

<b>Bass v Vogel</b>
2020 NY Slip Op 35270(U)
November 13, 2020
Supreme Court, Nassau County
Docket Number: Index No. 604087/2020
Judge: Leonard D. Steinman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
STUART BASS,

Plaintiff,

-against-

IAS Part 12  
Index No. 604087/2020  
Motion Seq. No. 001

DECISION AND ORDER

GLENN VOGEL and MARIAM CHUBINIDZHE,

Defendants.

-----X  
LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Plaintiff's Notice of Motion, Affirmation & Exhibits.....	1
Defendants' Affirmation in Opposition & Exhibits.....	2
Plaintiff's Reply Affirmation.....	3

In this action, plaintiff Stuart Bass, a Hofstra University professor, alleges that he was defamed by another Hofstra professor, defendant Glenn Vogel, and a former Hofstra student, Mariam Chubinidzhe. The defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(7) on the grounds that the complaint fails to properly detail the alleged defamatory statement(s) and because the defendants' actions, in all events, were shielded by the "common interest" privilege. For the reasons set forth below, the motion is denied.

**THE COMPLAINT'S ALLEGATIONS**

The complaint's material allegations are as follows:

Bass and Vogel are both Professors of Legal Studies at Hofstra's business school. Bass has taught multiple "double-section" classes—*i.e.*, classes attended by more than 55 students—which are highly coveted by the faculty because the remuneration for teaching such classes is higher than teaching a standard class size. Vogel desired to teach such

classes, but was not assigned any. Vogel resented Bass as a result, and bad-mouthed him to students, including Chubinidzhe (a Hofstra undergraduate alumnus and Hofstra law student), with the intent to cause the students to complain about Bass so that Bass would no longer receive the coveted assignments. Among the statements Vogel made to students was that Bass was arrested for DUI, lost his license, and therefore had a student drive him to and from the school's campus. This statement was made to Chubinidzhe on or about August 28, 2019.

Chubinidzhe then sent an email to the Dean of the business school the next day, August 29, which, among other things, repeated the accusation concerning Bass' driver's license and that Bass had a student drive him to and from school. Chubinidzhe also accused Bass of canceling classes on a regular basis, ending most classes early and of being late to every class, notwithstanding that he was never her professor. Chubinidzhe also complained that Bass was assigned to teach larger sections instead of other "more dynamic and professional instructors." The exact relationship between Vogel and Chubinidzhe is unclear from the pleading.

### LEGAL ANALYSIS

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and accord ... the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001); *see People ex rel. Cuomo v. Coventry First LLC*, 13 N.Y.3d 108 (2009); *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 (2001).

Notably, on a motion to dismiss, a party is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint. *See Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 (2d Dept. 2002); *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 (2d Dept. 1989). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372 (2d Dept. 2006). "In assessing a motion under CPLR 3211(a)(7) ... a court may freely

consider affidavits submitted by the plaintiff to remedy any defects in the complaint” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *see also Uzzle v. Nunzie Court Homeowners Ass’n, Inc.*, 70 A.D.3d 928 (2d Dept. 2010).

Although defendants complain that Bass has failed to properly particularize the defamatory statements as required by CPLR 3016(a), they are mistaken. Bass has specified that defendants falsely stated that he had a student drive him to and from class because Bass lost his license as a result of a DUI arrest and further identifies when the statements took place and to whom (Vogel: to at least Chubinidzhe on August 28, 2019; Chubinidzhe: to the Dean in an email on August 29). The allegations adequately give notice to defendants of the occurrences intended to be proven and pleads all of the elements of defamation. *Cablevision Systems Corp. v. Communication Workers of America District 1*, 131 A.D.3d 1082 (2d Dept. 2015).

Defendants’ argument that the complaint must be dismissed because defendants were protected by the “common interest” privilege might ultimately prove to be correct, but is premature at this juncture given the complaint’s allegations. *See Garcia v. Puccio*, 17 A.D.3d 199 (1st Dept. 2005).

A qualified privilege extends to a communication made by one person to another upon a subject in which both have an interest. *Lieberman v. Gelstein*, 80 N.Y.2d 429, 437 (1992); *Udeogalanya v. Kihó*, 169 A.D.3d 957 (2d Dept. 2019). A communication, even though defamatory, may be privileged if it “is fairly 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.” *Toker v. Pollak*, 44 N.Y.2d 211, 219 (1978), quoting *Lovell Co. v. Houghton*, 116 N.Y. 520, 526 (1889). The privilege does not apply where the plaintiff can demonstrate that the communication was not made in good faith, but was motivated solely by either common law malice—spite or ill-will—or “constitutional malice,” *i.e.*, with knowledge that the statement is false or with reckless disregard of the truth. *Kamchi v. Weissman*, 125 A.D.3d 142 (2d Dept. 2014).

Arguably, Vogel, Chubinidzhe and the Dean all had a common interest in upholding the academic reputation and the integrity of the business school. *See Udeogalanya v. Kiho*, 169 A.D.3d at 959-60. But whether the common interest privilege applies to statements made to and by Chubinidzhe, who was a *former* student of the business school, is a closer question. *See Acosta v. Vataj*, 170 A.D.2d 348 (1st Dept. 1991)(qualified privilege defense usually presents a jury question). The court need not reach this issue because it is sufficiently alleged in the complaint that defendants made the statements with malice. Bass alleges that defendants' actions were motivated by spite, jealousy and self-interest, not out of concern for the school. Bass has no evidentiary burden to support his allegations in opposition to a motion to dismiss pursuant to CPLR 3211(a)(7). *Kamchi v. Weissman*, 125 A.D.3d at 159; *see also Fletcher v. Dakota, Inc.*, 99 A.D.3d 43 (1st Dept. 2012)(courts should not "give conclusive effect to defendants' position of qualified privilege before any affirmative defense to that effect was raised in a responsive pleading"); *Garcia v. Puccio*, 17 A.D.3d at 201 (same); *Acosta v. Vataj*, 170 A.D.2d at 348, 349 (same).<sup>1</sup>

For all of the foregoing reasons, the motion is denied. Any relief requested not specifically addressed herein is denied.

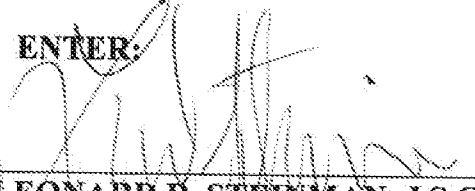
This constitutes the Decision and Order of this court.

Dated: November 13, 2020  
Mineola, New York

**ENTERED**

**Nov 23 2020**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

ENTER:  
  
LEONARD D. STEINMAN, J.S.C.

<sup>1</sup> It appears that the First and Second Departments may hold different views as to the propriety of dismissing defamation claims pursuant to CPLR 3211(a)(7) on the basis of an asserted qualified privilege. *See, e.g., Melis v. Wickler*, 185 A.D.3d 917 (2d Dept. 2020)(dismissing action); *Hame v. Lawson*, 70 A.D.3d 640 (2d Dept. 2010)(same) and compare to *Fletcher*, *Garcia* and *Acosta*, cited above. Whether there is a split in the departments in this regard is not material here given Bass' sufficient allegations of malice.