

Meckel v Quality Bldg. Servs., Corp.
2021 NY Slip Op 30865(U)
March 19, 2021
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**

<p>PRESENT: <u>HON. BARBARA JAFFE</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>RANDALL MECKEL,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p>	<p>PART</p>	<p>IAS MOTION 12</p> <p>INDEX NO. <u>160975/2019</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>002</u></p>
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QUALITY BUILDING SERVICES, CORP.,
MIRJANA MIRJANIC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23-34 were read on this motion to dismiss.

Defendants move pursuant CPLR 3211(a)(7) for an order dismissing the second amended complaint.

I. SECOND AMENDED COMPLAINT (NYSCEF 26)

Plaintiff was the director of construction and management services for non-party Macklowe Management, LLC (Macklowe). Defendant Mirjanic is the owner and chief executive of defendant Quality Building Services, Corp. (QBS), which had a contract to maintain buildings managed by Macklowe for some 20 years. In the spring of 2018, pending the sale of a building managed by Macklowe and serviced by QBS, and as part of its due diligence and in anticipation of renewing Macklowe's management contract under the new ownership, plaintiff notified the prospective new owners of discrepancies in QBS's payroll. In October 2018, after the closing of the sale of the building and renewal of Macklowe's management contract, plaintiff oversaw a competitive bidding process for the cleaning contract.

By email dated November 29, 2018, Mirjanic wrote to plaintiff's supervisor and the

human resources manager at Macklowe, in pertinent part, as follows:

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 Macklowe in mind or not knowing the business. This is exposing QBS, Macklowe 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 said it before had 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 Macklowe.

...

At this time I am asking that you please step in and deal with [plaintiff] and his actions.

...

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 approve 'additional charges' to make up for a discounted bid.

On October 25, 2019, after a series of meetings between plaintiff and his supervisors concerning defendants' complaints, and after transferring management of the bidding process for the building's security services to another employee, Macklowe fired plaintiff.

Plaintiff advances causes of action against Mirjanic and QBS for trade libel/injurious falsehood based on Mirjanic's email, and seeks damages in the amount of his lost annual salary of \$200,000 and the regular contributions previously made by Macklowe for his health insurance, life insurance, 401(k), and long-term disability benefits.

II. PROCEDURAL BACKGROUND

By decision and order dated August 27, 2020, defendants' motion to dismiss was granted to the extent that plaintiff's causes of action for tortious interference and *prima facie* tort were dismissed and severed, and his cause of action for trade libel was dismissed with leave to replead. (NYSCEF 17). He timely filed repleaded his cause of action for trade libel in his second amended complaint. (NYSCEF 21).

III. CONTENTIONS

Defendants contend that as Mirjanic's statements are non-actionable opinions made in the heated context of an employment dispute, plaintiff fails to state a cause of action for trade libel/injurious falsehood, and they rely on their legitimate economic interest in protecting their contracts with Macklowe in maintaining that the statements are, in any event, protected by the common interest privilege. Moreover, defendants argue, plaintiff fails to allege special damages by providing only round numbers or no numbers for each alleged economic harm and sets forth no plausible causal link between Mirjanic's email and plaintiff's termination from his job a year later. (NYSCEF 29, 34).

Plaintiff asserts that Mirjanic's email includes falsehoods and derogatory statements intended to convince Macklowe to fire him and to induce others not to do business with him, and that it constitutes a substantial factor in his termination and inability to obtaining other employment. He argues that defendant's statements were motivated by common-law malice and are thus not privileged. And, as the statements impugn his professional reputation, plaintiff maintains that they constitute libel *per se*, and thus he need not plead special damages. Otherwise, he denies that the damages set forth in his complaint fail to satisfy the special damages requirement for trade libel. (NYSCEF 31).

IV. DISCUSSION

“In assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint 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] quoting *AG Capital Funding Partners LP v State St Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). “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]).

For trade libel/injurious falsehood claims, the standard is no different. Thus, “[i]f, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action.” (*Davis v Boenheim*, 24 NY3d 262, 268 [2014], quoting *Silsdorf v Levine*, 59 NY2d 8, 12 [1983]).

To state a cause of action for trade libel/injurious falsehood, plaintiff must allege specific unprivileged statements made by the defendant about the plaintiff’s business which are reasonably susceptible of defamatory meaning and are “calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment.” (*Banco Popular N Am v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010]). Unless the contested statements are defamatory *per se*, in which case harm is presumed, the plaintiff must also allege specific pecuniary damages in the form of actual losses incurred as a result of the alleged libelous statements. (*Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]).

Plaintiff does not dispute that Mirjanic’s statements concern a work-related common interest between contractual partners. (NYSCEF 29, 31).

The rationale for the common interest privilege is that absent abuse of the privilege, communications among those sharing a common interest should not be impeded. (*Lieberman*, at 437). A malicious statement that is not made in furtherance of the common interest is not privileged. (*Frechtman v Gutterman*, 115 AD3d 102, 107–08 [1st Dept 2014]). A malicious statement, one made with “actual malice,” is made “with knowledge that it was false or with reckless disregard of whether it was false or not” (*New York Times v Sullivan*, 376 US 254, 280), whereas a statement made with common-law malice is one based solely on “spite or ill will” (*Lieberman*, at 437).

Once a defendant raises the common interest privilege, the plaintiff must allege malice, common-law or actual, to withstand dismissal, which allegation must be more than conclusory. (*O’Neill v New York Univ.*, 97 AD3d 199, 213 [1st Dept 2012]).

Here, plaintiff alleges that Mirjanic’s email was motivated by common-law malice, having made the statements with the intention of damaging plaintiff’s professional reputation and **dissuading** others from doing business with him. If, however, her statements “were made to further the interest protected by the privilege, it matters not that defendant *also* despised plaintiff.” (*Lieberman* at 439 [emphasis in original]; *Soames v 2LS Consulting Eng’g, D.P.C.*, 187 AD3d 490 [1st Dept 2020] [to overcome privilege, plaintiff must allege that malice was “sole motivation” behind statements]). Consequently, a triable issue is raised only if a jury could reasonably conclude that “malice was the one and only cause for the publication.” (*Lieberman*, at 439, quoting *Stukuls v State of New York*, 42 NY2d 272, 281-82 [1977]).

In *Lieberman*, a statement made by one tenant association board member to another expressing a suspicion that the plaintiff-landlord had bribed the police was held to be privileged by the parties’ common interest notwithstanding the speaker’s uncertainty as to the truth of the

claim and his well-documented dislike of the plaintiff-landlord. (*Id.*). The Court held that neither actual nor common-law malice were alleged, as the defendant, who did not share his suspicions publicly, shared a common interest in the building’s operations with his fellow board member, who had the power to investigate. (*Id.* at 439).

Likewise, here, while plaintiff alleges that defendants harbored an intent to harm his professional reputation, he neither alleges that it was the sole motivation for Murjanic’s email and, in any event, the email reflects defendants’ economic interest in preserving QBS’s contracts with Macklowe. Consequently, defendants demonstrate that Murjanic’s email is privileged, and the parties’ remaining contentions need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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BARBARA JAFFE, J.S.C.

3/19/2021
DATE

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<input type="checkbox"/>	NON-FINAL DISPOSITION		
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