

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0151

JAMES LODATO, III

VERSUS

KANDACE LEBOEUF AND NATIONAL OIL WELL VARCO, LP

Judgment Rendered: September 21, 2012

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2009-14001

Honorable William J. Knight, Presiding

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BEFORE: CARTER, C.J., GUIDRY, AND GAIDRY, JJ.

Carter of Carter

GUIDRY, J.

In this defamation action, plaintiff, James Lodato, III, appeals from a judgment of the trial court sustaining an exception raising the objection of no cause of action filed by Kandace LeBoeuf and National Oil Well Varco, LP (National), and dismissing Lodato's claims against them with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

James Lodato, III was a sales representative employed by Saia Motor Freight Line, LLC (Saia). As a sales representative, Lodato was required to call upon corporate customers for the purpose of securing transportation services. However, in June 2009, Saia terminated Lodato's employment.

On July 10, 2009, Lodato filed a petition for damages, naming Kandace LeBoeuf and her employer, National, as defendants. Lodato alleged that LeBoeuf, while acting in the course and scope of her employment, contacted a representative of Saia sometime prior to June 5, 2009, and made allegations of alleged inappropriate conduct by Lodato. According to the petition, such allegations were false and were made with malicious intent and resulted in Saia's decision to terminate Lodato's employment.

Thereafter, on July 16, 2010, Lodato filed a first supplemental and amending petition, naming Saia, Vivian Twilbeck, Robert Babin, and Victory as additional defendants. Lodato alleged that Twilbeck was aware of the allegations that LeBoeuf communicated to Saia, and Twilbeck subsequently communicated these allegations to Babin. Lodato alleged that Twilbeck requested that Babin lodge a complaint against Lodato, and that Babin subsequently composed a handwritten note dated June 10, 2009, which Babin provided to Twilbeck. Lodato alleged that the contents of the note were false and were made with malicious intent, and as a result of the contents of the note, Saia terminated his employment.

Babin and Victory filed a motion for partial summary judgment, asserting that Lodato cannot prove that Babin, with actual malice or other fault, published a false statement with defamatory words that caused Lodato damages. Following a hearing on November 10, 2010, the trial court passed on Babin and Victory's motions for partial summary judgment to allow for the taking of Babin and Twilbeck's depositions. Thereafter, on March 29, 2011, Babin and Victory re-urged their motions for summary judgment.

On May 20, 2011, Lodato filed a second supplemental and amending petition, naming Victoria Moorehead, another employee of Saia, as an additional defendant. Lodato alleged that during the course of events already described, Moorehead became aware of the allegations that LeBoeuf communicated to Saia and contacted LeBoeuf by telephone, flew to New Orleans and met with Twilbeck, and Twilbeck personally visited LeBoeuf. Lodato also alleged that Moorehead contacted Saia's human resources representative to advise him that a complaint had been made by Babin and also contacted Saia's regional vice president seeking authority to terminate Lodato. Lodato alleged that on June 10, 2009, Moorehead caused a handwritten note to be transmitted to individuals at Saia and to be made a permanent part of Lodato's personnel file. Lodato alleged that Twilbeck, Moorehead, and Babin conspired to prepare the complaint reflected in the handwritten note dated June 10, 2009. Finally, Lodato alleged that the allegations made by Babin concerning his meetings with Lodato are false, unsubstantiated and were made with malicious intent; the handwritten note by Moorehead, along with verbal and electronic communications, were also false, unsubstantiated and were made with malicious intent; and that the combined efforts of defendants led to his wrongful discharge.

Following a May 25, 2011 hearing on Babin and Victory's motions for summary judgment, the trial court signed a judgment on June 29, 2011, granting

summary judgment in favor of Babin and Victory and dismissing all of Lodato's claims against them with prejudice.¹

Thereafter, LeBoeuf and National filed an exception of no cause of action, asserting that the allegations in the second supplemental and amending petition clarify that Lodato's termination was exclusively caused by the acts of Saia employees subsequent to the initial Saia investigation into the allegations made by LeBoeuf and not by the alleged statements made by LeBoeuf. Following a hearing on the exception, the trial court signed a judgment sustaining the exception in favor of LeBoeuf and National and dismissing Lodato's claims against them with prejudice. Lodato now appeals from this judgment.

DISCUSSION

The peremptory exception raising the objection of no cause of action is designed to test the legal sufficiency of the petition by determining whether the plaintiff is afforded a remedy in law based on the facts alleged in the pleading. Fink v. Bryant, 01-0987, p. 3 (La. 11/28/01), 801 So. 2d 346, 348-349. The function of the objection of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. Fink, 01-0987 at pp. 3-4, 801 So. 2d at 348. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. Fink, 01-0987 at p. 3, 801 So. 2d at 349. The exception is triable on the face of the petition, and for purposes of determining the issues raised in the exception, the well-pleaded facts in the petition must be accepted as true. Fink, 01-0987 at p. 4, 801 So. 2d at 349. A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim. Fink, 01-0987 at p. 4, 801 So. 2d at 349. Any doubts are resolved in favor

¹ This judgment is the subject of a separate appeal, also decided this date, Lodato v. LeBoeuf, 2012CA0150 (La. App. 1st Cir. 9/21/12)(unpublished opinion).

of the sufficiency of the petition. Van Hoose v. Gravois, 11-0976, p. 6 (La. App. 1st Cir. 7/7/11), 70 So. 3d 1017, 1021.

The burden of demonstrating that the petition states no cause of action is on the mover. Ramey v. DeCaire, 03-1299, p. 7 (La. 3/19/04), 869 So. 2d 114, 119. In reviewing the judgment of a trial court on an exception of no cause of action, an appellate court conducts a *de novo* review, because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. City of Denham Springs v. Perkins, 08-1937, p. 12 (La. App. 1st Cir. 3/27/09), 10 So. 3d 311, 321-322, writ denied, 09-0871 (La. 5/13/09), 8 So. 3d 568.

Defamation is a tort which involves the invasion of a person's interest in his or her reputation and good name. Costello v. Hardy, 03-1146, p. 12, 864 So. 2d 129, 139. Four elements are necessary to establish a defamation cause of action: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. Costello, 03-1146 at p. 12, 864 So. 2d at 139. The fault requirement is often set forth in the jurisprudence as malice, actual or implied. Costello, 03-1146 at p. 12, 864 So. 2d at 139. Thus, in order to prevail on a defamation claim, a plaintiff must prove that the defendant, with actual malice or other fault, published a false statement with defamatory words which caused plaintiff damages. Costello, 03-1146 at p. 12, 864 So. 2d at 139-140. If even one of the required elements of the tort is lacking, the cause of action fails. Costello, 03-1146 at p. 12, 864 So. 2d at 140.

In the instant case, Lodato alleged that sometime prior to June 5, 2009, LeBoeuf contacted a Saia representative and made allegations about alleged inappropriate conduct of Lodato, and that such allegations were false and were made with malicious intent. According to Lodato's original petition, Saia decided to terminate Lodato's employment as a result of these allegations. However, in his

second supplemental and amending petition, Lodato alleged that “the defendants, [Twilbeck, Moorehead, and Babin], *knowing that the allegations made by the defendant, Kandace LeBoeuf, were not sufficient to cause detrimental action against the plaintiff*, conspired to prepare the complaint reflected in the handwritten note dated June 10, 2009.” (Emphasis added.) Accordingly, Lodato has admitted that LeBoeuf’s allegations, even if defamatory, were not sufficient to cause injury, *i.e.* termination of his employment with Saia. See La. C.C. art. 1853. Absent an allegation of injury, Lodato fails to set forth a cause of action for defamation against LeBoeuf and National, and the trial court was correct to sustain LeBoeuf and National’s exception.

Further, we do not find that the trial court abused its discretion by dismissing Lodato’s claims rather than providing him an opportunity to amend his petition. Louisiana Code of Civil Procedure article 934 states that “[w]hen the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court.” Article 934 further provides that if the grounds of the objection cannot be removed by amendment, the action shall be dismissed. In the instant case, Lodato amended his petition to state that LeBoeuf’s allegations were not sufficient to cause detrimental action against the plaintiff. Considering this admission by Lodato, and the several supplemental and amending petitions already filed into the record, we find do not find that the trial court abused its discretion in failing to provide Lodato with an opportunity to amend his petition.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court sustaining LeBoeuf and National’s exception raising the objection of no cause of

action and dismissing Lodato's claims against them with prejudice. All costs of this appeal are assessed to James Lodato, III.

AFFIRMED.