

Greenky v Joslin

2012 NY Slip Op 31915(U)

July 16, 2012

Supreme Court, New York County

Docket Number: 101174/10

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

SETH GREENKY and GREEN KEY MANAGEMENT,
LLC,
Plaintiffs,

- v -

JEFFREY S. JOSLIN, 3 LEGGED DOG
PRODUCTIONS, XCENTRIC VENTURES, LLC,
d/b/a RIPOFF REPORT and GOOGLE, INC.,
Defendants.

Index No.: 101174/10

Motion Date: 03/16/12

Motion Seq. No.: 04

Motion Cal. No.: _____

FILED

JUL 20 2012

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The following papers, numbered 1 to 2 were read on this motion to dismiss.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

1

Answering Affidavits - Exhibits _____

2

Replying Affidavits - Exhibits _____

Cross-Motion: Yes No

Plaintiff, a personal manager and agent, brings this action sounding in defamation against a former client based upon statements posted on an internet website and an email message transmitted to an industry group. Individual defendant Jeffrey S. Joslin now moves pursuant to CPLR 3211 to dismiss plaintiff's complaint.

In defamation cases, the Court has stated that

The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a necessary element of a libel claim, and only "facts" are capable of being proven false, it follows that a

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

libel action cannot be maintained unless it is premised on published assertions of fact.

Conversely, expressions of opinion are cloaked with the privilege of speech afforded by the First Amendment, and false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.

Distinguishing between protected expressions of opinion and actionable assertions of fact has proven to be a challenging task for the courts. In the past, the Court of Appeals has cited three factors that should be considered: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact.

Guerrero v Carva, 10 AD3d 105, 111-112 (1st Dept 2004) (citations omitted).

The issue on defendant's motion is whether the statements set forth in paragraphs 21 and 62 of the complaint are actionable. Applying the standard set forth by the Court above, this court now holds that as a matter of law certain of the defendant's statements alleged in the complaint are non-actionable opinion and cannot form the basis of a defamation claim.

The court agrees with plaintiff's argument that defendant's internet-posted statement that plaintiff's "treatment of his talent can be borderline to 'sexual harassment' from the times I've seen him interact with the female talent" is capable of a

defamatory meaning. Alianza Dominicana, Inc. v Luna, 229 AD2d 328, 329 (1st Dept 1996) ("accusations of sexual harassment and sexual abuse are . . . susceptible of a defamatory meaning and would have been understood by a reasonable viewer to be assertions of provable fact . . . notwithstanding the cautionary language used").

However, the court finds that the remainder of defendant's internet posting as set forth in plaintiff's first cause of action in paragraph 21 of the complaint constitutes non-actionable opinion. The statements in the posting comment upon plaintiff's alleged failure to procure work for defendant and otherwise perform his duties in the manner plaintiff expected of an agent. The mere expression of unhappiness with manner in which an employee/contractor is failing to carry out their duties does not constitute defamation. Aronson v Wiersma, 65 NY2d 592, 594 (1985); see also Williams v Varig Brazilian Airlines, 169 AD2d 434, 438 (1st Dept 1991) (comments on employees performance are expressions of opinion which are not actionable).

Similarly, the statements set forth in paragraph 62 of the complaint, allegedly contained in an email to the president of a professional association, are also expressions of opinion on the alleged conduct of plaintiff as an agent. The statement that plaintiff's contract, "obligates me as talent to everything and obligates him to do nothing" is too indefinite to support an

assertion that it is factual and the statement that the plaintiff was "unprofessional" is clearly protected opinion." Amodei v New York State Chiropractic Ass'n 160 AD2d 279, 281 (1st Dept 1990) affd 77 NY2d 890 (1991) ("use of the term 'unprofessional conduct' . . . comprises a constitutionally protected expression of opinion"). The other statement "what's appropriate and inappropriate behavior in the work place toward the same and opposite sex. In my opinion he has crossed that line . . . and it could subject him to legal action on the basis that that I witnessed" is defendant's opinion about plaintiff's conduct and is also non-actionable. See Kim v Dvorak, 230 AD2d 286, 291 (3d Dept 1997).

Accordingly, it is

ORDERED that the motion of JEFFREY S. JOSLIN pursuant to CPLR 3211 seeking to dismiss the complaint against him is GRANTED and the claims by plaintiff against JEFFREY S. JOSLIN are DISMISSED with the exception of plaintiff's cause of action for defamation based upon the statement "His treatment of his talent can be borderline to 'sexual harassment' from the times I've seen him interact with the female talent" and this action shall only continue against defendant JEFFREY S. JOSLIN with respect to such claim; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for the previously scheduled status conference on September 25, 2012 at 10:00 A.M.

This is the decision and order of the court.

Dated: July 16, 2012

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

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