SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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CESAR RIVERA,

Plaintiff,

- v -

CAPITAL ONE FINANCIAL CORPORATION, MICHAEL SLOCUM and MICHELLE GASPARIK,

Defendants.

INDEX NO. 151441/2018

MOTION DATE 11/27/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15

were read on this motion to/for DISMISS.

Motion by Defendants Capital One Financial Corporation ("Capital One"), Michael Slocum ("Slocum") and Michelle Gasparik ("Gasparik") (collectively, "Defendants") to dismiss the complaint in its entirety, pursuant to CPLR (a) (1) and (a) (7), is granted for the reasons stated herein.

BACKGROUND

In the instant complaint, Plaintiff Cesar Rivera alleges that he was terminated from his employment for non-party Aramark Services, Inc. ("Aramark") because a fellow non-party employee named Jasmine Alphonso falsely accused him of sexual harassment. At the time, Plaintiff was assigned to work as "a captain and executive dining room supervisor" at Defendant Capital One's office. (Complaint ¶ 14.) Defendants Michael Slocum was the President of Commercial Banking at Capital One and Michelle Gasparik was Slocum's executive assistant.

Plaintiff alleges that he learned that he would no longer be placed at the Capital One office by a letter sent to him in April of 2017 by Aramark. Plaintiff alleges that he was terminated thereafter and that he subsequently found work with a new employer that is paying 50% less. Plaintiff alleges that "[a]t the time of his separation from Aramark, Plaintiff discovered the basis for his no longer being placed with Capital One": that Alphonso had accused him of sexual harassment.

(Complaint ¶¶ 19-20.) Plaintiff alleges that, notwithstanding his termination, an "investigation" by Aramark "determined that there was no merit to said claims." (Id. ¶ 21.) Plaintiff alleges on information and belief that "Alphonso made up these false allegations against Plaintiff, a supervisor of hers with Aramark, to retaliate against him for reporting her repeated unexcused absences from the workplace." (Id. ¶ 22.)

Plaintiff alleges that "[n]otwithstanding the fact that these claims were entirely fabricated by Alphonso, during March and/or April 2017, Slocum and Gasparik disseminated these false accusations to other Capital One employees and/or Plaintiffs supervisors at Aramark." (Id. ¶ 23.) Plaintiff further alleges that Slocum and Gasparik "knew, or should have known, that these accusations of sexual harassment on the part of Plaintiff were false when made" and that, "upon information and belief," Slocum and Gasparik disseminated "[t]hese accusations" as "part of a campaign" with Alphonso to "defame Plaintiff and damage his position with Aramark." (Id. ¶¶ 24-25.) Plaintiff alleges that as a result of the "campaign," Aramark ended his placement at Capital One's premises and thereafter terminated his employment. (Id. ¶ 23.)

Based on the aforesaid allegations in the complaint, Plaintiff asserts causes of action for defamation, defamation per se, and tortious interference with Plaintiff's employment. Defendants move to dismiss Plaintiff's complaint in its entirety pursuant to CPLR 3016 (a) and CPLR 3211 (a) (1), (7).

Defendants argue, in sum and substance, that the defamation causes of action are not pled with sufficient particularity, and even if they were sufficiently pled the alleged defamatory statements are protected by the qualified privilege doctrine. In addition, Defendants argue that the second cause of action for defamation should be dismissed for failure to plead special damages. Defendants further argue that Plaintiff's third cause of action for tortious interference should be dismissed because, as a matter of law, a tortious interference claim cannot be predicated on an at-will employment relationship.

Plaintiff opposes the instant motion on all grounds.

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of

every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "'a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

When considering a CPLR 3211 (a) (1) motion to dismiss, where a defense is founded upon documentary evidence, dismissal "is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law." (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626–27 [1st Dept 2017] [internal citations omitted].)

> "The documents submitted must be explicit and unambiguous. In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence."

(Id.)

I. Plaintiff fails to sufficiently plead his causes of action for defamation with particularity pursuant to CPLR 3016 (a).

Defamation is "the making of a false statement that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" (*Manfredonia v Weiss*, 37 AD3d 286, 286 [1st Dept 2007], quoting *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211–212 [1926].) An action for defamation seeks to compensate the plaintiff for the injury to his or her reputation caused by the defendant's written expression, which is libel, or by the latter's oral expression, which is slander. (*Intellect Art*

Multimedia, Inc. v Milewski, 24 Misc 3d 1248(A) [Sup Ct, NY County 2009] [Gische, J.]; *Idema v Wager*, 120 F Supp 2d 361, 365 [SDNY 2000], *affd*, 29 Fed Appx 676 [2d Cir 2002].)

To state a claim for defamation, a plaintiff must allege: (1) a false statement that is (2) published to a third party (3) without privilege or authorization (4) constituting fault as judged by, at a minimum, a negligence standard and that (5) causes special damages, unless the statement constitutes defamation per se (in which case damages are presumed). (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].) There are four categories of statements that constitute defamation per se: "(1) statements charging plaintiff with a serious crime; (2) statements that tend to injure plaintiff in her trade, business or profession; (3) statements that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman." (*Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept 1996].)[1]

"Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance." (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985].) "The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." (Id.)

As such, to permit a court to determine whether words are defamatory in the first instance, defamation must be pled with sufficient particularity to withstand a motion to dismiss. Pursuant to CPLR 3016 (a), "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." (*See also Three Amigos SJL Rest., Inc. v CBS News Inc.*, 132 AD3d 82, 92 n 1 [1st Dept 2015].) In addition to stating the particular words, a defamation plaintiff must also "allege the time, place, and manner of the false statement and specify to whom it was made." (*Arvanitakis v Lester*, 145 AD3d 650, 651 [2d Dept 2016].) "Compliance with CPLR 3016 (a) is strictly enforced" and "a cause of action sounding in defamation

[1] As discussed above, the difference between a cause of action for defamation per se and general defamation is that a plaintiff need not plead special damages in the former. However, this Court does not reach the issue of special damages because, as discussed *infra*, the Court finds that Plaintiff has failed to plead defamation and defamation per se with sufficient particularity and because the alleged statements are protected by the qualified privilege doctrine. As such, this Court discusses the causes of action for defamation and defamation per se together (and generally refers to the causes of action as being for "defamation").

which fails to comply with these special pleading requirements must be dismissed." (*Lemieux v Fox*, 135 AD3d 713, 714 [2d Dept 2016].)

Here, the complaint merely alleges in general fashion that "in March and/or April 2017, Slocum and Gasparik disseminated these false accusations [of sexual harassment] to other Capital One employees and/or Plaintiffs supervisors at Aramark." (Complaint ¶ 23.)

Viewing the complaint in light of CPLR 3016 (a), Plaintiff's allegations are far too generalized as to what statements were said, which Defendants said which statements, to whom the statements were said, when and where the statements were made, and as to the manner and context of the statements. (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 454-55 [1st Dept 2008] ["[S]ince the actual defamatory words were never pleaded with particularity, but were only paraphrased in a manner such that the actual words were not evident from the face of the complaint, the long-standing rule is that dismissal is required."]; *Lesesne v Lesesne*, 292 AD2d 507, 509 [2d Dept 2002] ["T]he Supreme Court correctly dismissed the cause of action alleging defamation, as the complaint failed to allege the time, place, and manner of the allegedly false statements and to whom such statements were made."]; *Lemieux v Fox*, 135 AD3d 713, 714-15 [2d Dept 2016] [affirming dismissal where "cause of action alleging defamation did not set forth the particular words complained of and alleged only that the defendants made defamatory statements to the plaintiff, William Lemieux's, employer and others calling into question his character and professionalism" [emendation omitted]; *Gill v Pathmark Stores, Inc.*, 237 AD2d 563, 564 [2d Dept 1997] ["Failure to state the particular person or persons to whom the allegedly defamatory comments were made also warrants dismissal."]; *Fuel Digital, Inc. v Corinella*, 15 Misc 3d 1122(A) [Sup Ct, NY County 2006] [Lowe, J.] "[T]he [counterclaim] fails because Corinella does not list the statements' specific time, place, and manner. As to the time and date, he avers 'on or about July 4, 2006' and 'on or about the first week of August 2006.' Such ambiguous times and dates will not suffice to satisfy CPLR 3016(a)'s specificity requirements."].)

Indeed, based on the complaint's vague assertion that Slocum and Gasparik disseminated "these false accusations," it is impossible for this Court to discern whether Plaintiff is asserting that Slocum and Gasparik told others that Plaintiff had in fact committed certain acts constituting sexual harassment, or whether they expressed opinions that they believed the accusations were true and/or constituted sexual harassment, or whether they only told others of the accusations made by

Alphonso and expressed no opinion as to their truth.[2] The vagueness of the complaint thus prevents the Court from determining whether the (unknown) words constituting "these false accusations" are susceptible of defamatory meaning.

Accordingly, Plaintiff's first cause of action for defamation and second cause of action for defamation per se are dismissed, as they are not pled with sufficient particularity pursuant to CPLR 3016 (a).

II. Even if the Court did not dismiss the defamation causes of action pursuant to CPLR 3016 (a), the alleged defamatory statements would be non-actionable as a matter of law under the qualified privilege doctrine.

Defendants further argue that even if the Court does not dismiss the defamation claims as insufficiently particularized pursuant to CPLR 3016, the qualified privilege doctrine bars said defamation claims as a matter of law.

The Court of Appeals has explained that, as a matter of public policy, the law shields "certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether." (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992].) Where certain statements are absolutely immune when "compelling public policy requires", other statements "fostering a lesser public interest are only conditionally privileged." (Id.)

"[A] statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his or her own affairs, in a matter where his or her interest is concerned." (*Front, Inc. v Khalil*, 24 NY3d 713, 719 [2015] [internal quotation marks and emendation omitted, quoting *Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007].) The privilege is qualified in that "it can be lost by plaintiff's proof that defendant acted out of malice." (Id.)

"One such conditional, or qualified, privilege extends to a communication made by one person to another upon a subject in which both have an interest." (*Liberman*, 80 NY2d at 437.) Indeed, the qualified privilege doctrine is frequently applied to issues related to the performance and conduct of an employer's personnel. (*See e.g. Carone v Venator Group, Inc.*, 11 AD3d 399, 400 [1st Dept

[2] In addition, the complaint does not allege whether Defendants discussed in detail the specific acts that Plaintiff was accused of committing or whether they simply discussed in general terms that Plaintiff had been of accused of sexual harassment.

2004] [holding that statements about plaintiff-employees' suspensions were "subject to the qualified 'common interest' privilege, which protects good faith communications between employees and management regarding the employer's business"].)

Here, Defendants argue that Slocum and Gaparik were lawfully entitled to discuss accusations of sexual misconduct "involving an Aramark supervisor in the company's executive dining room in order to protect Capital One (and Aramark) employees from potential sexual harassment." (Memo in Supp. at 6.) Defendants argue that, other than Plaintiff's conclusory allegation that Slocum and Gasparik disseminated the sexual harassment accusations with malice, there are no allegations in the complaint "from which any inference can be drawn that Slocum or Gasparik communicated about the accusations for any purpose other than to ensure that the Capital One executive dining room is free from sexual harassment, conduct that could result in personal injury or legal liability." (Id.)

In addition, Defendants point to section 4.4 of Capital One's Master Services Agreement with Aramark, which states:

> "If Capital One determines in good faith that continued assignment to the Services of one or more of the Supplier Personnel is not in the best interests of Capital One, then Supplier shall remove such Supplier Personnel from performing the Services and replace same with person(s) of suitable ability, qualifications and experience. This provision shall not operate or be construed to limit Supplier's responsibility for the acts or omissions of Supplier Personnel."

(Affirm in Supp., Ex. B [Master Services Agreement] § 4.4.) Defendants assert that pursuant to this provision, potential communications about the suitability of Plaintiff working at Defendant Capital One's premises was completely appropriate pursuant to the business relationship between Capital One and Aramark.

The Court agrees with Defendant that—even if this Court were not dismissing Plaintiff's defamation claims for being insufficiently pleaded—this Court would find that the only inference that can be discerned from the complaint is that the allegedly defamatory statements were protected pursuant to the qualified privilege doctrine. Although the First Department has held that the qualified privilege is an affirmative defense to be raised in the answer and premature on a motion to dismiss (*see Garcia v Puccio*, 17 AD3d 199, 201 [1st Dept 2005]), Plaintiff has failed to allege any facts supporting malicious motives by Slocum or

Gasparik, and the only reasonable inference based on the complaint is that any dissemination of the accusations was pursuant to Capital One's business relationship with Aramark. (*See O'Neill v New York Univ.*, 97 AD3d 199, 213 [1st Dept 2012] ["The complaint fails to overcome this [qualified] privilege because it contains no more than conclusory allegations of malice ... ."]; *Stega v New York Downtown Hosp.*, 31 NY3d 661, 670 [2018] ["When subject to this form of conditional privilege, statements are protected if they were not made with spite or ill will or reckless disregard of whether they were false or not. A qualified privilege places the burden of proof on this issue of malice upon the plaintiff."].)

Although Plaintiff alleges that Slocum and Gasparik acted as "part of a campaign" with Alphonso to "defame Plaintiff and damage his position with Aramark[,]" Plaintiff provides no details as to how this campaign was orchestrated. (Complaint ¶ 23; *see also O'Neill*, 97 AD3d at 213 [comparing conclusory allegations of malice in case at bar to detailed factual allegations to support a "campaign of harassment" in *Pezhman v City of New York*, 29 AD3d 164 [1st Dept 2006]].)

As this Court finds that Plaintiff has failed to plead defamation with sufficient particularity and because the alleged statements are protected by the qualified privilege doctrine, this Court does not address whether Plaintiff has sufficiently pled special damages.

III. Plaintiff fails to plead a cause of action for tortious interference.

"Under New York law, the elements of a tortious interference claim are: (a) that a valid contract exists; (b) that a "third party" had knowledge of the contract; (c) that the third party intentionally and improperly procured the breach of the contract; and (d) that the breach resulted in damage to the plaintiff." (*Albert v Loksen*, 239 F3d 256, 274 [2d Cir 2001]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [same].)

As a preliminary matter, this Court notes that while Plaintiff alleges that he had a "contract of employment" with his employer Aramark, Plaintiff does not allege anywhere in his complaint that this contract was for a specified period of time or that there was any express limitation on his employer's right to terminate his employment. As such, Plaintiff fails to plead that his "contract of employment" was for anything other than employment at-will. (*Dalton v Union Bank of Switzerland*, 134 AD2d 174, 176 [1st Dept 1987] [dismissing complaint for breach of employment agreement where the plaintiff failed to plead that employment was

for a specified period of time or "allege the existence of any express limitation on the employer's right of discharge" him]; *Marino v Oakwood Care Ctr.*, 5 AD3d 740, 741 [2d Dept 2004] ["New York continues to adhere to the traditional common-law rule that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party."].) Furthermore, during oral argument Plaintiff's counsel admitted that Plaintiff was an at-will employee.

The general rule is that "agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts." (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999].) However, in "certain limited situations" an at-will employee may maintain a tortious interference claim. (*Albert v Loksen*, 239 F3d 256, 274 [2d Cir 2001].) To do so, he or she must establish that a "third party used wrongful means to effect the termination such as fraud, misrepresentation, or threats, that the means used violated a duty owed by the defendant to the plaintiff, or that the defendant acted with malice." (Id.)[3]

Here, Plaintiff alleges that: (1) he had a valid contract of employment with non-party Aramark; (2) Defendants were aware of Plaintiff s employment contract with Aramark; (3) "[b]y disseminating the false accusations of sexual harassment set forth above, Defendants intentionally induced Aramark to terminate Plaintiff's employment with said Company"; and (4) he was damaged by the loss of his employment in the amount of at least $250,000.

In sum and substance, the "wrongful means" was the "campaign … to defame Plaintiff" that formed the basis for his defamation claims. As the Court has already explained, these allegations fail to sufficiently state causes of action for defamation because: (1) they are pled with insufficient particularity pursuant to CPLR 3016; and (2) based on the facts alleged in the complaint, the only reasonable inference is that Defendants communicated about these sexual harassment accusations for purpose of ensuring that a potential sexual harasser was not working in their executive dining room, and, as such, these communications were protected by the qualified privilege doctrine.

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[3] To be clear, "New York has adamantly refused to allow employees to evade the employment at-will rule and relationship by recasting a cause of action in the garb of tortious interference with employment." (*Albert v Loksen*, 239 F3d 256, 274 [2d Cir 2001] [internal quotation marks and emendation omitted], quoting *Ingle v Glamore Motor Sales, Inc.*, 73 NY2d 183, 189 [1989].)

Moreover, Defendant has put forth a contract between Capital One and Aramark that establishes that Capital One had right to demand that Aramark remove Plaintiff from their premises if Capital One determined that Plaintiff's presence there was "not in the best interests of Capital One." (Affirm in Supp., Ex. B [Master Services Agreement] § 4.4.)

Accordingly, because Plaintiff fails to assert sufficient factual allegations to establish that Defendants acted with wrongful means, Plaintiff's third cause of action for tortious interference with his employment is dismissed.

IV. Plaintiff's request for leave to replead is denied.

In a footnote on page 9 of Plaintiff's memorandum in opposition to the instant motion, Plaintiff states: "In the unlikely event this Court finds that the allegations in the Complaint lack the requisite particularity, Plaintiff submits that he should be given an opportunity to amend his Complaint." (Memo in Opp. at 9 n.1.) Plaintiff did not cross-move for leave to replead or attach a proposed amended complaint.

As such, this Court has no material from which it can judge whether Plaintiff's repleading will establish good grounds for his causes of action. (*Hickey v Natl. League of Professional Baseball Clubs*, 169 AD2d 685 [1st Dept 1991] ["Plaintiff's application for leave to amend, contained in a single sentence without even the most conclusory indication of what the new pleadings would be, was properly denied. This Court has construed CPLR 3211(e) to require that the proposed new pleadings be supported by evidence as on a motion for summary judgment."]; *Aetna Health Inc. v Hishmeh*, 40 Misc 3d 1230(A) [Sup Ct, NY County 2013] [denying request to replead where plaintiff "failed to cross-move for such relief, nor has it included a proposed amended complaint"]; *Lesesne v Lesesne*, 292 AD2d 507, 509 [2d Dept 2002] ["CPLR 3211(e) provides in pertinent part that 'leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action'. The evidence should be in the form of affidavits of those with direct knowledge of the facts.].)

Moreover, when pressed for more specificity as to the alleged defamatory words during oral argument, which Defendants specifically communicated the words, to whom, and the time, place and manner of the communications, Plaintiff's counsel stated that discovery was needed to allow Plaintiff to provide such specificity in the complaint. The Court will not allow this insufficiently specific complaint to proceed to discovery in the hope that Plaintiff will find certain

defamatory words to insert into an amended complaint. To do so would be to award Plaintiff with a fishing expedition for his insufficiently pled complaint.

Accordingly, Plaintiff's request for leave to replead is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Defendants Capital One Financial Corporation, Michael Slocum and Michelle Gasparik to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that Plaintiff Cesar Rivera's application to replead is denied; and it is

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon Plaintiff and the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within thirty (30) days of the filing of this order; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

The foregoing constitutes the decision and order of the Court.

11/30/2018
DATE

HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE