must be denied.

Plaintiff's motion for partial summary judgment on liability is granted. Plaintiff has demonstrated that the statements made by defendant are defamatory and libelous *per se.* While defendant's complaint to the Disciplinary Committee may have been absolutely privileged when he reported the alleged conduct to the Committee, he waived such privilege when he publicized the complaint to an insurance company who was plaintiff's client.

While there is a privilege for defamatory statements made in the course of judicial proceedings (including the Disciplinary Committee), the disclosure of the complaint in this action was not made in the course of a judicial proceeding, but outside of it. It has been held that alleged defamatory statements made outside the context of attorney disciplinary proceeding, concerning those proceedings or any claims upon which those proceedings are based, are not protected by absolute privilege when such statements violate the confidentiality requirement of Judiciary Law § 90 (10). No privilege is so absolute that its abuse, unmitigated by any countervailing public policy considerations, will not result in its waiver. *Sinrod v. Stone,* 33 Misc.3d 1230[A].

Here, the act of sending a copy of the disciplinary complaint to the insurance company, which was not a party, after the litigation had ended was libelous and beyond the bounds of reason. *Youmans. v. Smith.* 153 NY216 (1897)

It should be noted that the defendant's claim regarding the veracity of plaintiff's expert is meritless, as the expert never testified before the jury, as plaintiff was granted a directed verdict before the expert had the opportunity to testify.

For the foregoing reasons, plaintiff is entitled to summary judgment as to liability on the first cause of action. The defendant's motion for summary judgment is denied.

This is the decision and order of the Court.

9/20/2019
DATE

W. FRANC PERRY, J.S.C.
HON. W. FRANC PERRY, III

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE