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MEMORANDUM DECISION

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

INTERNATIONAL SHOPPES, INC., ISATA LLC, DIPLOMATIC DUTY FREE SHOPS OF NEW YORK INC., GARE JEWELERS TERMINAL CORP., and MICHAEL HALPERN,

Plaintiffs,

-against-

ARLEIGH SPENCER,

Defendant.

Trial dates: June 22, 27, 28 29, 30 and July 5, 2011

INDEX NO: 10559/04

Appearances:

For Plaintiffs:

Hertern, Burstein, Sheridan, Cevasco, Bottinelli, Litt, & Hartz, LLC
747 Third Avenue, 37th Floor
New York, NY 10007

For Defendant:

Heslop & Kalba, Esq.
590 East 94th Street
Brooklyn, NY 11236

This action alleging defamation and fraudulent concealment was tried without a jury on June 22, 27, 28, 29, 30 and July 5, 2011. Plaintiffs called three witnesses, plaintiff Michael Halpern and the corporate plaintiffs' employees Wilma Diane Harge and Marlene Friedman. Defendant, Arleigh Spencer, testified on his own behalf.

On cross-examination, defendant admitted to submitting a false resume and employment application to plaintiff corporation. In both documents he claimed to have

attended two years of college when, in fact, he did not. Further, he admitted that "he lied in order to get a source of money." Defendant also changed his testimony as to whether he again brought up the phantom employee at a meeting with Michael Halpern in August of 2003 when confronted with his EBT testimony. Based upon the foregoing, defendant lacks credibility. On the other hand, the Court finds plaintiffs' witnesses to be believable and, therefore, any conflicts in testimony will be resolved in favor of plaintiffs.

Findings of Fact

Defendant was employed by plaintiff corporation and its affiliates from 1999 to June 2004 as a payroll clerk/coordinator. Plaintiff, Michael Halpern was and is the President of plaintiff corporation which operates a number of duty-free shops in various airports and other locations.

In August of 2002, defendant walked into Michael Halpern's office and requested a raise. When Mr. Halpern refused defendant told him about a phantom employee (someone who did not work for the corporation but was on the payroll) and suggested that the situation could go away if he received a raise. When Michael Halpern told him to leave his office and that he would not be blackmailed defendant became agitated and made the following comments as he exited the office "the company is committing fraud - -, the company is doing things that are illegal". Mr. Halpern immediately investigated the phantom employee and the problem was corrected by September, 2002. The investigation revealed that an individual who did not work for the corporation was being paid for the overtime hours her husband worked at regular hourly rates. Plaintiff corporation accused defendant of being aware of the practice for sometime and a failure to timely disclose same. (Exhibit "7" - Disciplinary Notice and Second Warning dated September 17, 2002).

Defendant responded by a memorandum dated September 26, 2002 denying any prior knowledge. (Exhibit "B").

In August, 2003, defendant again entered Michael Halpern's office, and demanded a raise. Plaintiff refused and ordered defendant out of his office. As defendant left he stated in a loud voice "you are an asshole -" "I should have sued your ass before". The comments were heard by the witnesses, Wilma Diane Harge and Marlene Friedman.

In addition, defendant admitted that he authored and mailed the following letters

Addressed to	Dated	Exhibit
Senator Skelos	4/26/04	1
NYS Dept. of Labor	6/5/04	2
NYS Unemployment Ins. Appeal Board	11/8/04	3
Senator Clinton	1/3/05	4
Senator Schumer	1/3/05	4

Argument

This Court will first turn to defendant's *in limine* motion to dismiss plaintiffs' First, Second and Third Causes of Action citing the doctrine of *res judicata*. In a decision and order dated November 8, 2006 the Appellate Division reversed a decision of the Supreme Court (Cozzens, J.) dismissing the complaint and reinstated plaintiffs' Third, Fourth and Seventh Causes of Action. Said decision also reversed the Supreme Court's denial of leave to amend the complaint to add four additional causes of action. While there is no record of plaintiffs' amended complaint, ultimately plaintiffs served a Verified Second Amended Complaint containing eight causes of action which is now before this Court. In comparing the original complaint with the Second Amended Complaint, this Court finds that the old Third Cause of Action corresponds to the new Second Cause of Action, the old

Fourth Cause of Action corresponds to the new Third Cause of Action and the old Seventh Cause of Action corresponds to the new Fourth Cause of Action. What is denominated as the First Cause of Action in the Second Amended Complaint appears to be nothing more than a recitation of jurisdictional and lead-in allegations. Therefore, plaintiffs' Second through Eighth Causes of Action are properly before this Court and defendant's motion is denied.

Plaintiffs' Second Cause of Action alleges that the words spoken by defendant to plaintiff Michael Halpern in August 2002 and August 2003 constitute defamation *per se* with respect to said plaintiff.

A false statement is defamatory *per se* if it charges another with a serious crime or tends to injure another in his trade, business or profession. (*Matovick v Times Beacon Record Newspapers*, 46 AD3d 636; see also *Geraci v Probst*, 61 AD3d 717). Whether particular words are reasonably susceptible of a defamatory meaning presents a question of law to be determined by the court. (*Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076; *Kamalian v Reader's Digest Ass'n, Inc.*, 29 AD3d 527, 528). In making such a determination, the factors to be considered include: 1) whether the specific language at issue has a precise meaning which is readily understood; 2) whether the statement is capable of being proven true or false; and 3) whether either the full context of the communication in which the statement appears, or the broader social context and surrounding circumstances, are such that they signal that what is being read or heard is likely to be opinion, not fact. (*Brian v Richardson*, 87 NY2d 46, 51). Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, regardless of how

offensive, cannot be the subject of an action to recover damages. (*Mann v Able*, 10 NY3d 271).

Here, a reasonable listener would understand that the statement "you are an asshole - I should have sued your ass before" conveyed an opinion rather than a fact about plaintiff Michael Halpern. Although vulgar and insulting, the statement does not accuse plaintiff of a crime and does not constitute defamation *per se*. Further, any statements made to Michael Halpern pertaining to the corporation do not defame him personally.

Plaintiffs' Third Cause of Action alleges that the words spoken by defendant against the corporation constitute defamation *per se*. Defendant claims that the statement "The company is committing fraud. The company is doing things that are illegal" were true. Where a defendant establishes the truth of the statements made it constitutes an absolute defense. (*Cahill v County of Nassau*, 17 AD3d 497; *Dillon v City of New York*, 261 AD2d 34).

It is undisputed that a managerial employee of the corporation had devised the scheme of the phantom employee. Further, this scheme was an illegal act, albeit quickly corrected when discovered by the corporation's president. Therefore, the accusation against the corporation was substantially true and is not actionable.

Turning next to plaintiffs' Fourth Cause of Action, fraudulent concealment for some period of time of the phantom employee, there is no doubt that as the payroll-clerk defendant had a duty to disclose the fraud. Further, there is ample evidence that he attempted to gain some monetary benefit from is disclosure to Mr. Halpern. However, plaintiffs have failed to prove that defendant had knowledge of this fraud prior to his

revealing same. Plaintiffs produced no witnesses to support their claim and the Disciplinary Notice (Exhibit "7") issued to defendant appears to be a self serving document without any probative value.

Finally, the Court will consider the letters (Exhibits "1", "2", "3" and "4") authored and mailed by defendant to various addressees. Initially, the Court finds no merit to defendant's claim that plaintiffs must prove receipt as there is a presumption of receipt if a letter is properly mailed. (*News Syndicate v Gatti Paper Stock*, 256 NY211; see also *Trusts and Guarantee v Barnhardt*, 270 NY 350)

The Fifth Cause of Action alleges defamation *per se* with reference to the corporation contained in the letter sent to the N.Y.S. Unemployment Insurance Appeal Board on November 8, 2004 (Exhibit "3"). It is essentially a lengthy letter wherein defendant attempts to have his unemployment insurance benefits reinstated and accuses plaintiff corporation of "creating a phantom employee" and a "cover-up". It is hereby dismissed in accordance with this Court's reasoning in dismissing the plaintiffs' Third Cause of Action.

Plaintiffs' Sixth Cause of Action alleges defamation *per se* against Michael Halpern based upon language in the same letter (Exhibit "3") wherein defendant states:

> "Michael Halpern the president of the company is trying to fool this division with misleading information in reference to the phantom employee. Mr. Mody [sic], who worked 67.5 hours per week, was forced to accept regular wages in lieu of overtime pay and it is an outraged [sic] and injustice of management. If I did not stumble on the **fraud** it would have continue [sic]. **Mr. Mody a subordinate had to be encouraged by management... Mr. Halpern is nervious and has a right to be. This act is criminal and for the president not to terminate anyone speaks for itself**. (Emphasis added.)"

It accuses the plaintiff, Michael Halpern, of fraud and a criminal act. One employee's wrongdoing which was quickly corrected by the president of the corporation upon discovery is not truthful when asserted against him. Defendant admitted that Michael Halpern had no knowledge of the phantom employee until so informed by the defendant and that the problem had been corrected within a month. Therefore, it was a false statement published without privilege or authorization to a third party, constituting a serious crime. (*Salvatore v Kunar*, 45AD3d 560, lv app div. 10 NY3d 703; *Matovich v Times Beacon Record Newspapers*, *supra*)

Plaintiffs' Seventh Cause of Action alleges defamation *per se* with respect to the corporate plaintiff based upon letters mailed to Senators Hillary Rodham Clinton and Charles Schumer dated January 3, 2005 (Exhibit "4") and is hereby dismissed as being substantially true, in accordance with this Court's reasoning in dismissing plaintiff's Third Cause of Action.

Plaintiffs' Eighth Cause of Action alleges defamation *per se* with respect to plaintiff Michael Halpern based upon language contained in the letters to Senators Clinton and Schumer dated August 3, 2005 (Exhibit "4"). The only accusation in reference to Michael reads as follows:

> "Unfortunately after reporting this corruption, I was ostracized, singled out and harassed by upper management mainly the president whom I had reported this crime to."

Clearly, the claim of being "ostracized or singled out" does not rise to defamation *per se*. Although harassment can be a crime (Penal Law § 240.25) it may also be an offense (Penal Law § 240.26). Defendant did not elaborate or specify the degree of

harassment, however, in the context of the entire letter a reasonable person is not likely to understand same as a crime.

Based upon the foregoing, the First, Second, Third, Fourth, Fifth, Seventh and Eighth Causes of Action are hereby dismissed. Plaintiffs have met their burden of proof on the Sixth Cause of Action. A hearing shall be conducted before the undersigned Justice at an IAS Part 3 of this Court on September 20, 2011 on the issue of damages pursuant to *Geraci v Probst*, *supra*.

Dated: AUG 19 2011

UTE WOLFF LALLY, J.S.C.

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ENTERED
AUG 25 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE