SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
----------x

BENJAMIN B. ABEDINE,

Plaintiff,

-against-

LORD SECURITIES CORPORATION,

Defendant.

----------x

Index No.: 151991/2016

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

Defendant, Lord Securities Corporation, moves, pursuant to CPLR 3211(a)[1] and [7], to dismiss plaintiff's, Benjamin B. Abedine, complaint based on documentary evidence and for failure to state a cause of action.

Background

This action arises out of the dissolution of the business relationship between defendant and nonparty Broad Street Contract Services ("Broad Street"), both of which either currently employ or previously employed plaintiff. In an earlier action (Index No. 653853/2014), defendant commenced an action against plaintiff for breach of contract and various tort claims, and initiated a parallel arbitration against Broad Street and its owner, Peter H. Sorensen ("Sorensen"), alleging similar claims on the same facts. Plaintiff's motion to dismiss defendant's complaint is decided concurrently, and facts relating to the background of the relationship between the parties, the dissolution of the

relationship, and the parallel arbitration, is set forth in that decision and order. The facts relevant to this action are as follows.

Defendant employed plaintiff as a Managing Director for eight years, ending on December 4, 2013, and Chief Financial Officer for five years before that (Complaint, ¶ 10). In April 2014, plaintiff agreed to serve as a consultant for defendant until July 31, 2014 (Id., ¶ 12). He also served as a corporate officer of Broad Street from 2000 to 2005, and from 2009 to the present day (Id., ¶ 11).

While in defendant's employ, plaintiff maintained a separate tax practice, and provided various tax preparation services for defendant and for defendant's clients, services which defendant itself did not provide (Id., ¶ 14). Among plaintiff's clients were Deutsche Bank Securities, Inc. ("Deutsche Bank") and JP Morgan & Co. ("JP Morgan") (Id., ¶ 15). On February 25, 2015, after defendant and Broad Street had terminated their relationship defendant advised Deutsche Bank that it had retained a separate accounting firm to replace plaintiff because he was no longer providing services to Lord (Id., ¶ 16). Deutsche Bank then terminated its agreement with plaintiff (Id., ¶ 17). On March 13, 2015, defendant gave similar instructions to JP Morgan, which resulted in the same outcome (Id., ¶¶ 18-19). In addition,

defendant instructed JP Morgan not to pay plaintiff for services previously rendered, later confirming that defendant would "deal with the repercussions" (Id., ¶¶ 20-23). Plaintiff also alleges that unspecified interference by defendant caused him to lose agreements to provide tax services for several other clients, including Citibank and the National Football League (Id., ¶ 24).

Plaintiff then alleges that at that same time defendant began defaming him to his clients. On March 13, 2015, Lori Gebron ("Gebron"), defendant's employee, informed Elaine Lo at JP Morgan that plaintiff had been "let go" by defendant (Id., ¶ 26). Plaintiff interpreted Gebron's comment as insinuating he had been terminated for cause when, in fact, he had resigned (Id.). Plaintiff claims, upon information and belief, that defendant made similar statements to his other clients (Id., ¶ 27).

On October 16, 2015, Broad Street transferred its ownership interest in ALMA Holdings, Inc., a holding company for a special purpose vehicle ("SPV") set up for Credit Lyonnais, defendant's client, to 48 Wall Street Holdco, Inc., defendant's designated equity ownership services provider (Id., ¶¶ 28-29). Credit Agricole CIB ("Credit Agricole") acquired Credit Lyonnais, and made the transfer request (Id.). Defendant later demanded that Sorensen step down as director of the SPV and transfer his personal shares in the SPV as well (Id., ¶ 30).

On March 28, 2016, plaintiff contacted Credit Agricole regarding fees owed to Sorensen, and was told by Credit Agricole employees Ludovic Langnier ("Langnier") and Richard Sinclair ("Sinclair") that defendant had told Credit Agricole that Broad Street and plaintiff had never consented to the transfer and, had not, in fact, transferred ALMA Holdings (Id., ¶ 32). Plaintiff claims this statement is false (Id., ¶¶ 32-33). He also alleges, upon information and belief, that defendant made similar statements to its other clients, and has instructed Credit Agricole not to respond to him (Id., ¶¶ 34-35).

In this action, plaintiff asserts claims for defamation, trade libel, tortious interference with contract, and tortious interference with prospective economic relations.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (Id. at 87-88). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary

evidence, they are not entitled to such consideration" (Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 [1st Dept 1994]). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d at 88). "In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Id. [internal quotation marks and citations omitted]).

I. Defamation (First Cause of Action)

The first cause of action purports to state a defamation claim. The elements of defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (Dillon v City of New York, 261 AD2d 34, 38 [1st Dept 1999]). Defamation must be pleaded with particularity (CPLR 3016(a)). The injured party must plead not only the specific words used but also the time, place, and manner that the words were said and to whom specifically they were said (Dillon v City of New York, 261 AD2d at 38 [internal quotation marks and

citations omitted]). "Generally, a [defamatory] statement may be defamatory if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community" (Golub v Enquirer/Star Group, 89 NY2d 1074, 1076 [1997] [internal quotation marks and citation omitted]).

Here, plaintiff claims that defendant maliciously made false statements to employees of JP Morgan and Credit Agricole that he had been terminated for cause and had failed to transfer Broad Street's interest in ALMA Holdings to defendant, as well as other vague and conclusory allegations of similar statements to other clients. As an initial matter, there are only two statements described with specificity in the complaint, namely, that plaintiff was "let go" and that he failed to complete the interest transfer (Complaint, ¶¶ 26, 32). Plaintiff also alleges that defendant made similar statements, but does not allege from whom they were made, to whom they were made, or when and where they were made.

To begin, allegations on "information and belief," (Complaint, ¶¶ 27, 35), are insufficient to sustain a claim for defamation where they do not state the speaker, listener, time, place, or the alleged defamatory words (see Bell v Alden Owners, 299 AD2d 207, 208 [1st Dept 2002] ["The claimed defamatory

remarks were alleged to have been made by unknown persons to certain unspecified individuals, at dates, times and places left unspecified"]). Further, neither of the two statements whose words are actually alleged in the complaint is sufficient to maintain a defamation claim. As defendant correctly points out, the statement that plaintiff was "let go" is not defamatory by itself (see Chang v Fa-Yun, 265 AD2d 265, 265 [1st Dept 1999] ["The mere statement of discharge or termination from employment, even if untrue, does not constitute libel" [internal quotation marks and citations omitted]).

Plaintiff, however, argues that, in the context made, defendant was attempting to ruin his tax business and therefore, the statement must be read as stating that he was terminated for cause (Plaintiff's Memo. at 13-14). That argument is unavailing. What matters in a defamation action is what words were actually uttered (Brian v Richardson, 87 NY2d 46, 50-51 [1995]). "Any qualification in the pleading thereof by use of the words 'to the effect', 'substantially', or words of similar import generally renders the complaint defective" (Geddes v Princess Props. Intl., 88 AD2d 835, 835 [1st Dept 1982] [internal quotation marks and citation omitted]).

Here, plaintiff interprets the words "let go" as "[defendant] had terminated [plaintiff] for cause[,]" but gives

no indication that Gebron, defendant's employee, said anything other than "let go" (Complaint, ¶ 26). Plaintiff's reliance on Carney v Memorial Hosp. & Nursing Home of Greene County, 64 NY2d 770, 772 (1985) is unavailing given in that case the defendant actually published the plaintiff had been terminated "for cause."

Next, plaintiff's claim that statements concerning his alleged failure to complete the interest transfer are defamatory is also facially deficient. He does not set forth who specifically at defendant told Langnier and Sinclair at Credit Agricole that plaintiff failed to complete the interest transfer (Complaint, ¶ 32). Nor does the complaint set forth allegations as to when or where the alleged communication occurred. Further, even if those allegations were sufficient, plaintiff, at most, merely succeeds in alleging that defendant, Broad Street, and by extension plaintiff, were in the midst of a dispute concerning ALMA Holdings and other clients.

Lastly, a defamatory statement must impugn the target within "the minds of a substantial number of the community" (Golub v Enquirer/Star Group, 89 NY2d at 1076). Plaintiff's allegations regarding how many other people defendant made the statement to, or were even aware that defendant had made such a statement, are vague and conclusory.

Accordingly, that branch of the motion to dismiss the first cause of action for defamation is granted, and it is dismissed.

II. Trade Libel (Second Cause of Action)

The second cause of action purports to state a claim based on trade libel. "The tort of trade libel ... requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment" (Banco Popular N. Am. v Lieberman, 75 AD3d 460, 462 [1st Dept 2010]). Malice and special damages must be alleged (Christopher Lisa Matthew Policano, Inc. v North Am. Precis Syndicate, 129 AD2d 488, 490 [1st Dept 1987]).

Plaintiff argues that the same statements alleged with respect to his defamation claim also constitute trade libel because they "impugn [plaintiff's] considerable talents in the provision of ... services to clients in the business of structured finance and have substantially impaired his ability to market his services to such clients" (Complaint, ¶ 40). Although the relevant statements may be used to support a trade libel claim, such a claim must be pleaded with particularity (see Congel v Malfitano, 61 AD3d 809, 810 [2d Dept 2009]).

Here, as with the defamation claim, supra, the allegations for the trade libel cause of action fall short of the required

particularity. In any event, contrary to his arguments, neither of the two statements complained of state derogatory facts related to plaintiff's business as an accountant or provider of other services. The statement that plaintiff was "let go" is simply not derogatory on its face. The statement regarding ALMA Holdings implies a business dispute and not derogatory of plaintiff's services. Indeed, it suffers from the same pleading defects noted above for the defamation claim. Further, even if both statements were derogatory of his business, the complaint makes only conclusory allegations of malice.

Accordingly, that branch of the motion to dismiss the second cause of action for trade libel is granted, and it is dismissed.

III. Tortious Interference with Contract (Third Cause of Action)

The third cause of action purports to allege a claim of tortious interference with plaintiff's contracts with JP Morgan and Deutsche Bank. "In a contract interference case ... the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (White Plains Coat & Apron Co., Inc. v Cintas Corp., 8 NY3d 422, 426 [2007]).

Plaintiff alleges that defendant tortiously interfered with his contracts with Deutsche Bank and JP Morgan to provide them

tax services when defendant told those companies to stop using him as a tax preparer and further told JP Morgan not to pay him for prior services rendered. Defendant, in response, makes two arguments.

First, defendant argues that its consulting agreement with plaintiff bars this claim because plaintiff was only to provide tax preparation services for the SPVs "as requested by [defendant]" (Mintz Affirm., Ex. 3, Consulting Agreement at 17), and that continuation of any tax services after he was no longer employed by defendant was a breach of the consulting agreement. Thus, defendant argues plaintiff had no protectable interest in his business relationships and contracts with defendant's clients.

Plaintiff contends that the requirement that he provide tax services to the SPVs upon defendant's request is not a requirement that such services could only be provided with defendant's permission. He further maintains that nothing in the consulting agreement provides that his purported breach thereof would invalidate separate contracts he entered into personally.

"[S]eparate written agreements involving different parties, serving different purposes and not referring to each other [are] not intended to be interdependent or somehow combined to form a unitary contract" (Applehead Pictures LLC v Perelman, 80 AD3d

181, 189 [1st Dept 2010] [internal quotation marks and citation omitted]). "[O]ne agreement may follow from and even have as its raison d'etre another and yet be independently enforceable" (Id. [internal quotation marks and citation omitted]). "[I]n the absence of some clear indication that the parties had a contrary intention, contracts manifesting separate assents to be bound are generally presumed to be separable" (Id. [internal quotation marks and citations omitted]).

Plaintiff alleges that he entered into contracts with Deutsche Bank and JP Morgan to provide tax services because defendant did not itself provide such services (Complaint, ¶ 14). There, however, is no allegation sufficient to indicate that plaintiff's tax contracts were meant to be interdependent such that a breach of the consulting agreement would undo the those contracts.

Second, defendant argues that it was justified in communicating as it did with JP Morgan and Deutsche Bank because, as defendant's clients, they all shared a common economic interest. Defendant is correct. In a tortious interference case, "a defendant may raise the economic interest defense -- that it acted to protect its own legal or financial stake in the breaching party's business" (White Plains Coat & Apron Co., 8 NY3d at 426). As the Court of Appeals held, the economic

interest defense applied "where the defendant had a managerial contract with the breaching party at the time defendant induced the breach of contract with plaintiff" (Id.).

Similarly, here, defendant had existing contracts with JP Morgan and Deutsche Bank to provide, inter alia, management services to both of them, which plaintiff acknowledges (Complaint, ¶ 15). As such, plaintiff must allege malice in order to overcome defendant's economic interest, which he fails to do (Foster v Churchill, 87 NY2d 744, 750 [1996] ["economic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality"]; see also Morgan v Worldview Entertainment Holdings, Inc., 141 AD3d 461, 463 [1st Dept 2016]).

Here, plaintiff continues to rely on the allegations that defendant knew that he had not been "let go," but had resigned to show malice. In that regard, he once again claims that defendant said that he was terminated. These allegations, without more, are insufficient to satisfy the malice requirement. Plaintiff, nonetheless, argues that economic justification cannot be decided on a motion to dismiss, and, at most, a factual issue exists that is to be resolved on a motion for summary judgment (Plaintiff's Memo. at 18-19). In making this argument, plaintiff relies on Demas v Levitsky (291 AD2d 653 [3d Dept 2002]). The reliance is

misplaced. The Appellate Division, First Department, has upheld dismissals based on the economic interest defense (see e.g. Torrenzano Group, LLC v Burnham, 26 AD3d 242, 242 [1st Dept 2006] ["(I)t is clear, by virtue of documentary evidence submitted by Burnham in support of this pre-answer motion to dismiss (CPLR 3211[a][1]), that the alleged interference had an economic justification"]). Here, rather than documentary evidence, plaintiff's own allegations detail the economic relationships defendant had with JP Morgan and Deutsche Bank. As such, factual issues do not exist.

Accordingly, that branch of the motion to dismiss the third cause of action for tortious interference with contract is granted, and it is dismissed.

IV. Tortious Interference with Prospective Economic Relations (Fourth Cause of Action)

The fourth cause of action purports to allege a claim for tortious interference with prospective economic relations. A claim for tortious interference with prospective business relations requires allegations that "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the

business relationship" (Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 108 [1st Dept 2009]).

Plaintiff claims that defendant's act of telling Deutsche Bank and JP Morgan that he had been "let go", which he interprets as telling them he was terminated for cause, and that he had failed to make the interest transfer, interfered with his ability to secure future business (Complaint, ¶¶ 47, 49). He also claims that defendant's act of telling Credit Agricole not to communicate with him had the same effect (Id., ¶¶ 48-49).

As an initial matter, plaintiff's claim is defective because he fails to set forth what prospective economic opportunities he has lost (see Learning Annex Holdings, LLC v Gittelman, 48 AD3d 211, 211 [1st Dept 2008] ["The record evidence establishes that plaintiff's cause of action for tortious interference with prospective business relations is not viable since plaintiff has failed to identify any specific customers it would have obtained but for defendant's actions"]).

In any event, even had plaintiff alleged specific lost economic opportunities, he fails to allege either unlawful means or that defendant's sole purpose was to harm him. As to unlawful means, the Court of Appeals has previously stated that "unlawful means" include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of

economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract" (NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614, 624 [1996]).

Here, the only remotely unlawful conduct plaintiff alleges is the defamatory statements made to JP Morgan and Credit Agricole. As noted above, such statements are neither defamatory nor a trade libel. As such, plaintiff fails to plead a claim for tortious interference with prospective economic relations.

Accordingly, that branch of the motion to dismiss the fourth cause of action is granted, and it is dismissed.

V. Leave to Amend and CPLR 3211(d)

In his opposition papers, plaintiff requests that if this Court finds that he has inadequately pleaded the words used to defame him he be granted leave to amend and set forth the precise words used. Alternatively, plaintiff asks that this Court hold the instant motion in abeyance as facts necessary to prove his claims exist, but cannot be stated at this time (Plaintiff's Memo. at 17-18). Applications for such substantive relief made in this form are not proper (CPLR 2211 and 2215).

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/20/17

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.