SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN Justice PART 63

Index Number : 111893/2011
ASHBY, DUGLAS H
vs
ALM MEDIA, LLC.
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 5/17/12

_____, J.S.C.
HON. ELLEN M. COIN

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: CIVIL TERM: PART 63

---------- X

DOUGLAS H. ASHBY,

Plaintiff,

-against-

ALM MEDIA, LLC and JEFFREY WHITTLE, individually and on behalf of ALM MEDIA, LLC,

Defendants.

----------X

Index Number 111893/2011
Submission Date May 16, 2012
Mot. Seq. No. 001

DECISION and ORDER

For Plaintiff:
The Law Offices of Stewart Karlin, P.C.
By Stewart Karlin, Esq.
9 Murray Street, Suite 4W
New York, New York 10007
(212) 792-9670

For Defendants:
Clarick Gueron Reisbaum, LLP
By Gregory A. Clarick, Esq.
40 West 25th Street
New York, New York 10010
(212) 633-4310

Papers considered in review of this motion to dismiss:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Memo of Law in Supp	2
Memo. of Law in Opp	3
Memo in Reply	4

ELLEN M. COIN, J.:

Defendants move pursuant to CPLR 3211(a)(7)to dismiss the complaint, as amended,[1] for failure to state a claim. The amended complaint alleges three causes of action: (1) against both defendants for slander; (2) against individual defendant Whittle for tortious interference with plaintiff's contract with defendant ALM Media, LLC (ALM); and (3) against individual defendant Whittle for tortious interference with plaintiff's prospective economic advantage.

[1]Plaintiff amended the complaint as of right during the pendency of this motion. Defendants contend that even as amended, the complaint fails to state a claim.

Plaintiff Ashby alleges that defendant Whittle is the senior Vice President, Chief Technology & Digital Products Officer for ALM (Amended Verified Complaint, para. 2), and that he was acting on his own and on ALM's behalf. Plaintiff's claim of slander is based on two allegations: that Whittle "approached Jill Windwer" (VP of Digital Media at ALM) "with the accusation that [plaintiff] was *deliberately* sabotaging projects...." (Amended Verified Complaint, para. 29); and that this statement "was published orally" to Windwer, to seven other named individuals (all of whom are alleged to work at defendant ALM), and "others in the ALM business community." (Amended Verified Complaint, para. 30). Plaintiff alleges that the statement was false, maliciously made, and slander per se; and that it was foreseeable that the allegations "would become common knowledge at ALM."

Defendants move to dismiss the claim of slander on three grounds: (1) that the alleged statement is protected opinion; (2) that the common interest privilege bars the claim; and (3) that plaintiff fails to allege special damages. Since the Court finds that the common interest privilege requires dismissal of the slander cause of action, it need not consider the other grounds offered for its dismissal.

"Even though a statement is defamatory, there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter" (*Foster v Churchill*, 87 NY2d 744, 751 [1996]; *O'Neill v New York Univ.*, 2012 NY Slip Op. 03570 [1st Dept. 2012]. The plaintiff may overcome this qualified privilege with allegations that the defendant made the defamatory statement with malice or reckless disregard for its truth or falsity. *Loughry v Lincoln First Bank,* 67 NY2d 369, 376 [1986]; *O'Neill v New York Univ., 2012 NY Slip Op. 03750.* This principle applies to communications reviewing an employee's performance, competence or

fitness. (*McNaughton v City of New York,* 234 AD2d 83, 84 [1st Dept. 1996]; *Kasachkoff v City of New York*, 107 AD2d 130, 134-136 [1st Dept 1985]).

Plaintiff attempts to evade the common interest doctrine by alleging that the individuals to whom the statement was published were not in plaintiff's "chain of command." (Amended Verified complaint, para. 30). "Chain of command" is not the test for this privilege. The requirement, instead, is that there be "some common interest in the subject matter." (*Foster v Churchill,* 87 NY2d at 751).

In a further attempt to evade the ambit of the common interest qualified privilege, plaintiff has amended his complaint to add: "[N]or were the statements made concerning a subject both individuals had an interest in." (Amended Verified complaint, para. 30). This contention is belied by earlier allegations in the very same pleading.

Plaintiff alleges that his duties at ALM included managing the Web Development, Enterprise Systems and Database Administration groups within the IT department (Amended Verified Complaint, para. 8). In addition, he claims to have been responsible for a large number of projects including "SmartLitigator" and the Lexis Nexis project (Amended Verified Complaint, paras. 11, 12). Plaintiff alleges that he was concerned about the lack of connection/collaboration between Learning Mate consultants and the developers of SmartLitigator (Amended Verified Complaint, para. 13)

The subject of Whittle's allegedly defamatory statement was plaintiff's "*deliberate*[] sabotag[e] [of] projects (emphasis added)(Amended Verified complaint, para. 29). Whittle allegedly published the statement to ALM's Vice President of Digital Media (Jill Windwer), ALM's CEO (William Pollak), ALM's Project Managers (Catherine Keeter, Bill Fuson), ALM's VP Substantive

Law Group (Tim Kennelty), ALM's project director (Patrick Slaven), and ALM's Learning Mate consultants (Manish Jain, Amit Soman)(Amended Verified Complaint, para. 30). It is evident from the foregoing allegations that all of the parties named as recipients of Whittle's alleged statement had a common interest in the projects, as well as plaintiff's fitness to manage them (*Shamley v ITT Corp.*, 869 F2d 167, 173 [2d Cir. 1989] [applying New York Law]; *McDowell v Dart*, 201 AD2d 895 [4th Dept. 1994]; *Levine v Board of Educ. of City of New York*, 186 AD2d 743, 745 [2d Dept. 1992]; *Kasachkoff v City of N.Y.*, 107 AD2d 130, 134-5 [1st Dept. 1985]).

While plaintiff alleges that Whittle's statement was made "maliciously", he does so in a conclusory fashion, without pleading any facts to support such conclusion. Thus, plaintiff's claim of slander must be dismissed (*Shamley v ITT Corp*, 869 F2d at 173; *McDowell v Dart*, 201 AD2d at 895-6).

Similarly, plaintiff's claim for tortious interference by Whittle with his contract with ALM fails to state a cause of action. Defendant Whittle, as an employee of ALM, was not a stranger to the contract. (*McNaughton v City of New York*, 234 AD2d at 83-84; *Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 157 [1st Dept. 1990]).

Finally, plaintiff's claim for tortious interference with prospective economic advantage must be dismissed, as it fails to allege that the alleged slander caused injury to his relationship with a third party. In essence, he alleges that Whittle's words, uttered in the course of his employment at ALM (and, according to his First Cause of Action, on behalf of ALM), interfered with his prospective economic relationship with ALM. So, in effect, plaintiff alleges that defendant ALM interfered with his prospective relationship with ALM. Moreover, as defendants note, "an at-will employee...can have no cause of action based on a co-employee's alleged tortious interference with his employment.

(*Baker v Guardian Life Ins. Co.*, 12 AD3d 285, 285-86 [1st Dept. 2004]).

For the foregoing reasons, it is

ORDERED that the motion of defendants to dismiss this action is granted, and the clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the decision, order and judgment of the Court.

Dated: May 17, 2012

ENTER:

Ellen M. Coin, A.J.S.C.