

Under the Milky Way LLC v Allieta
2020 NY Slip Op 31463(U)
May 20, 2020
Supreme Court, New York County
Docket Number: 154594/2019
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

-----X

UNDER THE MILKY WAY LLC
Plaintiff,

- v -

NICOLA ALLIETA,
Defendant.

-----X

INDEX NO. 154594/2019
MOTION DATE 11/07/2019
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 were read on this motion to/for DISMISS.

Plaintiff Under The Milky Way LLC (UMW) moves for an order, pursuant to CPLR 3211(a) (7), dismissing the three counterclaims in defendant Nicola Allieta's answer. Defendant cross-moves for an order, pursuant to CPLR 3025(b), granting him leave to amend the counterclaims.

This is an action between UMW, an employer, and its former employee, defendant, regarding defendant's purported use of confidential information to interfere with UMW's business relationships after defendant resigned from UMW to work for a competitor. Defendant has asserted counterclaims that UMW tortiously interfered with prospective business relationships with clients that he developed even before working for UMW, and that it defamed him in emails to those clients. The motion to dismiss is granted, and the cross motion for leave to amend is denied.

BACKGROUND

UMW is in the business of digital film distribution and marketing (NYSCEF Doc. No. 1, ¶ 9). Defendant was employed by UMW since February 2011 as a consultant, and, in January 2017, became a UMW employee (*id.*, ¶¶ 14, 21). Defendant was a senior business development manager in UMW's video aggregation business (NYSCEF Doc. No. 17, counterclaims ¶ 11). According to defendant, he did not have a written employment contract with UMW (NYSCEF Doc. No. 17, counterclaims ¶¶ 14-16). Defendant has contacts and clients in the video aggregation industry in Europe, which he developed before he became employed by UMW (NYSCEF Doc. No. 24, counterclaims ¶ 25).

On March 12, 2019, defendant told UMW that he was resigning after UMW had announced, in January, that there would be salary cuts beginning in June 2019 (*id.*, counterclaims ¶¶ 18-21). On March 18, 2019, defendant left UMW and began working as a consultant for Sweet Chili, a competitor of UMW (*see* NYSCEF Doc. No. 1, ¶¶ 38-39).

After his resignation from UMW, defendant began hearing from his contacts and clients that UMW was undermining his efforts to secure employment opportunities and clients (NYSCEF Doc. No. 17, counterclaims ¶¶ 26-27). Defendant alleges that UMW told these potential employers and clients that he had "contractual obligations" to UMW that precluded him from working for them, and that such work would be unlawful (*id.*, counterclaims ¶¶ 27-28).

On May 3, 2019, UMW commenced this action, asserting five causes of action: breach of fiduciary duty; tortious interference with prospective economic advantage; breach of contract; unjust enrichment; and prima facie tort (NYSCEF Doc. No. 1).

Thereafter, defendant answered the complaint denying the material allegations, and asserting three counterclaims: tortious interference with prospective business relations, slander per se and defamation per se (NYSCEF Doc. No. 17).

In moving to dismiss these counterclaims, UMW asserts that the tortious interference counterclaim fails to state a claim, because defendant is a mere employee, and not the party with whom any third parties were contracting for the video distribution services. They also urge that defendant does not allege an expectancy of future contract rights, or any causation. They argue that he also fails to allege that UMW acted unlawfully or solely with the purpose to harm him. On the slander and defamation claims, UMW contends that the claims lack particularity, under CPLR 3016(a), and that the statements are not defamatory and are not false. Finally, UMW seeks dismissal of defendant's demand for attorneys' fees.

In opposition and in support of his cross motion to amend, defendant proposes an amended answer in which he includes allegations that he had business relationships with I Wonder Pictures and Movie Inspired as well as Eagle Pictures, and that "[u]pon information and belief," UMW's tortious interference was the reason he was not offered a contract with Eagle Pictures. He further alleges that other companies also withheld contracts, and that their names would be revealed in discovery (NYSCEF Doc. No. 24, counterclaims ¶¶ 29, 39-40).

On the defamation counterclaims, defendant now alleges there were three instances of false statements by UMW to defendant's business clients, and attaches two emails from UMW, both dated May 27, 2019 – one to I Wonder Pictures and one to Movie Inspired—which contained the identical statements:

As you already know, Nicola Allieta, [UMW's] commercial representative for Italy, abruptly left us. We wish to thank him for the work he has done these past 8 years, and especially to have maintained the relationship between our companies.

We also wished him all the best for his future professional adventures while also reminding him of the obligations by which he must abide given his contract of employment with [UMW]. He was clearly informed that these obligations remain fully active after the termination of his contract.

(NYSCEF Doc. No. 25).

Defendant asserts that, on May 1, 2019, UMW called his business contact and client Riccardo Sacchi, the Director of Home Video department at Eagle Pictures, telling him that defendant “was prohibited from speaking with or engaging in any business with Plaintiff's clients due to a written agreement between Plaintiff and Defendant which restricted his ability to compete with Plaintiff” (NYSCEF Doc. No. 24, counterclaims ¶28). Defendant adds that the email and oral statements are false in that he did not have any contract with UMW and no obligations that would restrict his ability to engage in business with the client; the statements were made with intent to interfere with his rights to freely engage in business; and they disparaged him and make him appear like a person who disregards contractual obligations or violates his legal obligations (NYSCEF Doc. No. 24, counterclaims ¶¶ 45-48). He further adds that the statements had a chilling effect on his ability to enter into contracts with clients (*id.*, counterclaims ¶49). Defendant

asserts that as a result of UMW's false statements he suffered lost business and contracts (*id.*, proposed answer, ¶¶ 59-60; *see also* ¶¶ 66-67, 74).

DISCUSSION

The motion to dismiss is granted, and the cross motion to amend is denied.

While leave to amend, pursuant to CPLR 3025(b), shall be freely granted absent prejudice or surprise, the court must examine the merit of the proposed amendment and deny amendment if it is palpably improper or insufficient as a matter of law (*see Joon Song v MHM Sponsors Co.*, 176 AD3d 572, 572 [1st Dept 2019] [motion to amend denied as futile where insufficient to state claim]; *State of N.Y. ex rel. Willcox v Credit Suisse Sec. (USA) LLC*, 140 AD3d 622, 623 [1st Dept 2016]; *JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1st Dept 2013]). Here, the court will analyze the proposed amendments to the counterclaims in connection with the motion to dismiss.

To sufficiently plead the first counterclaim for tortious interference with prospective business relations, defendant must allege that (1) he had business relations with a third party, (2) UMW interfered with those business relations, (3) UMW acted with the sole purpose of harming defendant or used unlawful means, and (4) there was a resulting injury to those business relations (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]; *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]).

Unlawful or wrongful means requires "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference

with the contract” (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]). To show wrongful means, the defendant generally must show that the plaintiff’s conduct “amount[ed] to a crime or an independent tort” (*Carvel Corp. v Noonan*, 3 NY3d at 190; *see Friedman v Coldwater Creek, Inc.*, 321 Fed Appx 58, 59 [2d Cir 2009]).

In the instant case, defendant has not alleged any facts suggesting that UMW used any unlawful means or undertook actions with the sole purpose of harming him. In fact, by defendant’s own allegations, UMW acted with the intent of benefitting its business relations with these companies with whom it had previously done business, that is, to economically benefit itself (*see Carvel Corp. v Noonan*, 3 NY3d at 190 [the theory that defendant acts with sole purpose of intentionally harming is not viable where “[i]t is undisputed that [the defendant’s] motive in interfering with the [plaintiffs’] relationships with their customers was normal economic self-interest”]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 624-625 [1996]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d at 108). So long as UMW was “motivated by legitimate economic self-interest,” there is no basis to assert the sole motive to harm, and it does not matter if the parties were competitors (*Carvel Corp. v Noonan*, 3 NY3d at 191; *Phillips v Carter*, 58 AD3d 528, 528 [1st Dept 2009] [motion to dismiss granted where no sole motive to harm; motive was self interest and other economic considerations]).

Defendant also fails to allege any facts to suggest that such actions by UMW in sending these e-mails to its own clients were criminal or independently tortious.

Defendant does not allege, in either the answer or proposed answer, that UMW used wrongful means. There are no allegations of a crime. To the extent that defendant seeks

to allege slander/defamation as the independently tortious behavior, as discussed below, those claims as alleged are insufficient as a matter of law (*see Phillips v Carter*, 58 AD3d at 528 [where complaint alleges defendant falsely told third party that plaintiff breached contract and “could not be trusted as contract partner,” no defamation because statement were either true or nonactionable opinion, and, thus, no tortious interference with prospective business relations]).

Further, defendant fails to substantiate how he was injured as a result of UMW’s alleged interference (*see Joon Song v MHM Sponsors Co.*, 176 AD3d at 572-573). Defendant does not allege in either answer any description of any future contract or actionable expectancy with the alleged third parties. His conclusory allegation in the proposed answer that “[u]pon information and belief” UMW’s interference was the reason Eagle Pictures and other companies did not offer a contract, does not satisfy his pleading obligation (*see* NYSCEF Doc. No. 24, counterclaims ¶39). Moreover, he admits that he is a consultant for Sweet Chili, and, therefore, he would not be entering into any contract with these third parties on his own behalf, but on Sweet Chili’s behalf, and does not have standing to assert such a claim (*see SageGroupAssoc., Inc. v Dominion Textile [USA]*, 244 AD2d 281, 282 [1st Dept 1997] [broker lacks standing to assert tortious interference claim regardless of whether landlord knew of brokerage agreement with prospective sublessor]; *Maruki, Inc. v Lefrak Fifth Ave. Corp.*, 161 AD2d 264, 268 [1st Dept 1990] [broker is stranger to contract with third party and cannot recover for tortious interference with contract]). The fact that his earnings depend on his ability to generate business for Sweet Chili does not make him an intended beneficiary of any

contract between Sweet Chili and Eagle Pictures, Movie Inspired, or I Wonder Pictures (see *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 306-307 [1st Dept 2003]; *Bogan v Northwestern Mut. Life Ins. Co.*, 292 AD2d 411, 412 [2d Dept 2002]).

Defendant's conclusory allegations about a potential relationship with those third parties is insufficient to support a tortious interference with prospective business relations claim (see *Shawe v Kramer Levin Naftalis & Frankel LLP*, 167 AD3d 481, 483 [1st Dept 2018]; *RSSM CPA LLP v Bell*, 162 AD3d 554, 555 [1st Dept 2018] [no showing that but for defendant's tortious interference plaintiff would have entered into relationships with potential clients or unidentified third parties]). Defendant's vague assertions of potential contracts with third parties that will be uncovered in discovery also fail to satisfy his pleading burden. Therefore, the first counterclaim is dismissed.

The two remaining counterclaims for slander per se and defamation per se also are insufficient as a matter of law. In a defamation action, CPLR 3016(a) requires that the particular words be set forth in the pleading, as well as the time, place, and manner of the false statement and to whom it was made (see *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Defamation is defined as "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks and citations omitted]). To state such a claim, a plaintiff must allege: "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of

publications actionable regardless of harm” (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]).

In analyzing a motion to dismiss a defamation claim, “the court must decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury” (*id.* [internal quotation marks and citation omitted]). The language of the statements must be given “a fair reading in the context of the publication as a whole” (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995] [citation omitted]), “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 at 38). Courts have considerable discretion in deciding if statements are defamatory (*see Steinhilber v Alphonse*, 68 NY2d 283, 291-292 [1986]). “Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable” (*Dillon v City of New York*, 261 AD2d at 38). Statements are defamation per se if they charge someone with a serious crime or tend to injure the plaintiff in his business or profession (*Meer Enters., LLC v Kocak*, 173 AD3d 629, 631 [1st Dept 2019] [statement may be defamation per se if it impugns plaintiff’s reputation in trade, business, profession]).

To assert defamation regarding one’s business or profession, the statement must charge the plaintiff with conduct incompatible with the proper conduct of business, including being incompetent or incapable in the trade, business or profession (*see Liberman v Gelstein*, 80 NY2d 429, 436 [1992]). “Reputational injury to a person’s

business, or to a company, consists of a statement that either imputes some form of fraud or misconduct or a general unfitness, incapacity, or inability to perform one's duties" (*Jacobus v Trump*, 55 Misc 3d 470, 480 [Sup Ct, NY County 2017], *affd* 156 AD3d 452, 453 [1st Dept 2017] [internal quotation marks and citation omitted]). It requires the words to be more than a general reflection of the person's qualities or character—it need be incompatible with the proper conduct of his or her business or reflect on performance (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]), and involves a "matter of significance and importance for that purpose" (*Lieberman v Gelstein*, 80 NY2d at 436 [citation omitted]; *see also Gentile v Grand St. Med. Assoc.*, 79 AD3d 1351, 1353-1354 [3d Dept 2010] [statements that "do not want to work," or "hold jobs," and simply "want to make easy money" did not relate to matter of significance and importance in plaintiff's profession]).

The statements by UMW in the emails to I Wonder Pictures and Movie Inspired about the existence of a prior employment contract between UMW and defendant and that UMW reminded him that he had obligations thereunder, would not subject defendant to ridicule or aversion in the minds of right-thinking persons. Even if the statements are false, the words are not subject to a defamatory meaning. They do not impugn his reputation in his business, nor do they indicate that he is incompetent in his profession, or even imply that he has engaged in inappropriate conduct. The mere fact that he left UMW's employ, which is true, and had continuing contractual obligations that UMW states it had reminded him of, which defendant states is false, does not disparage him in his professional capacity. The statements in the emails are not the kind that would be

incompatible with the proper conduct of his business or attack his abilities or professional competency (*Aronson v Wiersma*, 65 NY2d 592, 594 [1985]; see *Coe v Town of Conklin*, 94 AD3d 1197, 1199-1200 [3d Dept 2012]).

Similarly, the allegations regarding the alleged oral statement to Sacchi of Eagle Pictures that defendant “was prohibited from speaking with or engaging in any business with [UMW’s] clients due to a written agreement between [UMW] and Defendant which restricted his ability to compete with [UMW]” (NYSCEF Doc. No. 17, counterclaims ¶28), does not indicate that defendant is incompetent, or impugn his reputation, and is not a “defamation of a kind incompatible with the proper conduct . . . of [his] business” (see *Aronson v Wiersma*, 65 NY2d at 594 [internal quotation marks and citation omitted]). It does not suggest improper performance of one’s professional duties or unprofessional conduct, or cast doubt on a specific quality at the very heart of his profession (see *161 Ludlow Food, LLC v L.E.S. Dwellers, Inc.*, 176 AD3d 434, 435 [1st Dept 2019] [claim dismissed where plaintiff failed to state how statements harmed reputation, business standing or corporate integrity]; *Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 39 [1st Dept 2011] [no meritorious defamation claim where no business reputation or credit standing harmed]; *Cardali v Slater*, 56 Misc 3d 1003, 1015 [Sup Ct, NY County 2017] [former employee’s statement that former employer was common criminal was not defamation per se]; see also *Spring v County of Monroe*, 151 AD3d 1694, 1697 [4th Dept 2017] [defamation where statement imputed incompetence or dishonesty in plaintiff’s trade or profession]; *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d at 48 [where

statement impugned creditworthiness of a business (insolvency) and its basic integrity (dishonesty), then defamation is sufficiently pled]).

Whether defendant is subject to a non-compete provision from a former employer is no reflection on his fitness to perform as a video distribution consultant (*see Liberman v Gelstein*, 80 NY2d at 436; *Kforce, Inc. v Alden Personnel, Inc.*, 288 F Supp 2d 513, 516-517 [SD NY 2003] [statement about unprofitability or lack of success in particular area is not incompatible with the proper conduct of the business, trade or profession]). The statement fails to impute fraud, dishonesty, misconduct, incapacity or unfitness (*see Four Star Stage Light. v Merrick*, 56 AD2d 767, 768 [1st Dept 1977]). In looking at the context, the court notes that the third party, Eagle Pictures, was aware that UMW was competing with Sweet Chili for Eagle Pictures' business, and was economically motivated to keep this client. In addition, while there is a general rule that words that disparage a person in his trade or business are defamation per se, there is a "single instance" exception in which a statement charging a person with a single dereliction, i.e. violating a non-compete, in connection with his business, trade or profession does not necessarily charge that person with ignorance, incompetence, or misconduct (*Muhlhahn v Goldman*, 93 AD3d 418, 419 [1st Dept 2012]; *Bowes v Magna Concepts*, 166 AD2d 347, 347-348 [1st Dept 1990]).

To the extent that defendant urges the statement is defamation by implication, that argument is unavailing. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*Armstrong v Simon & Schuster*, 85 NY2d at 380-381 [internal quotation

marks and citation omitted)). He fails to clarify what statements were true which then created false impressions. Rather, the counterclaims are a straightforward allegation of false statements of fact, but fail to meet the requirements for defamation per se.

On the demand in the counterclaims for attorneys' fees, there is no basis for such relief. The request for punitive damages is dismissed because the counterclaims are dismissed. To the extent that defendant urges that the demand is appropriate to deter any frivolous litigation by plaintiff (see 22 NYCRR 130-1.1), the argument is unpersuasive. Defendant has not alleged any basis for sanctions.

Accordingly, it is

ORDERED that plaintiff's motion sequence number 002 to dismiss defendant's counterclaims is granted, and the counterclaims and the demand for attorneys' fees in the answer are dismissed; and it is further

ORDERED that defendant's cross motion for leave to amend the answer is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/20/2020
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE