Frydman v Francese
2017 NY Slip Op 31069(U)
May 15, 2017
Supreme Court, New York County
Docket Number: 155477/2015
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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JACOB FRYDMAN,

Plaintiff,

-against-

ALEXANDER FRANCESE,

Defendant.

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DECISION/ORDER
Index No. 155477/2015

HON. CYNTHIA KERN, J.:

Plaintiff Jacob Frydman ("Frydman") commenced the instant action against defendant Alexander Francese ("Francese") alleging causes of action for defamation, tortious interference with prospective economic relations, *prima facie* tort and a permanent injunction. Defendant now moves for an Order pursuant to CPLR § 3212 granting him summary judgment dismissing plaintiff's complaint and for sanctions pursuant to 22 NYCRR § 130-1.1. Plaintiff cross-moves for sanctions pursuant to 22 NYCRR § 130-1.1. For the reasons set forth below, defendant's motion is granted in part and denied in part and plaintiff's cross-motion is denied.

The relevant facts are as follows. Plaintiff was the CEO and Chairman of a real estate investment trust until mid-September 2015 and is currently the Chairman of a "FINRA member broker dealer" and the principal of "numerous private entities" relating to real estate assets and funds. He is also the principal of Ledgerock LLC ("Ledgerock"), which owns a residence in Hyde Park, New York (the "Hyde Park property"). Defendant is the owner and president of APF Fire Protection, Inc. ("APF"), a sprinkler installation and maintenance company. In 2007, APF was hired to install a sprinkler system at the Hyde Park property, which was completed in 2009. In or around November 2012, Ledgerock hired APF to repair the sprinkler system. Plaintiff and defendant disputed the reasons for and the adequacy of these repairs.

After completing the repairs, APF billed Ledgerock but Ledgerock refused to pay on the grounds that the repairs were occasioned by APF's failure to properly design and install the sprinkler system and that the repairs were inadequate and actually damaged the sprinkler system. Thus, APF filed a mechanic's lien on the Hyde Park property. Ledgerock then commenced an action in the Supreme Court, New York County against APF and defendant asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, negligence, professional malpractice, fraud and damages for a willfully exaggerated lien. The court granted the motion of APF and defendant to compel arbitration. After an arbitration hearing on May 15, 2014, the arbitrator denied both Ledgerock's claims and APF's counterclaims for the unpaid repair bill. However, the arbitrator determined that APF and defendant were entitled to attorney's fees.

On or about June 5, 2014, after the arbitration hearing, defendant wrote a review of plaintiff and Ledgerock on RipoffReport.com (the "review"). In the review, which is titled "Ledgerock LLC Jacob Frydman Complete rip off and outright told untruths during arbitration. Fraud Hyde Park New York," defendant made the following statements:

> "You can look into the file of Ledgerock LLC, Hyde Park, NY and find that everyone that worked on the project had to file a lien or was just taken advantage of and decided to walk away as court costs became abundant. This person has taken advantage of everyone and anyone who worked on the project and from our investigation it looks like he has been doing this for years and getting away with it. At our arbitration hearing he out right lied, but we could not show proof as he had a confidentiality agreement with his supervisors as not to say anything that was going on. He himself took blue prints that were above and beyond the design contracted and had them sealed by an architect himself and then submitted them to the building department. I contacted the architect that he had taken them to and he told me that he was paid to stamp drawings that had nothing to do with original contract. He is very good with twisting words and creating situations that can take someone down that does not have the kind of money he has…I wish I had enough money to do something about this kind of person. People like this have been taking advantage of many and that is why we live in such a complex world today. He should be behind bars."

Based on this review, plaintiff commenced the instant action against defendant, asserting causes of action for defamation, tortious interference with prospective economic relations, *prima facie* tort and a permanent injunction.

The portion of defendant's motion for summary judgment dismissing plaintiff's cause of action for defamation on the grounds that the review did not constitute defamation per se, that the review concerns a

matter of legitimate public concern, that at least some of the statements in the review are true and that at least some of the statements in the review constitute nonactionable opinion is denied. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Defendant's argument that plaintiff's cause of action for defamation must be dismissed because the review did not constitute defamation per se is without merit. To recover on a claim for defamation, a plaintiff must establish that the defendant made "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*, 261 A.D.2d at 38. A statement constitutes defamation per se, *inter alia*, if it charges another with a serious crime or if it tends to injure another in his or her trade, business or profession. *Liberman v Gelstein*, 80 N.Y.2d 429 (1992). *See Rabiea v. Stein*, 21 Misc.3d 1149(A), at *2 (Sup Ct, Nassau County 2008) (holding that "because the alleged libel involved an accusation of perjury, a serious crime, the per se form of the tort has been pled").

In the present case, the court finds that defendant's statements that plaintiff lied during the arbitration hearing when testifying under oath, although he does not specify what the alleged lies were, and that plaintiff introduced blueprints showing the sprinkler system as it existed at a later date as evidence of APF's original design drawings for the sprinkler system constitute defamation per se as they allege that plaintiff committed the crime of perjury. Further, the court finds that defendant's statements that "[y]ou can look into the file of Ledgerock LLC, Hyde Park, NY and find that everyone that worked on the project had to file a lien or was just taken advantage of and decided to walk away as court costs became abundant" and that plaintiff "has taken advantage of everyone and anyone who worked on the project and from our

investigation it looks like he has been doing this for years and getting away with it" constitute defamation per se as they would tend to injure plaintiff in his business. If prospective contractors or other entities are led to believe that plaintiff does not pay any contractors, they may be reluctant to do business with plaintiff or the corporate entities for which he is the principal, including Ledgerock.

To the extent that defendant contends that plaintiff's cause of action for defamation must be dismissed because plaintiff failed to allege that the aforementioned statements led to an unsavory opinion of plaintiff in a substantial number of members of the real estate community, such contention is without merit. Although "a written 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," "[d]amages will likewise be presumed for statements that charge a person with committing a serious crime or that would tend to cause injury to a person's profession or business." *Geraci v. Probst*, 15 N.Y.3d 336, 344 (2010). As discussed above, the court finds that certain of defendant's statements either charged plaintiff with the crime of perjury or would tend to cause injury to his business and thus constitute defamation per se.

Further, defendant's argument that plaintiff's cause of action for defamation must be dismissed because his allegation that plaintiff has taken advantage of contractors is a matter of legitimate public concern is without merit. "In the case of a private person, if...the content of the publication 'is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition,' the defamed party must show gross irresponsibility" in publishing the statements. *Ortiz v. Valdescastilla*, 102 A.D.2d 513, 518 (1st Dept 1984) (internal citations omitted). "[T]he subject matter must be more than simply newsworthy...Instead, 'it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.'" *Krauss v. Globe Intl.*, 251 A.D.2d 191, 192 (1st Dept 1998) (internal citations omitted). In the present case, the court finds that defendant's allegation that plaintiff, a private person, has taken advantage of unidentified contractors is not a matter of legitimate public concern as this allegation merely relates to private disputes that have no bearing on the general public or some segment of it.

Defendant has also failed to make a *prima facie* showing that his statements that during the arbitration, plaintiff lied and "took blue prints that were above and beyond the design contracted and had them sealed by an architect himself and then submitted them to the building department" and that defendant "contacted the architect that he had taken them to and he told me that he was paid to stamp drawings that had nothing to do with original contract" are true and thus are nonactionable. Although defendant claims that plaintiff introduced the relevant blueprints stamped by an architect at arbitration as if they were APF's original design drawings and submits a letter from the architect who states that he was paid to stamp drawings that actually had nothing to do with the original design drawings, this letter is merely inadmissible hearsay. Moreover, even if defendant had made a *prima facie* showing that the aforementioned statements were true, plaintiff would raise a triable issue of fact as he states in his affidavit that he did not introduce the relevant blueprints as if they were APF's original design drawings but rather to show the state of the sprinkler system as it had ultimately been built.

To the extent that defendant submits an affidavit from the architect regarding the blueprints in reply, it is well-settled that evidence submitted for the first time in reply will not be considered by the court. *See Migdol v. City of New York*, 291 A.D.2d 201 (1st Dept 2002) ("The affidavit...submitted with appellant's reply papers was properly rejected by the motion court since it sought to remedy these basic deficiencies in appellant's *prima facie* showing rather than respond to arguments in plaintiff's opposition papers.")

However, defendant has established that his statement that plaintiff "is very good with twisting words and creating situations that can take someone down that does not have the kind of money he has. I wish I had enough money to do something about this kind of person. People like this have been taking advantage of many and that is why we live in such a complex world today. He should be behind bars" is merely a statement of opinion and thus is nonactionable. Under New York law, "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation." *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). In determining whether a statement is an opinion as opposed to a fact, a question of law for the court, the following factors are to 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; and (3) whether 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." *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995) (internal quotation marks and citations omitted).

In the present case, the court finds that defendant's statement that plaintiff "is very good with twisting words and creating situations that can take someone down that does not have the kind of money he has. I wish I had enough money to do something about this kind of person. People like this have been taking advantage of many and that is why we live in such a complex world today. He should be behind bars" is clearly a statement of opinion. The aforementioned statement is vague regarding plaintiff's allegedly harmful conduct and is not capable of being proven true or false. Further, as the statement expresses defendant's general opinion of society and connects plaintiff's unspecified harmful conduct to this opinion of society, readers would likely interpret this concluding portion of the review as a statement of opinion, not fact.

The portion of defendant's motion for summary judgment dismissing plaintiff's cause of action for tortious interference with prospective economic relations is denied without prejudice. "To prevail on a claim for tortious interference with business relations in New York, a party must prove 1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dept 2009).

Initially, defendant has failed to make a *prima facie* showing that plaintiff did not have a business relationship with a third party. Defendant has failed to submit any admissible evidence that plaintiff did not have a business relationship with a third party. Instead, defendant merely states that plaintiff did not allege any specific business relationships with third parties in his complaint, which is not admissible evidence. Moreover, even if defendant had made a *prima facie* showing that plaintiff did not have a business

relationship with a third party, plaintiff would raise a triable issue of fact as he describes a number of specific business relationships with third parties that were allegedly injured by the publication of the review in his affidavit.

To the extent that defendant contends that he is entitled to summary judgment dismissing plaintiff's cause of action for tortious interference with prospective economic relations on the ground that he did not know of any of plaintiff's business relationships or intend to harm any such relationships, the court finds that this portion of defendant's motion must be denied without prejudice as premature pursuant to CPLR § 3212(f). The court should not award summary judgment where discovery that may lead to relevant evidence has not been completed. *See* CPLR § 3212(f); *Blech v. West Park Presbyterian Church*, 97 A.D.3d 443 (1st Dept 2012) ("Defendants' initial motions for summary judgment were premature, since the matter was in the early stages of discovery, and depositions had not yet been taken").

In the present case, plaintiff has shown that discovery that may lead to relevant evidence has not been completed. Specifically, defendant has not yet been deposed and plaintiff thus has not had an opportunity to question defendant as to his knowledge of or intention to harm any of plaintiff's business relationships.

To the extent that defendant contends that the publication of the review did not cause injury to any of plaintiff's business relationships because there was a previous internet smear campaign against plaintiff, such contention is without merit. Defendant has failed to submit any evidence that the alleged injuries to plaintiff's business relationships were caused only by the previous smear campaign rather than by publication of the review.

The portion of defendant's motion for summary judgment dismissing plaintiff's cause of action for *prima facie* tort is granted on the ground that this cause of action, which is based on defendant's publication of the review, is duplicative of plaintiff's cause of action for defamation. *See Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 638-39 (1st Dept 2013) (dismissing a cause of action for *prima facie* tort as duplicative as the "underlying allegations fall within the ambit of other traditional tort liability, namely, plaintiff's cause of action sounding in defamation").

The court next considers the portion of defendant's motion for summary judgment dismissing plaintiff's cause of action for a permanent injunction with regards to the review, which is based on the same arguments he advanced in seeking summary judgment dismissing plaintiff's other causes of action. Initially, although plaintiff's complaint seeks a "preliminary permanent injunction," plaintiff concedes that this cause of action is actually for a permanent injunction, not a preliminary injunction. As the court has found that defendant is not entitled to summary judgment dismissing plaintiff's causes of action for defamation or tortious interference with prospective economic relations, as discussed above, the portion of defendant's motion for summary judgment dismissing plaintiff's cause of action for a permanent injunction is also denied.

The portions of defendant's motion and plaintiff's cross-motion for sanctions, including attorney's fees, pursuant to 22 NYCRR § 130-1.1 are denied as defendant and plaintiff both have failed to establish a basis for such relief.

Accordingly, the portion of defendant's motion for an Order pursuant to CPLR § 3212 granting him summary judgment dismissing plaintiff's cause of action for *prima facie* tort is granted, the portion of defendant's motion for summary judgment dismissing plaintiff's cause of action for tortious interference with prospective economic relations is denied without prejudice and the remainder of defendant's motion is denied. Plaintiff's cross-motion for sanctions is denied. This constitutes the decision and order of the court.

DATE : 5/15/17

KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.