SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**

Justice

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GERARD GARDNER,

Plaintiff,

- v -

GOTHAM PER DIEM, INC. and ARIONN J. COPELAND personally and ARIONN J. COPELAND in her professional capacity as a Licensed Practical Nurse,

Defendants.

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INDEX NO. 100710/2016

MOTION DATE

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 7-21, 41, 43, 46, 48-68, 70, 72, 74, 76-94, 114

were read on this motion to dismiss.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 22-40, 42, 44-47, 69, 71, 73, 75, 95-113, 115

were read on this motion for summary judgment.

In this action to, *inter alia,* recover damages for defamation, defendant Copeland moves pursuant to CPLR 3212 for an order granting her summary judgment dismissing the complaint as against her (mot. seq. 007) and defendant Gotham moves pursuant to CPLR 3212 for an order granting it summary judgment dismissing the complaint as against it (mot. seq. 008).

I. BACKGROUND

On the evening of May 5, 2015, Copeland arrived at the apartment of plaintiff's elderly mother to conduct an at-home sleep study. At the time, plaintiff was caring for his mother as a part-time home attendant through the auspices of a non-party.

Plaintiff requested the sleep study to aid in the determination of whether his mother

qualified for 24-hour split-shift care through non-party HealthFirst, his mother's Medicaid managed care organization. HealthFirst contracted with Gotham, an on-demand healthcare staffing agency, to perform the sleep study. Gotham assigned Copeland, then a licensed practical nurse (LPN), to conduct the study. To do so, Copeland was required to stay at the apartment for three nights and document her observations throughout the night, including each time plaintiff's mother woke up, her reasons for waking, the time she went back to sleep, and what helped her fall back asleep.

Copeland arrived at the apartment with an air mattress and set it up on the floor adjacent to the bed where plaintiff's mother slept. After asking plaintiff questions and eating the food she had brought with her, Copeland proceeded to lay down on the air mattress and sleep through most of the night. Unbeknownst to Copeland, plaintiff videotaped the entire visit with a nanny cam.

The next morning, Copeland told plaintiff that his mother had only slept for approximately one-half hour the entire night. Plaintiff asked her how she knew that his mother was up all night if Copeland had been sleeping all night. After Copeland denied sleeping all night, plaintiff directed her to take her things and leave the apartment. Copeland refused plaintiff's request for a copy of her notes and plaintiff refused her request that he sign her time sheet. Copeland told him that she could not complete the sleep study and that she would have to document their entire conversation. During the exchange, plaintiff also told Copeland that she stunk of beer and had snored all night. Copeland repeatedly denied drinking alcohol and stated that while she may have "dozed on an off," she did not sleep all night. Copeland packed up the air mattress and left the apartment.

According to plaintiff, immediately after Copeland left the premises on the morning of

May 6, 2015, he called HealthFirst's director of special investigations and told him that Copeland had slept on an air mattress the entire night as shown on the video he had taken. (NYSCEF 14). An investigator was soon dispatched to the apartment to review the video. Plaintiff and the director later met at the director's office to review the video together.

According to plaintiff, that same morning, he also contacted Gotham and informed it that he had a video of Copeland sleeping through the night on an air mattress and was told that someone from Gotham would get back to him. (*Id.*). He never heard back from Gotham and he repeatedly called to ask that someone from Gotham view the video. His requests were refused.

That same day, Copeland prepared a sleep study and incident report purporting to document her observations of plaintiff's mother throughout the night and to recount her conversation with plaintiff (NYSCEF 57). In her report, which she submitted to Gotham, Copeland claimed to have observed a "safety issue" and indicated that plaintiff's mother was residing in an "unsafe home environment." (*Id.*). In addition, Copeland alleged therein that she feared for plaintiff's mother and that plaintiff had stated during their exchange that "[a]ll you people do is drink and sleep." (*Id.*).

On May 8, 2015, Gotham's patient service coordinator faxed Copeland's report to HealthFirst. On the cover sheet, the coordinator asked that HealthFirst forward the report, "as soon as possible," to HealthFirst's director of special investigations and to a nurse case manager. (*Id.*; NYSCEF 17). HealthFirst then provided plaintiff with a copy of the report. Plaintiff asserts that Gotham thereafter refused his request to redact and/or change the report even though it had been proven false by his videotape. Instead, he was told to deal with his insurance company.

Plaintiff filed a complaint against Copeland with the New York State Education Department, Office of Professional Discipline and looked into her background, discovering,

among other things, that she had pleaded guilty in a federal court as "Arionn J. James" to five separate felony counts involving the theft of public monies. (NYSCEF 110). He also learned that she had pleaded guilty as "Arion James" to petit larceny in the Criminal Court of the City of New York. (*Id.*).

Copeland was later charged by the Office of Professional Discipline with two specifications of professional misconduct for (1) practicing the profession of nursing with gross negligence on a particular occasion in that on or about May 5, 2015, while conducting the sleep study at the home of plaintiff's mother, she "slept without waking through the entirety of that overnight home care nursing shift, and then filed a false report and progress notes fabricating her observation of the patient's status and activities during that shift" and (2) obtaining the license to practice as an LPN fraudulently in that on or about January 2006, she "caused to be submitted to the Division of Professional Licensing Services of the New York State Department an application for licensure as" an LPN in which she "fraudulently represented that she had only one criminal conviction, a 2002 conviction in the Criminal Court for the City of New York for Petit Larceny," whereas "she was also convicted in the District Court for the Southern District of New York on July 14, 2003, upon a plea of guilt [sic] to two counts of Conspiracy to Commit Fraud and Theft of Public Money and three counts of Theft of Public Monies." (NYSCEF 40). Having admitted to the first specification, the charges were deemed satisfied and Copeland was permitted to surrender her license to practice as an LPN in the State of New York. (*Id.*).

In April 2016, plaintiff commenced this action against Copeland alleging that the statements contained in her report are false and published with actual malice. (NYSCEF 10). He seeks compensatory and punitive damages and advances causes of action for libel, intentional infliction of emotional distress, and negligent infliction of emotional distress.

In May 2016, plaintiff commenced an action against Gotham. Other individuals, also named as party-defendants (NYSCEF 25), were subsequently dismissed from the lawsuit. In his amended complaint against Gotham, plaintiff seeks compensatory and punitive damages and advances causes of action for libel and negligent hiring. (NYSCEF 26). Other causes of action alleged therein were subsequently dismissed. (NYSCEF 49). By stipulation and order entered October 6, 2019, the actions were consolidated under Index No. 100710/2016. (NYSCEF 13).

II. DISCUSSION

On a motion for summary judgment, the movant "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.,* 36 NY3d 69, 73-74 [2020] [internal quotation marks and citations omitted]). If the movant fails to do so, the motion must be denied "regardless of the sufficiency of the opposing papers." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Matter of New York City Asbestos Litig.*, 176 AD3d 506, 506 [1st Dept 2019]). Where "the moving party proffers the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action." (*Trustees of Columbia Univ. in the City of N.Y.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). On the motion, the facts must be viewed in the light most favorable to the non-moving party. (*Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 179 [2020]; V*ega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

A. Copeland

1. Libel

A defamatory statement is one that "tends to expose a person to public contempt, hatred,

ridicule, aversion or disgrace." (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks and citations omitted]). "A cause of action predicated on alleged defamatory statements is subject to dismissal if the statements are insufficiently pleaded, constitute nonactionable opinion, or are subject to a qualified privilege defense." (*Landa v Capital One Bank (USA), N.A.*, 172 AD3d 1052, 1053 [2d Dept 2019]).

Copeland argues that the libel cause of action should be dismissed because her communication to Gotham concerns a subject in which both have an interest, and thus is protected by a qualified privilege.

As Copeland's statements to Gotham concern a matter in which each had an interest, she sufficiently demonstrates that the communication is qualifiedly privileged. (*See Stillman v Ford*, 22 NY2d 48, 53 [1968]).

Once statement is shown to be so privileged, the burden of proof shifts to the plaintiff to show that the statement is actionable because motivated by malice. (*Stega v New York Downtown Hosp.*, 31 NY3d 661, 673 [2018]). A showing of malice necessary to defeat the privilege requires a demonstration of either common-law malice, i.e., spite or ill will, or actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth. (*Laguerre v Maurice*, 192 AD3d 44, 49 [2d Dept 2020]).

Plaintiff's video of the sleep study demonstrates that some of the statements made in Copeland's report to Gotham reflect that she had fabricated the data in the sleep study and falsely implied that the study was incomplete due to the incident with plaintiff, rather than because she had slept when she should have been recording her observations. And, contrary to the report, there is no indication in the video of plaintiff's alleged statement to Copeland that "[a]ll you people do is drink and sleep." Thus, plaintiff contends that Copeland falsely implied in her report

that he is a racist.

Nor does the video support Copeland's statement that plaintiff's mother kept asking him "what happened?" and that plaintiff "ignored her." Rather, plaintiff is depicted as an attentive caregiver to his mother and it does not appear that the apartment was dirty or unsafe, as reported by Copeland. Consequently, plaintiff raises an issue of fact as to actual malice.

Copeland also argues that the cause of action for libel should be dismissed as many of the statements in the report constitute opinions which are not susceptible to being proven true or false. While opinions are not actionable (*Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 38 [1st Dept 2011]), an opinion containing an implication that it is based on facts which justify it but are unknown to those reading or hearing it, is actionable as a mixed opinion. (*Stega*, 31 NY3d at 674; *Davis v Boeheim*, 24 NY2d 262, 269 [2014]). Where the facts on which an opinion is based are known, the reader has a chance to assess the basis of the opinion and thereby determine its validity. (*Davis v Boeheim*, 24 NY2d at 269).

The determination of whether a statement conveys a fact or opinion constitutes a question of law for the court to resolve, which determination is to be "based on what the average person hearing or reading the communication would take it to mean," and in reaching that determination, the court must consider whether it is reasonable conclude that the statements conveyed facts about the plaintiff. (*Id.* at 269-270 [internal quotation marks and citations omitted]). The Court in *Davis v Boeheim* provides three factors to be considered: (1) whether the language used has a precise and readily understood meaning, (2) whether the statement can be proven true or false, and (3) whether the full context of the communication in which the statement appears or its broader social context and surrounding circumstances "signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact." (*Id.* at 270 [internal

quotation marks and citations omitted]). The Court explained that the third factor requires the consideration of "the content of the communication as a whole, its tone and apparent purpose," thereby rejecting an analysis whereby the communication is "sift[ed] . . . for the purpose of isolating and identifying" factual assertions contained therein. (*Id.* [internal quotation marks and citations omitted]).

Plaintiff's video supports his claim that some of Copeland's allegations that his home was unsafe, unclean, and cluttered are false and her claim to have feared for plaintiff's mother has no apparent basis. Thus, the content of her communication as a whole, its tone, and apparent purpose of reporting a safety concern suggests that the serious accusations are based, at least in part, on facts which are unknown to the reader and/or are conveying facts about plaintiff and the environment in which he cared for his mother. Therefore, Copeland does not demonstrate that the statements constitute non-actionable opinion.

Copeland also maintains that the statements at issue are not defamatory *per se*, absent special harm, and that therefore, proof of special damages is necessary. As plaintiff alleges no special damages, she asserts, the cause of action for libel must be dismissed.

"Special damages contemplate the loss of something having economic or pecuniary value." (*Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992] [internal quotation marks and citation omitted]). They must be pleaded and proved unless the allegedly defamatory statement: (1) charges the plaintiff with a serious crime, (2) tends to injure the plaintiff in her trade, business or profession, (3) imputes to the plaintiff "a loathsome disease," and (4) imputes unchastity to a woman. (*Nolan v State of New York*, 158 AD3d 186, 195 [1st Dept 2018]). Such statements are presumed to be damaging. (*Liberman v Gelstein*, 80 NY2d at 435). The determination of whether a statement is defamatory *per se* constitutes a question of law for the

court to resolve. (*Geraci v Probst*, 15 NY3d 336, 344 [2010]).

In her report, Copeland accuses plaintiff of neglecting his elderly mother, and as a licensed home attendant, he is responsible for caring for her. Such statements have the potential to damage plaintiff's professional reputation as a licensed home attendant and negatively impact his business as a private investigator. He thus sufficiently pleads that the statements "tend to injure" him in his trade, business or profession. (*Liberman v Gelstein*, 80 NY2d at 435).

In light of the foregoing, Copeland does not establish her entitlement to a judgment dismissing the libel cause of action as asserted against her.

2. Intentional and negligent infliction of emotional distress

Plaintiff's claims of emotional distress are duplicative of his defamation claim. (*Matthaus v Hadjedj*, 148 AD3d 425, 425 [1st Dept 2017]; *Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011]; *Hirschfeld v Daily News, L.P.*, 269 AD2d 248, 249 [1st Dept 2000]). In any event, it is well settled that "a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Sheila C. v Povich*, 11 AD3d 120, 130-131 [1st Dept 2004] [internal quotation marks and citations omitted]; *see Norris v Innovative Health Sys., Inc.*, 184 AD3d 471, 473 [1st Dept 2020]; *see also Xenias v Roosevelt Hosp.*, 180 AD3d 588, 589 [1st Dept 2020] ["Extreme and outrageous conduct continues to be an essential element of a cause of action alleging negligent infliction of emotional distress"]). The standard of outrageous conduct "is strict, rigorous and difficult to satisfy." (*Scollar v City of New York*, 160 AD3d 140, 146 [1st Dept 2018]).

Here, the alleged conduct is not so outrageous in character or so extreme in degree as to

be beyond all possible bounds of decency, nor may it be regarded as atrocious and utterly intolerable in a civilized community. (*See Matthaus v Hadjedj*, 148 AD3d at 425-426] [defendant's false statements to police, causing plaintiff's arrest and incarceration, insufficient as matter of law to constitute extreme and outrageous conduct to sustain cause of action for intentional infliction of emotional distress]).

B. Gotham

1. Libel

An employer may be held vicariously liable for an employee's defamatory statement if the employee uttered the statement in the course of his or her employment. (*Stevenson v Cramer*, 151 AD3d 1932, 1934 [4th Dept 2017]; *Pezhman v City of New York*, 29 AD3d 164, 168 [1st Dept 2006]). The employer may be held liable when the employee acts negligently or intentionally, as long as the tortious conduct is generally foreseeable and a natural incident of the employment. (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]). Where the employee acts independently and departs from the line of duty so that his or her acts may be deemed to constitute an abandonment of service, the employer is not held liable. (*Id.*).

Whether a particular act is within the scope of employment ordinarily poses a question for resolution by a jury, unless the material facts are undisputed. (*Rivera v State of New York*, 34 NY3d 383, 390 [2019]; *Riviello v Waldron*, 47 NY2d 297, 303 [1979]).

Although there is no dispute that when Copeland prepared her report, she was performing a task within the scope of her duties, Gotham argues that because Copeland fabricated information in the report for her own personal motives, her conduct in that regard constitutes a significant departure from the normal performance of her job. Thus, it maintains, her otherwise work-related activity falls outside the scope of Copeland's employment.

To the extent that Copeland wrote the report, at least in part, to explain why the sleep study had not been completed, she arguably did so not only for her own benefit, but also in furtherance of Gotham's business. Consequently, Gotham does not demonstrate, as a matter of law, that Copeland acted outside the scope of her employment when she wrote and filed the report.

Plaintiff also alleges that when Gotham published Copeland's report to HealthFirst, it too defamed him. According to Gotham, as HealthFirst needed the report to investigate the incident, Gotham's communication to it is qualifiedly privileged. While acknowledging that such privileged statements are actionable if motivated by actual malice, Gotham claims that absent reason to doubt the veracity of the report or evidence that plaintiff or HealthFirst had communicated to it the existence of the video by the time the report was faxed on May 8, 2015, and as the video in question is not audible, there is no evidence that it was motivated by actual malice. (NYSCEF 23).

As plaintiff testified that he had informed Gotham immediately after the incident that Copeland had slept through the sleep study and that he had a video of the entire visit, Gotham had reason to review the report before signing off on it. Plaintiff thereby demonstrates that Gotham at least recklessly disregarded the video, notwithstanding the testimony of its director of patient services that no one had checked the report for accuracy and that it would have been impossible for her to know the truth of the statements contained therein. As plaintiff testified that Gotham declined his repeated requests to have someone review the video, which is audible, he demonstrates that Gotham had reason to believe the report contained false accusations before it shared it with HealthFirst, thereby raising an issue of fact as to whether it harbored actual malice.

Although Gotham argues that plaintiff offers no evidence establishing that it published

defamatory statements to ACS, it cannot sustain its *prima facie* burden by pointing out gaps in plaintiff's proof. (*See J&M Indus., Inc. v Red Apple 180 Myrtle Ave. Dev.*, LLC, 197 AD3d 1154, 1156 [2d Dept 2021]; *Vazquez v 3M Co.*, 177 AD3d 428, 429 [1st Dept 2019]). In any event, it is undisputed that Gotham shared the report with HealthFirst and the law provides that "[p]ublication to even one person other than the defamed is sufficient." (*Torati v Hodak*, 147 AD3d 502, 504 [1st Dept 2017]).

For all of these reasons, Gotham fails to demonstrate its entitlement to a judgment dismissing the cause of action for defamation claim as asserted against it.

2. Negligent hiring and supervision

Plaintiff alleges that Gotham negligently hired Copeland by disregarding its obligation to fingerprint her and conducting a grossly deficient background check that failed to discover her felony conviction. He claims that had they learned about her full criminal history, they would have been aware of her propensity to fabricate information and level false accusations. (NYSCEF 110). Gotham asserts that if Copeland was acting within the scope of her employment, the claim for negligent hiring must be dismissed.

As a triable issue remains as to whether Copeland was acting within the scope of her employment (*supra*, II.B.1.), it would be premature to dismiss the negligent hiring cause of action.

In any event, Gotham alleges that it conducted a thorough background check before hiring Copeland, as she had used an alias in applying to it for a job. Thus, Gotham denies having had reason to believe that she had a propensity to fabricate information and level false accusations.

In opposition, plaintiff argues that on her application for employment, Copeland

indicated that she had been convicted of a misdemeanor or felony, without specifying the nature of the crime. Given this admission, plaintiff maintains that Gotham should have delved further into her background by asking her about the prior conviction and/or conducting a fingerprint-based background check which would have revealed her criminal history and that she had applied for the job using an alias.

Recovery on a negligent hiring and retention theory requires a showing that the employer "knew or should have known of the employee's propensity to commit injury even if the injury committed was not identical to the prior injury." (*Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 99 [1st Dept 2020] [internal quotation marks and citation omitted]; *see White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243, 244 [1st Dept 2006]). "[T]he depth of inquiry prior to hiring, irrespective of convictions, may vary in reasonable proportion to the responsibilities of the proposed employment." (*Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d at 99 [internal quotation marks and citation omitted]).

As Copeland indicated a prior conviction on her application (NYSCEF 38), whether Gotham's failure to inquire about it and/or conduct a fingerprint-based background check constitutes negligent hiring or retention is a jury question (*see Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d at 100, and cases cited therein), especially as she was seeking employment that required her to care for vulnerable people in their homes.

To the extent that plaintiff advances a cause of action for negligent supervision, he alleges that Gotham never accompanied or supervised Copeland during a sleep study to ensure that she was conducting them properly. Absent a connection between the manner in which Copeland conducted the sleep study and the damages plaintiff claims for defamation, he fails to allege a sufficient factual basis for such a cause of action. For the same reason, plaintiff's

assertion that Gotham was negligent *per se* in assigning Copeland to conduct the sleep study in violation of Education Law § 6902 provides no basis for holding Gotham liable absent a connection between the alleged violation and the defamation of plaintiff. (*See Rabideau v Weitz*, 169 AD3d 1330 [3d Dept 2019]; *Colon v H&B Plumbing & Heating,* 305 AD2d 235, 237 [1st Dept 2003]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendant Arionn J. Copeland personally and Arionn J. Copeland in her professional capacity as a licensed practical nurse, for summary judgment (mot. seq. seven) is granted to the extent of severing and dismissing plaintiff's intentional and negligent infliction of emotional distress claims insofar as asserted against her, and the motion is otherwise denied; it is further

ORDERED, that defendant Gotham Per Diem, Inc.'s motion for summary judgment (mot. seq. eight) is granted to the extent of severing and dismissing plaintiff's claim for negligent supervision insofar as asserted against it, and the motion is otherwise denied; and it is further

ORDERED, that the Clerk of the court enter judgment accordingly.

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4/6/2022
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