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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA J.S.C. Justice

PART 19

Index Number : 104761/2010
SKEET, JASON
vs.
150 RFT VARICK CORP.
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 104761/2010

MOTION DATE

MOTION SEQ. NO. 005

The following papers, numbered 1 to ____, were read on this motion to/for SUMMARY JUDGMENT/DEFAULT JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is DETERMINED IN ACCORDANCE WITH THE ACCOMPANYING DECISION/ORDER

FILED

OCT 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/18/12

SS

SALIANN SCARPULLA, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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JASON SKEET,

Plaintiff,

- against -

150 RFT VARICK CORP., d/b/a GREENHOUSE, JONATHON BAKHSHI, a/k/a "JON B" in his official and individual capacities, BARRY MULLINEAUX, in his official and individual capacities, MERLIN WILLIS, a/k/a "MERLIN BOBB" in his official and individual capacities, and RICARDO REGISFORD, a/k/a "TIMMY REGISFORD" in his official and individual capacities,

Defendants.

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150 RFT VARICK CORP., d/b/a GREENHOUSE, JONATHON BAKHSHI, a/k/a "JON B" in his official and individual capacities, BARRY MULLINEAUX, in his official and individual capacities, MERLIN WILLIS, a/k/a "MERLIN BOBB" in his official and individual capacities, and RICARDO REGISFORD, a/k/a "TIMMY REGISFORD" in his official and individual capacities,

Third-Party Plaintiffs,

-against-

MICHAEL GIBBARD,

Third-Party Defendant.

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Index Number: 104761/10
Submission Date: 8/1/12

DECISION and ORDER

For Plaintiff:
Thompson Wigdor LLP
85 Fifth Avenue, Fifth Floor
New York, NY 10003
212-257-6800

For Defendants/ Third-Party Plaintiffs:
Morris Duffy Alonso & Faley
2 Rector Street, 22nd Floor
New York, NY 10006
212-766-1888

Third-Party Defendant, *pro se*:
Michael Gibbard
47-12 213th Street
Bayside, NY 11361

Papers considered in review of this motion for summary judgment:

Notice of Motion/Affirm. of Counsel in Supp.....1
Memo. in Opp. to Defendant's Mot.....2
Affirm. of Counsel in Opp. to Defendant's Mot 3
Reply Affirm. in Further Supp.....4

HON SALIANN SCARPULLA, J.:

In this negligence and defamation action, defendant/third-party plaintiff 150 RFT Varick Corp., d/b/a Greenhouse ("Greenhouse") moves for partial summary judgment dismissing plaintiff Jason Skeet's ("Skeet") defamation claim pursuant to CPLR 3212, and for a default judgment against third-party defendant Michael Gibbard ("Gibbard") pursuant to CPLR 3215.

Skeet is an African-American male who worked as a security guard at Greenhouse, a nightclub at 150 Varick Street, New York, NY. On October 11, 2009, Skeet was stabbed twice by a patron at Greenhouse, while he visiting the nightclub with a friend. Shortly after the incident, the police identified Gibbard, a white male, as the person who stabbed Skeet.

On April 30, 2010, Skeet commenced this action against Greenhouse and its owners, Jonathon Bakhshi, Barry Mullineaux, Merlin Willis, and Ricardo Regisford

(collectively "defendants"). In his complaint, Skeet alleges that the defendants were negligent because they failed to provide proper security, training, and supervision at Greenhouse, which negligence allegedly caused Skeet to be stabbed multiple times with a knife. More specifically, Skeet claims that Greenhouse was negligent in allowing Gibbard to enter the nightclub with a knife, which resulted from the nightclub's discriminatory security practice of admitting white patrons without a security check, while black patrons were required to undergo a pat down or metal detector scan.

After Skeet commenced his lawsuit, the Daily News printed an article entitled "Club's racism led to knifing: suit" by Jose Martinez on or about April 14, 2010. The article discussed Skeet's lawsuit and other similar lawsuits brought against Greenhouse based on the nightclub's alleged discriminatory security practices. The article quoted Skeet's lawyer Kenneth Thompson stating, "[i]t's an outrage that any club would not search white patrons but search black patrons . . . [t]his discriminatory practice almost cost my client his life." The article later stated that "Greenhouse denies the charges" and then quoted a Greenhouse spokesperson who stated, "[t]his lawsuit is clearly an attempt by a disgruntled former employee who was fired to blackmail the Greenhouse ownership for a payout." After publication of the article, Skeet amended his complaint to include a third cause of action for defamation, specifically libel *per se* and slander *per se*, based on the statement of Greenhouse's spokesperson.

On May 25, 2010, the defendants impleaded Gibbard as a third-party defendant for indemnification and contribution. The defendants then moved for a default judgment

against Gibbard. I issued an October 25, 2011 order denying the defendants' motion for default judgment against Gibbard, with leave to resubmit the motion with an affidavit of merit by a party with knowledge of the facts. On March 21, 2012, I also dismissed the action against the defendants Jonathon Bakhshi, Barry Mullincaux, Merlin Willis, and Ricardo Regisford.

In support of its current motion for partial summary judgment, Greenhouse argues that Skeet's defamation claim should be dismissed because: (1) Greenhouse's statement is non-actionable opinion; and (2) Skeet failed to prove special damages for his defamation claim. In support of its motion for default judgment, Greenhouse argues that it corrected the deficiency of its prior default judgment motion by submitting an affidavit of merit from a party with knowledge of the facts.

In opposition to the motion for partial summary judgment, Skeet argues that: (1) Greenhouse's statement is a defamatory factual statement and/or actionable mixed opinion; and (2) Skeet is not required to prove special damages because Greenhouse's statement qualifies as libel *per se* and slander *per se*. In regards to Greenhouse's motion for default judgment against Gibbard, Skeet does not set forth any objection.

Discussion

1. Motion for Summary Judgment

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853

(1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In a defamation action, the plaintiff must show: (1) a defamatory false statement; (2) published without privilege or authorization to a third party; (3) constituting fault as judged by, at a minimum, a negligence standard; and (4) it must either cause special harm or constitute defamation *per se*. *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996); *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999).

To be actionable, the alleged defamatory statement must be an assertion of fact, not an expression of opinion which cannot form the basis of a defamation claim. *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). An expression of opinion is not actionable because "it receives the Federal constitutional protection accorded to the expression of ideas." *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986). The determination of whether a particular statement constitutes fact or opinion is a question of law and is tested by the standard of "whether a reasonable reader could have concluded that the article was conveying facts about plaintiff." *Mann*, 10 N.Y.3d at 276; *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152-153 (1993).

In determining whether a statement is non-actionable opinion, the court must consider: (1) whether the specific language in issue has a precise meaning that is readily understood; (2) whether the statement is capable of being proven true or false; and (3)

whether the full context of the statement or broader social context signals that it is likely to be opinion. *Steinhilber*, 68 N.Y.2d at 289; *Dillon,* 261 A.D.2d at 39.

Upon considering the foregoing factors, I find that Greenhouse's statement was non-actionable opinion. Based on the language in the statement and the overall context of the article, a reasonable reader would conclude that the statement was conveying an opinion about the merits of Skeet's lawsuit, rather than an assertion of fact that Skeet's lawsuit was an actual attempt to commit a crime – blackmail – against Greenhouse.

The statement appears in an article concerning a contentious lawsuit between Skeet and Greenhouse, in which Skeet claims that Greenhouse negligently caused his stabbing because of the nightclub's discriminatory security policies. The article first quotes Skeet's lawyer, Kenneth Thompson, who describes Greenhouse's security policies as an "outrage" that "almost cost my client his life." Greenhouse's statement appears several lines later, prefaced by the phrase "Greenhouse denies the charges." Given the content and format of the article, a reasonable reader would understand that the article presented both sides of the lawsuit and Greenhouse's statement was an opinion that Skeet's lawsuit was meritless. *Galasso v. Saltzman*, 42 A.D.3d 310, 311 (1st Dep't 2007) (finding that an alleged defamatory statement was non-actionable opinion because issues were clearly in dispute and the statement was made when respective sides were presenting their positions).

Moreover, while Greenhouse used strong language to rebut Skeet's allegations of discrimination, it is clear from the overall tone of the article that Greenhouse's words

were used figuratively. "Loose, figurative or hyperbolic statements, even if deprecating the plaintiff are not actionable." *Dillon,* 261 A.D.2d at 38. Furthermore, Greenhouse's use of the word "blackmail" in this context is insufficient to constitute a serious accusation of blackmail. *Pecile v. Titan Capital Group, LLC*, 96 A.D.3d 543, 544 (1st Dep't 2012) (finding that "the use of the term 'shakedown' did not 'convey the specificity'" that would suggest that defendants were seriously accusing the plaintiff of committing extortion).

I also find that the statement does not qualify as actionable mixed opinion. An actionable mixed opinion implies "that the speaker knows certain facts, unknown to the audience, which support his opinion and are detrimental to the person about whom he is speaking." *Steinhilber*, 68 N.Y.2d at 290. Here, Greenhouse's statement did not imply any facts unknown to the reader. Greenhouse's statement expressed an opinion that Skeet's lawsuit was meritless, and that Skeet was disgruntled after his firing. The fact that Skeet was fired formed the basis of Greenhouse's opinion and was made known to readers. The statement is not an actionable mixed opinion because it is an opinion that specifically recites the facts on which it is based. *Gross*, 82 N.Y.2d at 154; *Dillon*, 261 A.D.2d at 41.

Because Greenhouse's statements in the Daily News article constituted non-actionable opinion, I grant the defendant's motion for partial summary judgment dismissing Skeet's defamation cause of action (the third cause of action).

2. Motion for Default Judgment

Greenhouse also moves for default judgment against third-party defendant, Michael Gibbard, on its contribution and indemnification claims. CPLR 3215 provides that an application for default judgment must include: (1) proof of service of the summons and complaint; (2) proof of the merits of the claim; and (3) proof of the default. In my October 25, 2011 order, I denied the defendant's motion for default judgment for failure to submit adequate proof of the merits of the claim. To prove the merits of the claim, an applicant must submit "an affidavit executed by a party with personal knowledge of the merits." *Francisco v. Soto*, 286 A.D.2d 573, 573 (1st Dep't 2001); *Thattil v. Mondesir*, 253 A.D.2d 809, 810 (2nd Dep't 1998). The affidavit of merit must also establish a *prima facie* case against the defendant. *See State v. Williams*, 44 A.D.3d 1149, 1152 (3rd Dep't 2007).

A claim for contribution arises when "two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person." *Smith v. Sapienza*, 52 N.Y.2d 82, 87 (1981). The critical requirement of a contribution claim is that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." *Nassau Roofing & Sheet Metal Co. v. Facilities Dev.*, 71 N.Y.2d 599, 603 (1988).

To prove an indemnification claim, the movant must show that it maintains a right to "shift the entire loss" to another party based on an express contract or implied

indemnification. *Bellevue S. Assoc. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 296 (1991). An implied indemnification claim must be predicated on a theory of vicarious liability. *Guzman v. Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 N.Y.2d 559, 567 (1987); *Consolidated Rail Corp. v. Hunts Point Terminal Produce Coop. Ass'n*, 11 A.D.3d 341, 342 (1st Dep't 2004); *Great Am. Ins. Co. v. Canandaigua Natl. Bank & Trust Co.*, 23 A.D.3d 1025, 1028 (4th Dep't 2005).

Here, I find that Greenhouse is entitled to a default judgment against Hibbard, on its contribution claim, but not its indemnification claim. Greenhouse submitted a proper affidavit of merit from Jonathon Bakshi, an owner of Greenhouse, who attests that he has personal knowledge of the facts and circumstances alleged in the third-party complaint. The third-party complaint sets forth a *prima facie* case for contribution against Gibbard, based on Greenhouse's allegations that Gibbard caused or contributed to Skeet's injuries by assaulting him. Greenhouse also submitted proper proof of service of the third-party summons and complaint, and proof of Gibbard's default in failing to answer the third-party complaint or oppose Greenhouse's motion for default judgment.

Greenhouse, however, does not sufficiently state a *prima facie* case for its indemnification claim because it does not allege the existence of any express contract or vicarious liability between Greenhouse and Gibbard.

Accordingly, Greenhouse's motion for a default judgment on its contribution claim is granted, and the motion for a default judgment on its indemnification claim is denied.

In accordance with the foregoing, it is

ORDERED that defendant Greenhouse's motion for partial summary judgment dismissing Skeet's defamation claim pursuant to CPLR 3212 is granted and the third cause of action is dismissed; and it is further

ORDERED that the defendant Greenhouse's motion for default judgment against third-party defendant Hibbard is granted only on the issue of liability for contribution, and denied on the issue of liability for indemnification; and it is further

ORDERED that an inquest assessing damages against defaulting third-party defendant Hibbard will be held at trial of the main action.

This constitutes the decision and order of this Court.

Dated: New York, New York
October 17, 2012

ENTER:

Saliann Scarpulla, J.S.C.