

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JAMES C. EATON)	
)	
Plaintiff,)	
)	
v.)	C.A. No. S07C-08 033 RFS
)	
MILLER BREWING COMPANY)	
RAVEN TRANSPORT, INC., and)	
FLEET MASTERS EXPRESS, INC.)	
)	
Defendants.)	

MEMORANDUM OPINION

Upon Raven Transport, Inc.'s Motion to Dismiss. Denied.

Submitted: December 5, 2008

Decided: April 30, 2009

James C. Eaton, Plaintiff Pro Se, Lewes, DE.

Craig A. Karsnitz, Esq., and Barry M. Willoughby, Esq., Young Conaway Stargatt & Taylor, LLP, Georgetown, DE, Attorneys for Defendant, Raven Transport, Inc.

Matthew F. Boyer, Esq., and Timothy M. Holly, Esq., Connolly Bove Lodge & Hutz, LLP, Wilmington, DE, Attorneys for Defendant, Fleet Masters Express, Inc.

STOKES, Judge

This is my decision regarding Raven Transport Inc.'s ("Raven") Motion to Dismiss. For the reasons set forth herein, the motion is denied.

BACKGROUND

James Eaton ("Plaintiff") began working for Raven as a truck driver on January 30, 2007. On or about February 3, 2007, he was sent to pick up his first load, a load of Miller Beer from Eden, NC to Rockville, MD. During the drive, the beer shifted and fell around the trailer, damaging some of the cases. Plaintiff alleges that it fell due to Miller Brewing Company's ("Miller") loading procedures. When Plaintiff delivered a second load for Miller from Eden, NC to Elizabeth, NJ on February 14, 2007, the same problem occurred. It reoccurred when Plaintiff transported a third load from Eden, NC to Baltimore, MD on March 9, 2007. Raven alleges that Plaintiff never reported this third incident.

On March 20, 2007, Miller allegedly contacted Raven to inquire about payment to restack the load of beer. Plaintiff has claimed that due to his pacemaker, he cannot pickup cases of beer. From information learned during a phone call on February 11, 2007, Raven also alleges that Plaintiff's truck was involved in an unreported accident which caused about \$2,674.13 in damages. On March 22, 2007, Plaintiff met with Mr. Hogle and Mr. Wiese, both Raven's employees, in Jacksonville, FL. He was discharged for poor performance. Raven has claimed that his initial employment was subject to a

90-day probationary period, and that Plaintiff was terminated within this time. Plaintiff has alleged that Raven chose to fire and blame him rather than Miller to keep its account.

Plaintiff filed a discrimination claim with the U.S. Equal Employment Opportunity Commission (“EEOC”) for discrimination based on age and disability. The EEOC denied his claim after receiving a statement from Raven about Plaintiff’s employment and termination. Raven also provided information to the Delaware Department of Labor (“DOL”), which ultimately determined that Plaintiff was not fired for just cause and granted him unemployment benefits. Plaintiff then filed suit on July 17, 2008 against Raven, Miller, and Fleet Master Express, Inc. for character assassination, defamation of character, time loss, libel, and distortion of his record. Miller filed a Motion to Dismiss on December 23, 2008, which was granted by this Court on February 12, 2009. Raven filed a Motion to Dismiss for Lack of Personal Jurisdiction on September 22, 2008, withdrew that motion on November 5, 2008, then filed a new Motion to Dismiss on the same day.

STANDARD OF REVIEW

The Court must assume all well-pleaded facts or allegations in the complaint as true when evaluating a motion to dismiss under Rule 12(b)(6). *RSS Acquisition, Inc. v. Dart Group Corp.*, 1999 WL 1442009 (Del. Super. 1999) at *2. The Court will not dismiss a claim unless the plaintiff would not be entitled to recover under any circumstances that are susceptible to proof. *Id.* The complaint must be without merit as

a matter of fact or law to be dismissed. *Id.* The plaintiff will have every reasonable factual inference drawn in his favor. *Ramunno v. Cawley*, 705 A.2d 1029, 1036 (Del. 1998).

“Dismissal is warranted where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.” *Hedenberg v. Raber*, 2004 WL 2191164 (Del. Super. 2004) at *1. “Where allegations are merely conclusory, however (*i.e.*, without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss.” *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).

DISCUSSION

Plaintiff has accused Raven of making defamatory statements about him to the EEOC and the DOL as well as to a potential employer, D. Krutiak Trucking (“Krutiak”).

Raven has also been accused of releasing defamatory statements in a DAC Report, an employment-history database for motor carriers. Raven has moved to dismiss on the grounds that the statements that they made were privileged and not subject to liability. Plaintiff claims that these statements were knowingly false and have made it difficult for him to secure other employment.

Plaintiff has claimed in his Reply to Raven's Motion to Dismiss that he “has not filed a civil complaint against the defendant ‘Raven’ for defamatory statements made to the

‘DOL’ and the ‘EEOC’”. Plaintiff’s Opp. Brief 2. He states that he is using those statements “to show the court the extent of the untrue statements made to the State of Delaware, the ‘DOL’ and the Federal Government through the ‘EEOC’, without regard or fear of reprisal while hiding under the privilege statement.” *Id.* Since the Plaintiff has withdrawn any defamation claims regarding those particular statements, this subject is closed; the issue of whether or not they are privileged does not have to be addressed.

Raven relies on a qualified privilege for its communications with Krutiak and for the DAC Report¹. Communications of this nature may be privileged in the following way:

(a) An employer or any person employed by the employer who discloses information about a current or former employee’s job performance to a prospective employer is presumed to be acting in good faith; and unless lack of good faith is shown, is immune from civil liability for such disclosure or its consequences. For purposes of this section, the presumption of good faith may be rebutted upon a showing that the information disclosed by such employer was knowingly false, was deliberately misleading or was rendered with malicious purpose; or that the information was disclosed in violation of a nondisclosure agreement, or was otherwise confidential according to applicable federal, State or local statute, rule or regulation.

(b) For purposes of this section, the word “information” includes:

(1) Information about an employee’s or former employee’s job performance or work-related characteristics;

(2) Any act committed by such employee which would constitute a violation of federal, State or local law; or

¹ A DAC (Drive-A-Check) report is part of an employment history database for the transportation industry. Employers are able to use the database to screen potential hires. The DAC report is typically a crucial component to a company’s decision to hire a truck driver. It includes the person’s driving history, drug and alcohol history, and work record as submitted by his previous employers.

(3) An evaluation of the ability or lack of ability of such employee or former employee to accomplish or comply with the duties or standards of the position held by such employee or former employee.

19 *Del. C.* § 709.

This privilege carries a rebuttable presumption of good faith. Qualified privilege will not attach to the DAC Report or Raven's communications with Krutiak if they were knowingly false, deliberately, misleading, or rendered with malicious purpose. *Id.* Plaintiff's allegations on a motion to dismiss must be assumed to be true. In *Burr v. Atlantic Aviation Corp.*, 348 A.2d 179 (Del. 1975), the Supreme Court reversed the Superior Court's grant of summary judgment in a libel and slander suit. The Superior Court had ruled that the conditional privilege precluded any issues of material fact. The Supreme Court reversed, saying:

The question whether a conditional privilege has been abused by malice or intent to harm ordinarily is a factual question for the jury, (citation omitted), unless, of course, the evidence when considered in a light most favorable to plaintiff is insufficient to raise a factual question upon which reasonable men might differ.

Id. at 181. Consequently, the qualified privilege that Raven has claimed should be considered after discovery in the summary judgment context if there are no genuine issues of material fact.

Raven has also claimed a qualified privilege under the Code of Federal Regulations. 49 CFR § 391.23(l). That privilege states:

(1) No action or proceeding for defamation, invasion of privacy, or interference with a contract that is based on the furnishing or use of information in accordance with this section may be brought against—

(i) A motor carrier investigating the information, described in paragraphs (d) and (e) of this section, of an individual under consideration for employment as a commercial motor vehicle driver,

(ii) A person who has provided such information; or

(iii) The agents or insurers of a person described in paragraph (l)(1)(i) or (ii) of this section, except insurers are not granted a limitation on liability for any alcohol and controlled substance information.

(2) The protections in paragraph (l)(1) of this section do not apply to persons who knowingly furnish false information, or who are not in compliance with the procedures specified for these investigations.

49 CFR § 391.23(l). It is not clear that this privilege would apply to the statements that were allegedly made. Paragraphs (d) and (e) only pertain to alcohol and drug issues and accident history. 49 CFR § 391.23(d)-(e). The term accident is only used to describe incidents which result in a fatality, bodily injury to a person who receives immediate medical treatment away from the scene of the accident as a result, or disabling damage to a motor vehicle which must be taken away from the scene by a tow truck or other motor vehicle. 49 CFR § 390.5. Since Plaintiff's incidents were not accidents under this definition, the information provided by Raven was not covered by the protection of paragraph (l).

Plaintiff has alleged that Raven's statements were knowingly false and rendered with malice. Since this Court must assume that these allegations are true for the purposes of this motion, *RSS Acquisition* at *2, Plaintiff's defamation claim for the DAC Report

and for communications with Krutiak cannot be dismissed now but may later be subject to summary judgment.

Raven has argued that this action should be dismissed for *Forum Non Conveniens*. There are six factors under Delaware law which are to be weighed by the Court in making this determination. The factors are:

- 1) the applicability of Delaware law in the action;
- 2) the relative ease of access to proof;
- 3) the availability of compulsory process for witnesses;
- 4) the pendency or non-pendency of any similar actions in other jurisdictions;
- 5) the possibility of a need to view the premises; and
- 6) all other practical considerations which would serve to make the trial easy, expeditious and inexpensive.

In Re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106, 117 (Del. Ch. 2009). Raven cites access to proof and witnesses and that Delaware law may not be applicable (although citing Title 19 for its privilege claim) as factors which should weigh in its favor. “The Courts of this State recognize that a plaintiff’s choice of forum is to be afforded great deference.” *Monsanto Co. v. Aetna Cas. and Sur. Co.*, 559 A.2d 1301, 1304 (Del. Super. 1988). The burden of proving inconvenience is on Raven, and the grant of this motion “may occur only in the rare case in which the combination and weight of the factors to be considered balance overwhelmingly in favor of the defendant.” *Id.* This decision rests within the discretion of the Court. *Id.*

Raven claims that witnesses and other evidence will not be found in Delaware. Yet it has not proved that there is another state which would be more convenient. Raven is located in Florida; Krutiak is located in Massachusetts; Plaintiff is a Delaware citizen.

His three deliveries were made from North Carolina to either Maryland or New Jersey. Witnesses and proof could be found in any of these states, and potentially others as well. If Raven does wish to move this case to Florida, then much of the evidence and witnesses may be just as difficult, if not more so, to procure.

This Court must consider the interests of all parties to decide this issue. Plaintiff is a pro se litigant pursuing a claim related to losing his job as a truck driver. The inconvenience that would be imposed on him to have to continue this case in Florida would be so great that he may have to abandon this claim. The factor which Raven urges, that Delaware law may not be applicable to the alleged defamatory statements, does not entitle Raven to dismissal; it must outweigh the burden it would place on Plaintiff. The arguments set forth by Raven are not strong enough to be decisive. Delaware courts frequently apply law from other jurisdictions should Florida law control the issue, and Delawareans are entitled to their day in court. This Court will not decline to hear this case on the grounds of *Forum Non Conveniens*.

CONCLUSION

Considering the foregoing, Raven's Motion to Dismiss is DENIED.

IT IS SO ORDERED.