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

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Bledsoe

- v -

Sandoval

INDEX NO. 110562/2011

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____ were read on this motion to/for dismiss second amended complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is determined pursuant to the accompanying transcript, so-ordered on 5-24-12, as modified by decision + order dated 6-19-12.

FILED

JUN 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6-19-12

MARCY S. FRIEDMAN J.S.C.

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

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER (CHECK AS APPROPRIATE)
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 57

PRESENT: Hon. Marcy S. Friedman, JSC

---------- x

DAVID BLEDSOE,

Plaintiff,

Index No.: 110562/11

- against -

DIANE C. SANDOVAL,

DECISION/ORDER

Defendant.

---------- x

On the court's own motion, the court's decision on the record on May 10, 2012, so ordered on May 24, 2012, is vacated to the extent that the decision denied defendant's motion to dismiss plaintiff's third cause of action in his second amended complaint for tortious interference with prospective economic advantage. That cause of action, as pleaded, was based on interference with prospective employment of plaintiff by Park Slope Veterinary Hospital (Park Slope). At the oral argument, plaintiff withdrew the claim of interference with employment at that hospital and sought to assert the cause of action based on termination of plaintiff's employment at Tribeca Soho Animal Hospital (Tribeca Soho) as a result of use of wrongful means – namely, alleged criminal coercion under the Penal Law, in the nature of a threat to label Tribeca Soho as "soft on animal abusers" unless it terminated plaintiff. That threat was alleged in the second amended complaint (para. 31). However, the third cause of action was based solely on interference with the prospective employment at Park Slope.

The court's decision on the record on January 26, 2012, so ordered on February 29, 2012

(prior decision), which determined a motion to dismiss plaintiff's first amended complaint, granted leave to replead the cause of action for tortious interference with prospective economic advantage. Plaintiff's request for leave to replead that cause of action was based on interference with the Park Slope employment. (See Mysliwiec Aff. In Opp. To Prior Motion, paras. 59-63.) The claim that plaintiff now seeks leave to assert under the rubric of interference with prospective economic advantage is identical to the first cause of action that plaintiff pleaded in the first amended complaint as one for tortious interference with existing contractual relations. The prior decision dismissed that cause of action with prejudice.

To the extent that the May 10, 2012 decision of the instant motion to dismiss permitted the pleading of the claim for interference with the Tribeca Soho employment under the prospective interference rubric, the decision was in error. The court recognizes, however, that although plaintiff's employment with Tribeca Soho was at will, a cause of action for tortious interference with existing contract may be maintainable if the employment was terminated by wrongful means. (See Guard-Life Corp. v S. Parker Hardware Mfg. Corp., 50 NY2d 183, 194.) The court will therefore entertain a motion by plaintiff, if he is so advised, to reargue the branch of the prior motion that sought dismissal of the first cause of action of the first amended complaint for tortious interference with contractual relations. In the event such a motion is brought, plaintiff shall cite legal authority that the alleged threat, if proved, would rise to the level of criminal coercion.

It is accordingly hereby ORDERED that defendant's second motion to dismiss is granted to the extent of dismissing the third cause of action in the second amended complaint, and dismissing any causes of action or parts thereof that plaintiff withdrew on the record at the May

10, 2012 oral argument.

This constitutes the decision and order of the court.

Dated: New York, New York
June 19, 2012

MARCY FRIEDMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART

DAVID BLEDSOE,

Plaintiff,

-against-

Index No.
110562/2011

DIANE C. SANDOVAL a/k/a
DIANE SANDOVAL KURZON,

Defendant.

MOTION

60 Centre Street
New York, New York
May 10, 2012

B E F O R E:

HONORABLE MARCY S. FRIEDMAN,

JUSTICE

A P P E A R A N C E S:

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BY: ELIZABETH EILENDER, ESQ.

DENISE M. PATERNOSTER, RPR
Senior Court Reporter

Proceedings

THE COURT: On the record, good morning. Counsel, your appearances, please.

MR. MYSLIWIEC: For the plaintiff, my name is Ron Mysliwiec.

MS. EILENDER: Good morning, your Honor. Elizabeth Eilender, Jaroslawicz & Jaros, on behalf of the defendants.

THE COURT: I will now have oral argument on the defendant's motion to dismiss the recently amended complaint. Please try to confine yourselves to five to ten minutes per side.

MS. EILENDER: Good morning, your Honor.

Defendants brought on this order to show cause to dismiss and request that the Court's convert it into a summary judgement motion, quite frankly, because there are simply no issues of fact requiring this case to proceed.

This is a case, as your Honor is well aware, founded in slander and liable. The statements that the plaintiff has attributed to the defendant, every single statement with respect to being a verbal statement, has been refuted by affidavits submitted by the defendants in connection with their -- with our motion.

For example, plaintiff has made allegations

in the complaint regarding statements that the defendant allegedly made to prospective employers that has been proven to be false.

We've submitted affidavits from prospective employers who have said they have never spoken to the defendant Sandoval, they have never spoken -- they didn't even know who she was. So those allegations are just patently false.

We've submitted further affidavits from another individual who had employed the plaintiff as caretaker for her pet. Likewise, she never spoke with Miss Sandoval. And any circumstances that she was aware of that there was separation from a veterinary hospital was information that she learned from the plaintiff himself.

The statements with respect to e-mails sent to his present employer are her opinion and are protected and not considered defamatory under the case law.

The so-called newsletter does not identify the plaintiff in any fashion, nor are there any extrinsic facts which would lead a person to conclude that it was David Blesdoe.

In fact, there were some allegations about the reporter called him and she didn't even know who

the person who was being referred to in the newsletter. Moreover, the newsletter can be protected under qualified privilege.

And, moreover, it's the defendant's opinion, frankly. I've never seen a complaint written in this fashion. In my opinion it looks like the plaintiff just wrote up notes for his lawyer and he pasted it into the complaint. It's very hard to make heads or tails of the allegations.

But there are simply no issues of fact here. And, the Court's generally favor summary judgement decisions on defamation cases.

Your Honor previously dismissed certain claims in this case; for example, the tortious interference against the contract, tortious inference with respect to advantage and injurious falsehood claim, and it appears from a review of the complaint that the complainant has just been re-branded it and called it something else but, in essence, the flavor of the action is the same.

There is no reason why this case could proceed based on all the affidavits that we have submitted on our motion which completely contradict everything that the plaintiff has claimed.

These are wild allegations that the plaintiff

is making and simply untrue, which is the basis, your Honor, for our application for costs in connection with bringing this lawsuit which we believe is frivolous and was intended for some type of nefarious purpose against the defendant. And, accordingly, we made an application for costs.

But in reviewing the case law and the affidavits we've submitted, I don't want to waste the Court's time, the Court is familiar with the record, there are no issues of fact which would warrant this case to proceed.

Thank you.

THE COURT: Yes.

MR. MYSLIWIEC: May it pleases the Court. First, your Honor, I would like to address the claim for what I had originally argued was inference with contractual relations.

Since you have ruled in January that this was an inappropriate cause of action because it was at will employment. And you ruled under Guard Life and MBT Bank law.

I have to confess -- and I apologize that I didn't get the point of your ruling. I was surprised by it at the time until later and then it occurred to me what you were telling me is that my client being

in an adversarial position, was as if he was suing for prospective -- suing for inference with prospective economic advantage.

Now if I'm wrong about that, I'm sure you'll tell me. But if I'm right about that, if that's the message you were sending in your last decision in this case, then, as you know, the law says, look, if there is a cause of action, let it come forth.

I mean, if what the amendment process reveals is that there is just no cause of action. And what defendant argues is there is no cause of action because you're either an employee with a term of employment, in which case you're protected against inference with contractual relations, or you're a prospective employee and you are protected by that tort, wrongful inference with prospective advantage.

But if you are an employee who is a present at will employee, the law just doesn't help you; the law doesn't cover your situation, and I don't think that's the case, your Honor. I don't think any lawyer can look at the law and say that's it, that you are plumb out of luck if you are in this -- in this small crease which is unprotected by the law.

So I'm sorry it took me so long to figure out what you were telling me, but once I read MBT Corp.,

actually more than Guard Life, I thought I now understand. And since there is a cause of action there, I'd like to proceed with the terms of is there a dispute of fact under this --

THE COURT: You're asking to proceed with your cause of action for tortious inference with prospective economic relations based not on the alleged inference with the job application in the Park Slope veterinary center.

As I understand it from your papers, you have withdrawn the claim involving Park Slope, but you wish to proceed with the claim based on --

MR. MYSLIWIEC: Dr. Burns's employment of my client, that's right.

THE COURT: Based on the Tribeca --

MR. MYSLIWIEC: The Tribeca Soho --

THE COURT: What is the name of that?

MR. MYSLIWIEC: Tribeca Soho.

THE COURT: The Tribeca Soho Animal Hospital's not hiring him in the future?

MR. MYSLIWIEC: Yes. Well, I mean for terminating him from his at will employment. What MBT Bank Corp. says is that you don't have a cause of action for inference with contractual relations because there is no breach of contract in an at will

contract, all right?

But that must mean that then he is protected by prospective economic advantage, because if he isn't there is a gap in between. And I don't believe the law intended that.

THE COURT: I am perplexed by this argument that you are making. I will look at the MBT case before I rule finally on this cause of action.

But let me say also, that in the second amended complaint you have not pleaded a cause, not anywhere that I can see. Anyway, if I missed something you can show me.

But the cause of action for inference with prospective economic advantage seems to be pleaded just based on the Park Slope application for employment.

MR. MYSLIWIEC: Well, not to get hyper-technical, your Honor, but I do carry through the factual paragraphs into -- from above, from the Tribeca Soho employment into the cause of action.

I agree with your Honor and I have a footnote to the point. If we are being technical, what I have left out and -- in amending the complaint was the specific allegation that the means used -- the means used by the defendant were wrongful in bringing about

by client's termination by Tribeca Soho. That's the one thing that's left out.

That, however, has been no secret to anybody here since the beginning of the case. And if I have to amend to put that specifically in again, I will. But, again, the law favors the allowance of a cause of action if there is one there to be found.

Let me move on to --

THE COURT: What is --

MR. MYSLIWIEC: Okay.

THE COURT: -- the cite for the MBT case that you have referred to?

MR. MYSLIWIEC: Your Honor, it was in your last opinion, and I don't have it.

THE COURT: All right. If I cited it in my last opinion, then I will just look there.

All right. Let's continue with the other causes of action.

MR. MYSLIWIEC: With respect to -- we've dropped slander, your Honor. We don't have the means or ability to pursue that at this time.

And Dr. Parker, although I don't think his affidavit tells the whole story, he is certainly not going to change his story now and say that he would have hired my client but for. So I think that's not

on the table.

What I really want to focus on is liable, the liable of the newsletter, your Honor.

THE COURT: Excuse me just one minute.

(Pause taken.)

THE COURT: Counselor, excuse me for the interruption.

MR. MYSLIWIEC: That's all right.

THE COURT: Please continue.

MR. MYSLIWIEC: Your Honor, if you would like, I would like to move to liable and, specifically, the liable in the newsletter of August 12, 2011.

There are five or so subtopics here and if I go over my time, I'm sure your Honor will let me know.

As we talked about last time in January, the publication does not have to specifically identify the plaintiff. And as we've shown in our opposition papers, that he simply has to be identifiable to those who know him, that's the law, not the public in general.

And furthermore, that -- well, the evidence provided -- they're moving for summary judgement on this issue, so that means they have to carry their

burden of proof.

The burden of proof is attempted here by plaintiff's -- I'm sorry, by defendant's original moving affirmation, paragraph eight that she says that not a single recipient of her newsletter has informed me that they have been able to discern my client's identity.

Your Honor, even if one had been able to discern my client's identity, that would be hearsay. I don't think that statement by defendant moves the burden of proof to me.

The second argument they make is in opposing counsel -- paragraph 54 of opposing counsel's reply affirmation where they say, and I am paraphrasing although it's a delicious paragraph, where she says that my client was, in effect, a mere schlepper, a nobody, somebody who worked in the basement of the animal hospital, how would anybody know his name?

Well, how would counsel know that? Counsel's affirmation on that point doesn't alter the burden of proof, they still have to carry it.

The last thing that they provide is Amy Sack's affidavit where she said she had to connect the dots. And we provided case law in our opposition saying -- that says that if a diligent reporter can

Proceedings

connect the dots from the newsletter and from other sources, then that is sufficient, you are able to identify the subject of the liable.

THE COURT: Well, you don't have any information, do you, about the distribution of the newsletter. >

MR. MYSLIWIEC: That's a great point, your Honor. And I was going to address that under the common interests privilege; it's our position that there was excessive publication. That's a very interesting point.

In the moving papers they talk about the distribution of the newsletter to the animal loving community, all right? Now, I think that's an awfully big group. And I think that that might well be excessive publication even as self-described by the defendant.

But in the reply papers, the defendant herself at paragraphs seven and twelve of her reply affidavit says that she -- in seven, she says that she got the e-mail addresses by -- from her clients -- whether they were her clients or Dr. Burns's clients is yet to be determined -- and sent the newsletter to these e-mail addresses.

But what she doesn't say, what she is hazy

about is whether she asked these people in paragraph seven whether they wanted to receive her newsletter. She doesn't say that.

What she says in paragraph 12 of her reply affirmation is even better. It says that you had to be registered to get the newsletter.

Well, I got the newsletter and I wasn't registered. It is not even like Amazon.com where you have to send in your e-mail address and so forth and so on. You just push a button on the website that says, archives newsletter now. She changed that since then.

And I believe what she is describing in paragraph 12, Miss Sandoval, in paragraph 12 of her affirmation is what may currently be her policy. That she's understood that she has run the risk of excessive publication by her old method of distribution, which is anybody who went on her website could press archives newsletter and get the newsletter. That's the way I did it, all right?

But she has apparently changed that now, but she hasn't told the Court in paragraph 12 that this is her new way of doing things. Her suggestion is this is always the way you got the newsletter.

So the newsletter was available to anybody

who went on her website. And she says she sent the newsletter to people whose e-mails she has, but it is fuzzy whether those are people would asked to receive her e-mails or she was just able to get their e-mail addresses when she asked for them.

THE COURT: Well, I don't know if these are people in the Tribeca community whom might have known Mr. Blesdoe or not. What is in the record on that issue?

MR. MYSLIWIEC: Your Honor, there is very little in the record on that issue. And I guess my position with you is that it is their motion for summary judgement and they have to carry the burden of proof on that issue.

They haven't, all right? And so the burden of proof then does not move to me on this issue. And what I have done is shown you the law, as at least I read it, on the point.

THE COURT: Is there anything else before I hear a reply from defendant's counsel?

MR. MYSLIWIEC: Well, I have other issues. You know, we've talked about excessive publication. We've talked about my client not being identified.

We could talk about the public interest privilege for a moment. They discuss that in --

together with the common interest privilege, although they are kind of separate subjects.

And it's our position here that we can't decide whether this is covered by the public interest privilege unless and until we determine that this newsletter was not issued for an ulterior purpose, all right?

And the purpose --

THE COURT: Am I correct that you are no longer seeking to maintain your libel claim based on the e-mails that Ms. Sandoval sent to various persons at Tribeca Soho Animal Hospital?

MR. MYSLIWIEC: That's right, your Honor. We're strictly dealing with the newsletter, that's our issue.

THE COURT: Please continue.

MR. MYSLIWIEC: All right.

Now, even though I asked for it in my opposing papers, the one thing we haven't seen -- and this is relevant to the public interest privilege and it's relevant to the first claim of Miss Sandoval making threats to Dr. Burns regarding the continued employment of my client -- is that nowhere have we seen, even though I have asked for it, is the e-mail or the letter that defendant sent out to her clients.

She calls them her clients. Dr. Burns's might dispute that. They might dispute that. And nowhere have we seen that. Because that would throw a lot of light on whether -- what was her point, what was she doing and what was her intent and whether she was trying -- what she was trying to do.

THE COURT: What was the August, I believe, August 11th e-mail that you were referring to in your papers?

MR. MYSLIWIEC: There was an August 20th e-mail to Dr. Burns's, and this was -- the timeline being that --

THE COURT: Have you seen that e-mail?

MR. MYSLIWIEC: Yes. I mean, I've seen the August 20th e-mail. I'm not sure.

THE COURT: Didn't you refer in your papers to an e-mail in August that you haven't seen?

MR. MYSLIWIEC: Yes, that's what I am talking about now.

THE COURT: What is the basis for believing that there is another e-mail that you haven't seen?

MR. MYSLIWIEC: That she informed her clients -- and I don't think she disputes this -- that she was ending her relationship with Dr. Burns and his hospitals. That's the e-mail or the letter,

I don't know what form it was in.

THE COURT: But where are you getting the information that she sent a communication to her clients that she was terminating her relationship with Tribeca Soho? Is it something that she says in her affidavit? If so, just call my attention to it. I'm just asking you to focus my attention on where that information is brought up.

MR. MYSLIWIEC: Well, your Honor, I can't show you this minute a paragraph in the papers, but I don't believe it's disputed that she did just that; that she terminated -- she sends an e-mail to Burns saying that's it, it's over between us.

I mean, it would seem --

THE COURT: And that was the August 20 e-mail?

MR. MYSLIWIEC: That was August 20.

THE COURT: Now, would you please take another couple of minutes and bring your oral argument to a close. Thank you.

MR. MYSLIWIEC: Certainly.

With respect to opinion versus fact, your Honor, and the question of mixed opinion, in my present version of the complaint I refer to five items on page 11 of the second amended complaint.

[* 22]

And I've said in my papers that under the law of the Court of Appeals, that probably the allegation of the abuse applied was protected as opinion because she gave the source -- I mean, she didn't identify the source, but she in fact quoted a source for this allegation. And under the Court of Appeals law, as I read it, that makes it an opinion; not a fact, from which the reader can derive their own views.

Nonetheless, to me there are at least three statements, liable statements of fact here; the cat allegation on June 3 about David threatening the cat and pulling back his fist, the allegation that he had done this and much worse to animals for years, because there was no source for that in the newsletter, and that he might be a high school dropout or drug addict with a felony record.

And she denies that that was intended to apply to him, but the e-mails that she sends to Burns make constant reference back to this woman Ruth who was a substance abuser, and saying Dave was going down the same path. And I think in spite of her credentials, I think that is evidence of what she intended at the time.

THE COURT: I must stop you now. Thank you.

MR. MYSLIWIEC: That's fine. Thank you very

much, your Honor.

THE COURT: Do you want to reply?

MS. EILENDER: Very briefly, your Honor.

There seems to be a tremendous amount of subterfuge here, and just to cut through the issues, what I am hearing counsel say is that he is focusing the cause of action in this case to the newsletter.

If you look at the newsletter, I believe the defendant has more than carried their burden. If you look at the plain language of the newsletter, there is no way to identify the plaintiff or the Tribeca Soho Veterinary Hospital.

And in fact, this reporter, Amy Sacks, whose affidavit dated March 13, 2012, was submitted with our papers, apparently she is a reporter who commonly writes about issues for the Daily News.

And with respect to counsel's allegation that she connected the dots, I think her affidavit is actually the opposite of that. She obtained information from asking around, asking people. And, she cited a confidential source.

And so with respect to the fact that he thinks his client is readily identifiable, this newsletter is belied by this reporter's affidavit and common sense, if you just read it.

Proceedings

Moreover, the --

THE COURT: Miss Eilender --

MS. EILENDER: Yes.

THE COURT: I said very clearly in my prior decision on the prior motion to dismiss that I thought that the plaintiff was entitled to discovery on that issue.

And I know you didn't write these papers, but the attorney who did these write these papers just ignored that I indicated that discovery was necessary. Didn't move to reargue my decision, just ignored it.

MS. EILENDER: Your Honor, I have a copy of your decision on the record from the prior motion. And in your Honor's dismissing certain claims, there was an understanding by my office, I assume, that when we made a fresh motion to dismiss the amended complaint that you have to put in all those claims or else they would be dismissed.

THE COURT: I don't know how the attorney who wrote that could have possibly thought that based on my decision. It was quite clear that I was granting leave to renew with respect to the tortious inference claim when it was re-pleaded.

MS. EILENDER: Your Honor, then with respect

to the newsletter, the defendant asserts that it was certainly, at the very least, a qualified privilege with respect to her clients and who read the newsletter. And that she would be entitled to a privilege based on that, as well as a public policy privilege.

THE COURT: Well, I did leave it open for you to make a summary judgement motion, but don't you think there are triable issues of fact on these issues of whether these statements are true and whether -- well, certainly you're not claiming that the statements in the newsletter are subject to a qualified privilege?

MS. EILENDER: They can be, Judge, because with respect to the community to which it was disseminated (sic).

But, your Honor, the whole purpose of doing discovery is to discover information which would resolve the case. In this case --

THE COURT: Excuse me, are you taking the position that a publication to the downtown animal loving community would be subject to the qualified privilege?

MS. EILENDER: It can be, your Honor.

THE COURT: Well, show me the case that says

that. Because if that is so, then that expands the concept of qualified privilege to any instance in which someone believes that a cause to which they are committed entitles them to publish information about someone who they think is acting in a manner detrimental to the cause.

MS. EILENDER: Judge, I'm not saying that this defendant had carte blanche to write whatever she wanted about whomever she feels. However, in this newsletter she doesn't identify the plaintiff. Moreover, the Tribeca Soho Vet Hospital is not identified in the newsletter either.

And so I believe under the Kahn case the Courts held that unless it is readily identifiable with extrinsic facts that you can tell who it is. In this cas --

THE COURT: She identifies the man by his weight and his height. She is working in the Tribeca community and it would be surprising if that newsletter weren't going to persons who live in the Tribeca community who may have patronized the Tribeca Soho VETERINARY HOSPITAL with which she was affiliated. We just don't know that because there hasn't been discovery yet.

MS. EILENDER: Your Honor, on the face of

this motion for summary judgement we submitted all these affidavits. The plaintiff didn't come up with a single name or a single affidavit from anyone who read the newsletter and said, ha, ha, this is David Blesdoe. And so if they were going to come up with anything, this was the time to identify somebody.

THE COURT: Well, frankly, I don't think it was the plaintiff's burden to do that.

Is there anything else before I recess?

MS. EILENDER: No, Judge.

THE COURT: Okay. If you return to the courtroom at 11:40 -- 10:45 by the courtroom clock, I will give you a decision on this case. I'm going to review the Bank Corp. case before I rule.

MS. EILENDER: Thank you, your Honor.

MR. MYSLIWIEC: Thank you.

(Recess taken while the Court entertained other cases.)

THE COURT: On the record. The record will reflect that as is my usual practice, I have heard oral argument -- withdrawn.

Earlier this morning I heard oral argument of the motion on the record. I will now place my decision on the record.

Defendant moves to dismiss plaintiff's second

amended complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) and to convert the motion to one for summary judgement.

In my prior decision on the record on January 26, 2012, which determined a motion to dismiss the first amended complaint, this Court granted leave to plaintiff to replead the slander and ~~liable~~ libel causes of action, dismissed plaintiff's cause of action for tortious inference with existing contract with prejudice, and denied defendant's motion to dismiss plaintiff's cause of action for tortious inference with prospective economic advantage without prejudice to renew after the cause of action was re-pleaded.

At the time of the hearing of the prior motion to dismiss, plaintiff also withdrew his cause of action for injurious falsehood.

Plaintiff then served his second amended complaint, to which the instant motion is addressed. The second amended complaint, hereafter referred to as complaint, pleads a first cause of action for ~~liable~~ libel based on defendant's publication of a newsletter on or about August 12, 2011, and on e-mails sent to the owner of the veterinary hospital where plaintiff worked, ~~and~~ to plaintiff's immediate supervisor at that hospital, and to other employees of

the hospital, accusing plaintiff of being an animal abuser. (Complaint paragraphs 47, 52 and 53.)

At the oral argument of the instant motion plaintiff withdrew the ~~libel~~ libel claim to the extent they were based on the e-mails sent by defendant to various individuals at the veterinary hospital, Tribeca Soho Hospital.

Plaintiff's cause of action for ~~libel~~ libel as pleaded was also based on e-mails from defendant to Park Slope Veterinary Hospital, to which plaintiff applied for employment after he was terminated from Tribeca Soho Hospital. (Complaint paragraph 54.)

The complaint pleads a second cause of action for slander based on telephone calls by defendant to the owner and employees of the Tribeca Soho and Park Slope hospitals.

The third cause of action of the complaint is for interference with prospective economic advantage. Defendant seeks dismissal of the ~~libel~~ libel and slander causes of action on the grounds that ~~plaintiff's statements were true -- withdrawn, that~~ defendant's statements were true, that they were non-actionable opinion and that they are protected under a qualified privilege of common interest.

In addition, defendant claims that the

statements in the newsletter did not specifically refer to plaintiff by name, and that there is not a sufficient factual showing that the words would be taken by anyone as referring to plaintiff and intending to defame him.

Plaintiff opposes the motion on the ground, among others, that discovery is needed. In opposition to the motion plaintiff withdraws his slander cause of action explaining that it, ~~quote~~, "hinged on oral conversations between defendant and non-hospital employees," ~~close quote~~, and that because they have submitted affidavits denying that they spoke with defendant, it is unlikely that they would ever testify in his favor.

Plaintiff further states that he does not have the means to pursue this claim given these circumstances and will not, ~~quote~~, "tilt at windmills," ~~close quote~~. (Affirmation in opposition paragraphs 89 through 91.)

Plaintiff seeks to continue to maintain his libel ~~liable~~ claim but only based on the August 12, 2011 newsletter published by defendant.

I stated a moment ago he is no longer seeking to maintain the libel ~~liable~~ claim based on e-mails sent by defendant to various individuals at the Tribeca Soho

Proceedings

Hospital. Nor does he seek to maintain the ~~libel~~ libel claim based on e-mails allegedly sent by defendant to other persons. (See affirmation in opposition, paragraph 61.)

Off the record.

(Discussion held off the record.)

THE COURT: Back on the record. The Court has previously held that the allegation that plaintiff, a veterinary technician's assistant at a veterinary hospital, abused animals under his care is sufficient to support a defamation cause of action, as it tends to expose plaintiff to contempt in his employment. (Prior decision at five.)

The Court now holds that this motion should not be converted to a motion for summary judgement on the ~~libel~~ libel cause of action, as plaintiff has not had the opportunity to conduct any discovery given the early stage of this case.

The general rule is that summary judgement should not be granted prior to completion of discovery, where facts necessary to oppose the motion may exist but are within the exclusive knowledge or control of the moving party. (See e.g. Integrated Logistics Consultants v. Fidata Corp., 131 AD2d 338; Simpson v. Term Industries, Inc., 126 AD2d 484.)

Proceedings

This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. (Baron v. Incorporated Village of Freeport, 143 AD2d 792, 793; Colicchio v. Port Authority of New York and New Jersey, 246 AD2d 464.)

On the prior motion to dismiss defendant similarly argued that the claim based on the newsletter should be dismissed because plaintiff was not named in the newsletter.

Plaintiff argued in opposition to the prior motion and argues again now that discovery is necessary on the issue of who read the newsletter and whether the readers would have understood that it was referring to plaintiff.

While the Court directed plaintiff in the re-pleaded liable cause of action to set forth the identities of the readers of the newsletter to the extent known to him, the Court specifically stated ~~quote~~ "To the extent that the identities are unknown, the Court agrees with plaintiff that at this early juncture in which discovery has not yet been conducted, failure to plead the identities of the readers of the newsletter and their knowledge that the newsletter referred to ~~them -- referred to~~ plaintiff

plaintiff is not fatal to the maintenance of the libel liable cause of action," above quote. (Prior decision at seven.)

Nothing has changed since the prior decision.

In moving again to dismiss based on the fact that plaintiff was not expressly named in the newsletter, defendant simply ignores the prior order determining that plaintiff is entitled to discovery on this issue.

The Court further holds that plaintiff is entitled to discovery of defendant and the parties from whom defendant obtained affidavits claiming that plaintiff committed animal abuse. Defendant submits these affidavits in support of her defense of the truth of her allegation that plaintiff was an animal abuser.

As defendant's and the other parties' affidavits raise issues of credibility, plaintiff is entitled to discovery.

In addition, plaintiff submits the affidavit of plaintiff's supervisor at the Soho at Tribeca Soho Hospital, Piotr Stachera, in which he states his belief that plaintiff would never harm an animal other than in self-defense.

He also attests to the fact that plaintiff

himself was the first person to bring to Stachera's attention the incident which is the subject of the newsletter involving the ear cleaning of a dog and in which plaintiff was injured.

And, Stachera attests to the lack of any complaints about plaintiff other than the aforementioned incident during the six years from 2005 to 2011, during which plaintiff worked under Stachera's direct supervision.

This affidavit raises a triable issue of fact about the truth of defendant's charge of animal abuse and, thus, also militates against conversion of the motion to dismiss to one for summary judgement.

The Court, accordingly, declines, based on these ~~facts~~ factual issues and the need for discovery, to convert the motion to dismiss to one for summary judgement. MF

To the extent that defendant moves to dismiss the ~~liable~~ libel claim based on the newsletter on the ground that the statements in the newsletter were protected opinion, the Court rejects that claim.

~~First of all, it was withdrawn.~~ MF

The Court finds that there are statements in the newsletter that do not set forth the facts on which they are based. And these statements include,

among others, that plaintiff had done, quote, "much worse to animals that are patients at this hospital for years." close quote.

The phrase "much worse" refers to incidents much worse than the incident regarding the ear cleaning of the dog which was the central focus of the newsletter.

The Court now turns to the branch of the motion to dismiss the third cause of action for tortious inference with prospective economic relations.

Plaintiff withdraws the part of this cause of action insofar as it relates to his job application to Park Slope Hospital. His explanation for doing so is that based on the submission of an affidavit of this affirmation on this motion by Dr. Parker of the Park Slope Hospital, it appears unlikely that Parker will ever testify that his failure to hire plaintiff was due to defendant's intervention.

Like plaintiff's withdrawal of his slander claim, this withdrawal appears then to be based on the lack of any desire of plaintiff to quote, "tilt at windmills." close quote. (See affirmation in opposition, paragraph six.)

Plaintiff seeks, however, to maintain this cause of action based on his at will employment at

the Soho Tribeca Hospital. He is claiming that defendant threatened that unless the hospital terminated plaintiff's employment, she would make the hospital the subject of a newsletter labeling it "soft," on animal abusers.

The complaint further alleges that she threatened to steer her clients' pets' medical needs to the hospital's competitors unless her demands were met. (See complaint, paragraph 31.)

It is well-settled that a motion to dismiss must be denied if from the pleading's four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." close quote.

In furtherance of this task, the Court liberally construes the complaint and accepts as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion.

The Court also accords plaintiff the benefit of every possible favorable inference. (See 511 West 232 Corp. v. Jennifer Realty Company, 98 NY2d 144, 152.

Applying these liberal pleading standards, the Court finds that the second amended complaint

pleads a cause of action, tortious inference with economic relations, particularly as clarified in plaintiff's opposition papers to the instant motion.

Plaintiff is, in effect, claiming that although plaintiff had an at will relationship with Tribeca Soho Hospital, defendant used wrongful means to interfere with and bring about the termination of plaintiff's employment from that hospital.

In particular, plaintiff's claim is that defendant committed the crime of coercion in the second degree under Penal Law 135.60, by inducing the hospital to engage in conduct which the hospital had the legal right to abstain from; that is the termination of plaintiff by threatening to ~~, quote,~~ "expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule," ~~close quote~~.

Certainly, publicizing that a veterinary hospital was soft on animal abuse would expose a secret that would tend to expose it to hatred, contempt or ridicule within the meaning of the statute.

The Court notes that the pleadings in this case have been anything but artful. But that is not the standard ~~of~~ for determining whether the complaint

will survive a motion to dismiss.

And here the Court finds that the pleadings are sufficiently clear to give notice of the transactions on the basis of which the causes of action are sought to be maintained, and the underlying evidentiary facts.

Much as the defendant would like to, she cannot achieve dismissal of this action at this early juncture in which plaintiff has not had the opportunity to obtain discovery of information which is uniquely within defendant's possession.

~~This concludes -- withdrawn.~~

Defendant's motion is denied. This concludes the Court's decision on the motion.

The movant shall promptly obtain a copy of the decision and file it with the clerk at Part 57 for transmission to me for so ordering.

The parties are advised that the Court may correct errors in the transcript. Therefore, if it is needed for any further purpose, they should be sure they have a copy as so ordered by the Court and not merely as signed by the court reporter.

The Court notes that in the instant motion defendant attached a copy of an un so-ordered transcript rather than of the so-ordered transcript,

Proceedings

and that should and must be avoided in the event of any further motion practice in this case.

I am going to open the decision to provide that defendant shall serve an answer within twenty days of today's date, and the parties shall appear for a preliminary conference in this part on June 28th at 11 a.m.

The decision is now concluded. The record is closed.

* * * * * * * * *

Certified to be a true and accurate transcription of the minutes taken in the above-captioned matter.

Denise M. Paternoster, RPR
Senior Court Reporter

FILED
JUN 27 2012
NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED

5/24/12

MARCY S. FRIEDMAN, J.S.C.