Meckel v Quality Bldg. Servs., Corp.
2020 NY Slip Op 32821(U)
August 27, 2020
Supreme Court, New York County
Docket Number: 160975/2019
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE**, *Justice* — **PART** **IAS MOTION 12EFM**

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RANDALL MECKEL,

Plaintiff,

- v -

QUALITY BUILDING SERVICES, CORP., MIRJANA MIRJANIC,

Defendants.

---X

INDEX NO. 160975/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5-13, 15, 16 were read on this motion to dismiss.

By notice of motion, defendants move pursuant to CPLR 3211(a)(7) for an order dismissing the complaint. Plaintiff opposes.

I. VERIFIED COMPLAINT (NYSCEF 7)

By summons and verified complaint dated November 11, 2019, plaintiff alleges that he, the former director of construction and management services for a nonparty managing agent, was responsible for overseeing the bidding process for cleaning contracts in its buildings. In spring 2018, one of those buildings, 400 Madison Avenue in Manhattan, changed ownership. Defendant Quality Building Services, Corp. (QBS), owned by defendant Mirjanic, had been under contract to provide cleaning services for the building since 1998, and at the time of the ownership change, QBS managed four union cleaners at the building, paid by the managing agent.

The managing agent sought to continue as the building manager and during the bidding process for the management contract for the new owner, plaintiff identified approximately

$65,000 worth of savings from the current QBS contract.

In October 2018, 400 Madison's new owner awarded the contract to the managing agent, which required a formal competitive bidding process for the cleaning contract. QBS was one of the companies bidding.

On November 29, 2018, Mirjanic emailed plaintiff, his supervisor, and human resources manager as follows:

> I am very disappointed with what took place at 610 Broadway. You have asked me to remove 2 cleaners and place them in different QBS buildings. Based on our longstanding relationship, I have done that despite the fact that this move is costing QBS the contract at 610 Broadway and $74,000 over two years (QBS had to bump two junior cleaners to replace them with two senior cleaners). Now I understand that there is a new cleaning company with a union contract, so that company should take the former building cleaners, effective December 3, 2018.
>
> First, the Union was very upset with me and QBS for placing [the] 2 cleaners in different buildings and that they did not support the Union in picketing the building and its fight against you. Now QBS looks bad again that 610 Broadway is going to have a union contractor again, but without the two cleaners who are entitled to the positions.
>
> I also learned today that the 2 cleaners that worked at 610 Broadway also learned this information and that they are filing charges in labor department against QBS, [the managing agent] and ownership of the building.
>
> I am at the point that I no longer can deal with [plaintiff's] agenda, personal interests, unprofessional conduct, manipulation and misrepresentation of information, and him simply either not having the best interests of [the managing agent] in mind or not knowing the business. This is exposing QBS, [they managing agent] and Ownership to legal fees and liabilities as we try to help you with what looked like legitimate concerns, but is just [plaintiff's] unfair scheme.
>
> I have demonstrated my commitment to [the managing agent] every day for past 30 years. I will continue to do so every day. Today, I need you or Maria to step in and deal with this complicated, insane situation.
>
> 400 Madison
>
> At this time I would like to remind you when [plaintiff] canceled my window cleaning contract at 400 Madison (mostly for me not wanting to expose [the managing agent] and QBS by cleaning windows using a Boston chair, which is not legal and if an accident was to happen we would be all over newspapers). I informed you at the time all that AQS (the company that [plaintiff] awarded the contract) does not have a union agreement for

window cleaners. My understanding is that not only that AQS did not have window cleaning agreement then, they don't have one now. At that time we all clearly did know that all contractors at 400 Madison should be union. These sorts of actions make the Union focus on this building and the other [the managing agent] and QBS buildings. I am also concern and you should verify if they have window cleaning insurance.

The problem and agenda did not stop with window cleaning. After [plaintiff] gave AQS the window cleaning contract, he also gave them metal, marble, pressure-washing and carpet cleaning contracts. I understand there was no bid. He was simply taking away my contract and feeding the same company that is providing services with non-union labor with prices as if the company had a union contract.

156 William

AQS has taken over the contracts at 156 William for windows and snow removal. I do not believe that the contracts were bid. Again, the work was just taken from me and headed to AQS.

I have said it before and I believe that [plaintiff] does not understand pricing or business. I can say with confidence that if you question him you will confirm yourself.

[Plaintiff] operates from personal agenda and wants his friends in the job and not companies that he can't manipulate, which are companies committed to [the managing agent].

For past 30 years I been servicing [the managing agent's] accounts, dealt with unions, hurricanes, floods, fires, black outs, strikes, difficult tenants, many managers, and different leaders that were in your job. No matter what challenge was, I dealt with it and provided the highest level of service. I continue to be ready to do this, but I believe that the way things are being handled, you will not have the same support and service.

Please remember that when GM was purchased, we eliminated 15 cleaners in 4 weeks to create savings. Your building always operated at the highest level of efficiency in regards to productivity and the highest level of service. We have demonstrated integrity, credibility and loyalty every minute of every day and we did this because we are committed to [the managing agent] as [the managing agent] has been supportive of QBS.

At this time I am asking that you please step in and deal with [plaintiff] and his actions. There is, of course, my interest in protecting my contracts, but also my interest in protecting [the managing agent].

General concern

I am very concerned about [plaintiff's] misrepresentations and manipulation of costs relating to bids. I think this is due to his apparent personal agenda and relationship with vendors or his not understanding the business. And based on my understanding, his habit is to represent one price as a bid and approving "additional charges" to make up for a discounted bid.

> I request that each time pricing is provided where QBS is included in the bid that someone qualified and senior oversees the process. I think that this will preserve the integrity of the process so that management can be better assured that it will get the services promised at the pricing offered. Where the bidding process is unprofessional, contractors either decline to bid or cannot bid properly. Either way, [the managing agent] loses.
>
> The email below is only one more example of [plaintiff's] approach and conduct.

Thereafter, plaintiff held multiple meetings with his supervisor, human resources, the the managing agent's general counsel, and others to discuss the email and QBS's performance. QBS initially submitted a bid on the contract, but then withdrew it. Outside of the formal bidding process and in plaintiff's absence, Mirjanic later held a meeting with plaintiff's supervisor, human resources, and the managing agent's general counsel. She thereafter resubmitted a bid.

A bidding process for the security contract at 400 Madison was also underway in 2019, and nonparty Quality Protection Services (QPS), also owned by Mirjanic and the provider of security services at the time, bid for the contract. Due to the issues with the cleaning contract bidding process, the managing agent engaged a third party to oversee the security contract bidding process.

On October 25, 2019, the managing agent fired plaintiff.

Accordingly, plaintiff alleges that defendants tortiously interfered with his employment with the managing agent, and as a result, in 2019, for the first time in his tenure there he did not receive a raise, and his year-end bonus that year was two-thirds less than that received in prior years. And, after he was fired, plaintiff lost his $200,000 salary. He also claims damage to his professional reputation and advances causes of action of trade libel/injurious falsehood and *prima facie* tort, alleging that "various statements" were false and that Mirjanic sent the email with the sole intent of getting plaintiff fired.

II. CONTENTIONS

A. Defendants (NYSCEF 5-9)

Defendants contend that having reproduced Mirjanic's email in its entirety, plaintiff fails to identify the injurious words or statements within it that he alleges are defamatory with the particularity required by CPLR 3016. Even had he done so, they claim, the statements are non-actionable opinions or are substantially true. In support, defendants submit an email exchange between plaintiff and Mirjanic (NYSCEF 8), which they assert establishes that the allegedly defamatory statements are based on fact. Moreover, as the statements were made in the context of a labor dispute, defendants argue that the statements concern an employee's performance, which are not actionable.

Plaintiff's claim for injurious falsehood should be dismissed, defendants argue, because he fails to plead special damages, and to the extent that he claims a reduction in his annual bonus or salary, his allegations are not itemized. Moreover, the alleged connection between the email and plaintiff's firing is too conclusory to state a claim. Defendants observe that plaintiff was an at-will employee who could be fired for any reason at any time.

According to defendants, plaintiff's cause of action for tortious interference and *prima facie* tort are duplicative of his injurious falsehood claim, and thus, should be dismissed. Moreover, his cause of action for tortious interference must be dismissed because Mirjanic did not act with the sole purpose of harming plaintiff or by wrongful means, as her emails demonstrate that she was motivated, at least in part, by defendants' economic desire to preserve its contracts and business with the managing agent. Even if plaintiff was not an at-will employee, defendants contend that he cannot claim tortious interference with prospective employers absent an allegation that he was denied employment by a specific employer due to Mirjanic's email.

Defendants maintain that plaintiff's *prima facie* tort claim must be dismissed absent a plausible allegation that defendants acted solely out of malice, and he fails to allege special damages.

<u>B. Plaintiff (NYSCEF 13)</u>

Plaintiff contends that the allegations supporting his cause of action for defamation are sufficiently particular, observing that he included the email in the complaint and specified the date and time the email was sent, as well as the recipients of it. According to him, the entire email is necessary, as it puts Mirjanic's statements in context, but he highlights "some" examples of libelous statements in the email:

> I am at the point that I no longer can deal with [plaintiff's] agenda, personal interests, unprofessional conduct, manipulation and misrepresentation of information, and him simply either not having the best interests of [the managing agent] in mind or not knowing the business. This is exposing QBS, [the managing agent] and Ownership to legal fees and liabilities as we try to help you with what looked like legitimate concerns, but is just [plaintiff's] unfair scheme.
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discounted bid.

...

The email below is only one more example of [plaintiff's] approach and conduct.

Plaintiff argues that the email supports the claim that defendant knowingly published the statements with the hope and expectation that he would be fired by the managing agent.

At this stage of the litigation, plaintiff maintains that his defamation claim must be sustained if the statement may have a defamatory connotation and even if there are competing interpretations of it. He denies that Mirjanic's statements constitute opinion, asserts that they are of mixed opinion, and seeks leave to amend his complaint if it is dismissed for a pleading deficiency.

Plaintiff maintains that his *prima facie* tort and tortious interference claims may be pleaded in the alternative, and thus should not be dismissed. And, as the defamation claim is valid, so too are his other claims. He argues that he sufficiently alleges that defendants were motivated solely by the desire to injure him, and that Mirjanic's unlawful statements are considered unlawful means. He contends that he pleads special damages as he was terminated from his job and was earning $200,000 a year, and that he is damaged in his professional reputation. In any event, plaintiff claims entitlement to discovery on the issue.

C. Reply (NYSCEF 16)

Defendants contend that plaintiff cannot attempt to particularize his pleadings in his memorandum of law and that he is not entitled to leave to amend absent a motion, a proposed amended complaint, and an explanation of his proposed amendments. They deny that plaintiff's tortious interference and *prima facie* tort claims may be pleaded in the alternative, and maintain that plaintiff is not entitled to discovery as to special damages absent a cross motion, an affidavit

supporting the need for discovery, and an explanation as to which facts are unresolved.

III. ANALYSIS

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must construe the pleading liberally, accept the facts alleged to be true, and afford the plaintiff "the benefit of every possible favorable inference." (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co., 5* NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A. Trade libel/injurious falsehood

To state a claim for trade libel or injurious falsehood, the plaintiff must allege "the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment," and special damages, "in the form of actual lost dealings." (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010]).

Pursuant to CPLR 3016(a), when pleading a cause of action for libel, one must set forth "the particular words" used. Although in some instances attaching an entire publication is sufficient, Mirjanic's email is lengthy, and it is not readily apparent which statements are alleged to be false and defamatory. (*Compare Pappalardo v Westchester Rockland Newspapers*, 101 AD2d 830, 830 [2d Dept 1984], *affd* 64 NY2d 862 [1985] [attachment of entire allegedly

defamatory article sufficient where "the alleged libelous material can be easily located" and the article's references to the plaintiff were "widespread and consistent"]; *with Freeze Right Refrigeration & Air Conditioning Servs., Inc. v City of New York*, 101 AD2d 175, 178 [1st Dept 1984] [attachment of entire article insufficient where the plaintiff "failed to set forth the particular words complaint of"]). While plaintiff is referenced throughout the email, his conclusory allegation that "various statements" within the email are false is insufficient, as it is not for the court "to pick out and isolate particular phrases." (*Tellier-Wolfe v Viacom Broad. Inc.*, 134 AD2d 860 [4th Dept 1987]). Although in his opposition, plaintiff lists excerpts from the email that he claims are libelous, he maintains that those are only "some" of the statements which form the basis of his claim. Absent specification as to which statements are allegedly defamatory, plaintiff's complaint is insufficiently particular to withstand dismissal.

As it is unclear which statements are allegedly libelous, whether the statements are non-actionable opinion and caused him special damages is not addressed.

Nevertheless, Mirjanic's email is sufficient evidence that it contains statements that may be sufficient to state a trade libel claim. As such, leave to replead is appropriate. (*See Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 693 [2d Dept 2007] [granting leave to replead libel claim where complaint failed to comply with pleading requirement of CPLR 3016]; *see also Elliman v Elliman*, 259 AD2d 341, 341 [1st Dept 1999] [granting leave to replead despite plaintiffs' failure to request leave in their opposition]).

B. Tortious interference

To state a claim for tortious interference with at-will employment, a plaintiff must allege, among other things, that the defendant used wrongful means to harm the plaintiff or acted for the sole purpose of causing such harm. (*See Snyder v Sony Music Entm't, Inc.*, 252 AD2d 294, 299–

300 [1st Dept 1999] [where employment at-will, plaintiff must also allege that wrongful means were employed or that defendant acted for sole purpose of harming plaintiff]). Wrongful means are those which "amount to a crime or an independent tort" (*Lawrence v Union of Orthodox Jewish Congregations of Am.*, 32 AD3d 304, 304 [1st Dept 2006], quoting *Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]), but does not "include persuasion alone," even if directed at interference with plaintiff's contractual relations (*Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]).

Plaintiff's sole allegation of wrongful means is the alleged defamatory email, but having failed as of yet to state a claim for trade libel, he fails to allege wrongful means. In the event that Mirjanic's email is sufficient to state a claim for trade libel, plaintiff's cause of action for tortious interference claim is duplicative of his cause of action for defamation. (*See Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014], *lv denied* 25 NY3d 915 [2015] [dismissing tortious interference claim as duplicative of defamation claim where no new facts alleged and no distinct damages sought from defamation claim]).

In addition, plaintiff fails to allege facts demonstrating that defendants acted for the sole purpose of harming plaintiff, especially in light of Mirjanic's statement in the email that she acted out of her interest in protecting her contract with the managing agent.

C. *Prima facie* tort

To state a claim for *prima facie* tort, plaintiff must allege, among other things, "(1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]), and that defendants' sole motive for their otherwise lawful act was "disinterested malevolence." (*Burns Jackson Miller Summit &*

Spitzer v Lindner, 59 NY2d 314, 333 [1983]).

Plaintiff alleges no facts demonstrating that defendants acted solely out of disinterested malevolence, and moreover, plaintiff's *prima facie* tort claim is based on the same allegations as his libel claim and is thus duplicative. (*See Holt v Columbia Broad. Sys., Inc.*, 22 AD2d 791, 791 [2d Dept 1964] [dismissing *prima facie* tort claim as duplicative of libel claim, especially as plaintiff given leave to replead libel claim]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent that plaintiff's claims for tortious interference and *prima facie* tort are severed and dismissed; and it is further

ORDERED, that plaintiff's claim for trade libel is dismissed with leave to replead within 30 day of the entry of this order.

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8/27/2020
DATE | **BARBARA JAFFE, J.S.C.**

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**