Glazier v Harris
2011 NY Slip Op 33720(U)
December 28, 2011
Sup Ct, New York County
Docket Number: 103482/2010
Judge: Judith Gische

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. JUDITH J. GISCHE PART 10
Justice

Glazier and Reid

Plaintiff (s),

INDEX NO. 103482/10

MOTION DATE

MOTION SEQ. NO. 001

-v-

Harris, et al.

Defendant(s).

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

PC on for April 7, 2011 @ 9:30 a.m.

Dated: 2/28/11

Hon. Judith J. Gische, *J.S.C.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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WILLIAM GLAZIER and GEORGE REID,

Plaintiffs,

-against-

LYNDON HARRIS, LEE WESLEY, ST. JOHN'S LUTHERAN CHURCH, ROBERT A. RIMBO, THE METROPOLITAN NEW YORK SYNOD – EVANGELICAL LUTHERAN CHURCH IN AMERICA, MARK S. SISK and THE EPISCOPAL DIOCESE OF NEW YORK,

Defendants.

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DECISION/ ORDER
Index No.: 103482/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3211) w/JEK affirm, exh	1
Pltf's opp w/SR affirm and GR, WG, SS, CS affids, exhs	2

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiffs have asserted claims of defamation, negligent/intentional infliction of emotional distress, misrepresentation, and intentional interference with employment relationships, against defendants. Defendants, Lyndon Harris ("Harris"), Lee Wesley ("Wesley"), and St. John's Lutheran Church (the "Church"), now move, pre-answer to dismiss each of the causes of action asserted in the complaint based upon failure to state a cause of action [CPLR §§ 3211 (a)(7)]. Defendants, The Metropolitan New York Synod-Evangelical Lutheran Church in America ("Evangelical") and Robert Rimbo ("Rimbo"), have answered the complaint and take no position on this motion. The

001

remaining defendants have not yet appeared in this action.

Facts Presented and Arguments Considered

Plaintiffs, William Glazier ("Glazier") and George Reid ("Reid"), were each employed by the Church, for approximately 42 years. Glazier was employed as an organist and choirmaster, and Reid was employed as a parish administrator. Harris and Wesley are pastors at the Church. Plaintiffs allege in their verified complaint that on June 6, 2009, during a retreat held by the Church (the "retreat"), Harris and Wesley made defamatory statements about plaintiffs to various members of the Church's council (the "Council").

Plaintiffs allege that Harris' false and defamatory statements were words to the following effect:

> 1. Defendant, HARRIS, stated that a long-time parishioner, Ms. Lilli Jaffe, had gifted to plaintiff, REID, property in Connecticut and that plaintiffs, GLAZIER and REID, were beneficiaries in Ms. Jaffe's Will.
>
> 2. Defendant, HARRIS, stated that at some point prior to June 6,2009, he had seen papers showing that Ms. Jaffe's estate was worth well over $1,000,000.00 and that she intended to leave her estate to defendant, ST. JOHN'S at that time.
>
> 3. Defendant, HARRIS, stated that while Ms. Jaffe's initial plan had been to leave all of her money to defendant, ST. JOHN'S, now the money was being left to plaintiffs, GLAZIER and REID.
>
> 4. Defendant, HARRIS, also stated that church member, Lud Mayleas, was initially to have had sole Power of Attorney for Ms. Jaffe but because of plaintiffs' undue influence on Ms. Jaffe, the Power of Attorney would now be solely with plaintiff, GLAZIER.

5. Defendant, HARRIS, noted that plaintiffs, GLAZIER and REID had been visiting Ms. Jaffe and taking care of her and that it was immoral for any person in a caregiver capacity to be a recipient of such gifts.

6. Defendant, HARRIS, stated that if plaintiffs, GLAZIER and REID, had been professional caregivers, they would be arrested as a result of their conduct towards Ms, Jaffe.

7. Defendant, HARRIS, stated that a Connecticut statute outlawed Ms. Jaffe's purported gift to plaintiff, REID, and that he would follow up on such illegal behavior.

8. Defendant, HARRIS, wrongly accused plaintiff, GLAZIER, of unduly influencing Ms. Jaffe to change her Will.

9. Defendant, HARRIS, wrongly accused plaintiff, REID, of unduly influencing Ms. Jaffe to change her Will.

10. Defendant, HARRIS, wrongfully accused plaintiff, GLAZIER of diverting funds that were to go to the Church upon Ms. Jaffe's death for his own benefit.

11. Defendant, HARRIS, wrongfully accused plaintiff, REID, of diverting funds that were to go to the Church upon Ms. Jaffe's death for his own benefit.

12. Defendant, HARRIS, wrongly accused plaintiff, GLAZIER, of stealing from the church.

13. Defendant, HARRIS, wrongly accused plaintiff, REID, of stealing from the church.

14. Defendant, HARRIS, stated at the aforementioned retreat that he could not work with an immoral person such as plaintiff, GLAZIER.

15. Defendant, HARRIS, stated at the aforementioned retreat that he could not work with an immoral person such as plaintiff, REID.

Plaintiffs allege that Wesley's' false and defamatory statements were words to the following effect:

> 1. Defendant, WESLEY, stated that he had been present with defendant, HARRIS, during the above-mentioned visit to Ms. Lilli Jaffe's residence.
>
> 2. Defendant, WESLEY, confirmed defendant, HARRIS' statement that a long-time parishioner, Ms. Lilli Jaffe, had gifted to plaintiff, REID, property in Connecticut and that plaintiffs, GLAZIER and REID, were beneficiaries in Ms. Jaffe's Will.
>
> 3. Defendant, WESLEY, confirmed defendant, HARRIS' statement that at some point prior to June 6,2009, defendant, HARRIS, had seen papers showing that Ms. Jaffe's estate was worth well over $1,000,000.00 and that she intended to leave her estate to defendant, ST. JOHN'S.
>
> 4. Defendant, WESLEY, confirmed defendant, HARRIS' statement that while Ms. Jaffe's initial plan had been to leave her money to defendant, ST. JOHN'S, now the money was being left to plaintiffs, GLAZIER and REID.
>
> 5. Defendant, WESLEY, confirmed Defendant, HARRIS' statement that church member, Lud Mayleas, was initially to have sole Power of Attorney for Ms. Jaffe but because of plaintiffs' undue influence on Ms. Jaffe, the Power of Attorney would be solely with plaintiff, GLAZIER.
>
> 6. Defendant, WESLEY, stated that plaintiffs, GLAZIER and REID, had been visiting Ms. Jaffe and taking care of her to the exclusion of other parties such as himself.
>
> 7. Defendant, WESLEY, confirmed defendant, HARRIS' statement that wrongly accused plaintiff, GLAZIER, of unduly influencing Ms. Jaffe to change her Will.
>
> 8. Defendant, WESLEY, confirmed defendant, HARRIS' statement that wrongly accused plaintiff, REID, of unduly influencing Ms. Jaffe to change her Will.

9. Defendant, WESLEY, confirmed defendant, HARRIS' statement that wrongfully accused plaintiff, GLAZIER of diverting funds that were to go to the Church upon Ms. Jaffe's death for his own benefit.

10. Defendant, WESLEY, confirmed defendant, HARRIS' statement that wrongfully accused plaintiff, REID, of diverting funds that were to go to the Church upon Ms. Jaffe's death for his own benefit.

11. Defendant, WESLEY, confirmed defendant, HARRIS' statement that wrongly accused plaintiff, GLAZIER, of stealing from the church.

12. Defendant, WESLEY, confirmed defendant, HARRIS' statement that wrongfully accused plaintiff, REID, of stealing from the church.

Plaintiffs have asserted five causes of action against the defendants, to wit: defamation (COA1 and COA3); negligent/intentional infliction of emotional distress (COA2); misrepresentation (COA4); and intentional interference with plaintiffs' employment relationships (COA5).

In opposition to the motion to dismiss, plaintiffs rely upon their own affidavits and the pleadings, copies of Lilli Jaffe's 1998 and 2009 Wills, and upon the sworn affidavits of non-parties, Steven Smith ("Smith"), Vice President of the Council and Craig Snoke ("Snoke"), member of the Council. Smith and Snoke state in their sworn affidavits, *inter alia*, that on June 6, 2009, they were present at the retreat when Harris called for an unannounced Council meeting and informed the members of the Council that Glazier and Reid had been regularly visiting Lilli Jaffe ("Ms. Jaffe"), a member of the Church, and that they had "manipulated and unduly influenced Ms. Jaffe into changing her Will so that in her new Will they were beneficiaries of her Estate. According to Pastor

Harris, money originally intended for the church was being diverted to [Glazier] and [Reid]."

Snoke stated that he believed Harris' statement because he knew Harris was a witness to Ms. Jaffe's 2008 Will. Smith stated that Harris had seen papers showing that Ms. Jaffe had intended to leave her Estate to the Church, which consisted of over a million dollars. Smith further stated that based solely on these representations, the Council voted to end Glazier and Reid's 42 years of service at the Church.

Discussion

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court must determine whether the allegations support the causes of action asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 [2005]).

Where the parties submit affidavits and other evidentiary materials in support of their respective motions, the courts are free to consider the affidavits and documents submitted to remedy any defects in the pleading. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994).

Defamation

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 N.Y.2d 453 (1967). The elements of slander are: (1) the statement was defamatory, meaning it had a tendency to expose plaintiff to public hatred, contempt, ridicule, or disgrace; (2) the statement referred to plaintiff; (3) defendant published or broadcasted the statement to someone other than plaintiff; and (4) the statement was a substantial factor in causing plaintiff to suffer financial loss. Epifani v. Johnson, 65 A.D.3d 224 (2d Dept. 2009); Rufeh v. Schwartz, 50 A.D.3d 1002, 1003 (2d Dept. 2008).

A plaintiff does not need to prove special damages, however, if he or she can establish that the alleged defamatory statement constituted slander *per se*. Rufeh v. Schwartz, *supra* at 1003. Only certain statements are considered slander per se. They are limited to four categories of statements that: (1) charge plaintiff with a serious crime; (2) tend to injure another in his or her trade, business, or profession; (3) plaintiff has a loathsome disease; or (4) impute unchastity. *See* Liberman v. Gelstein, 80 N.Y.2d 429, 435 (1992); Epifani v. Johnson, *supra* at 234. When statements fall within one of these categories, the law presumes that damages will result, and they need not be separately proven.

It is the court's responsibility, in the first instance, to determine whether a publication is susceptible to the defamatory meaning ascribed to it. Golub v. Enquirer/Star Group, Inc., 89 N.Y.2d 1074 (1997); Rejent v. Liberation Publications Inc., 197 A.D.2d 240 (1st Dept. 1994). A court should neither strain to place a particular construction on the language complained of, nor should the court strain to interpret the

words in their mildest and most inoffensive sense, in order to hold them non-defamatory. Rejent, *supra*.

Competing with an individual's right to protect one's own reputation, is the constitutionally guaranteed right to free speech. One of the staples of a free society is that people should be able to speak freely. United States Constitution v. New York State Constitution, Article I § 8. Consequently, statements that merely express opinion are not actionable as defamation, no matter how offensive, vituperative or unreasonable they may be. Immono AG v. Moore-Jankowski, 77 N.Y.2d 235 (1991). If the material, when read in context, could be perceived by a reasonable person to be nothing more than a matter of personal opinion, no claim for libel exists. Immuno AG, *supra*.

Under New York law, only statements of objective fact, as opposed to a statement of opinion, can form the basis for a defamation action. An opinion, which is a person's thought, belief or inference, is not capable of being proven false (Black's Law Dictionary [8th Ed 2004]; *see also* Four Corners Comm. v. Graphic Arts Mut. Ins. Co., 25 Misc.3d 1236[A] [NY Sup 2009]).

Here, plaintiffs allege that while at a church retreat, Harris and Wesley told members of the Council that plaintiffs unduly influenced Ms. Jaffe into diverting funds from the Church and using the funds for their own benefit. Based upon this communication, the Council voted to remove plaintiffs from the Church.

The court holds that plaintiffs have asserted actionable causes of action for defamation (slander *per se*). The challenged speech alleges that plaintiffs are guilty of the crimes of undue influence and stealing. The challenged speech has allegedly

injured the plaintiffs in their professions with the Church, and exposed plaintiffs to public hatred, contempt, ridicule, and/or disgrace.

Furthermore, Harris and Wesley's statements would constitute one of fact rather than the privileged expression of an opinion, because Harris and Wesley reportedly saw the documents showing that Ms. Jaffe intended to leave her estate to the Church. Mann v. Abel, 856 N.Y.S.2d 31 (2008) (expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action to recover damages for defamation).

Although "truth" is a defense to a claim for defamation, there is no documentary evidence presented by defendants that plaintiffs actually exerted undue influence over Ms. Jaffe to change her Will. Russo v. Padovano, 84 A.D.2d 925 (4th Dept. 1981). In fact, the 1998 Will and the 2008 Will both designate that the Church is to receive $10,000.00. Defendants' accusations that Ms. Jaffe was unduly influenced into giving money originally intended for the Church to the plaintiffs is, therefore, unsupported. Defendants' generalized claims are insufficient to dismiss plaintiffs' first and third causes of action for defamation. Accordingly, defendants' motion for the dismissal of plaintiffs' first and third causes of action is denied.

Intentional Infliction of Emotional Distress

Plaintiffs' second cause of action claims that the Church's actions constituted intentional infliction of emotional distress. The elements of a cause of action for an intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional

distress; (3) a causal conduct between the conduct and the injury; and (4) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). Extreme and outrageous conduct is measured by the reasonable bounds of decency tolerated by a decent society. Marmelstein v. Kehillat New Hempstead, 11 N.Y.3d 15 (2008). It is a rigorous standard that is difficult to satisfy because it is designed to filter out trivial complaints and assure that a claim of severe emotional distress is genuine. Seltzer v. Bayer, 272 A.D.2d 263 (1st Dept. 2000). Whether conduct complained of is outrageous is, in the first instance, for the courts to determine. Cavallaro v. Pozzi, 28 A.D.3d 1075 (4th Dept. 2006).

The court finds that plaintiffs have failed to set forth an account of the events or conduct that they allege is "extreme and outrageous." Plaintiffs' complaint alleges that defendants accused plaintiffs of being "immoral" people and engaging in various crimes including undue influence and diversion of funds. Plaintiffs' facts and the situation described by them, even if proved at trial, do not meet the "threshold of outrageousness" needed to support a cause of action for intentional infliction of emotional distress. Graupner v. Roth, 293 A.D.2d 408, 410 (1st Dept. 2002).

Accordingly, the facts presented do not support a cause of action for intentional infliction of emotional distress, and defendants' motion for the dismissal of plaintiffs' second cause of action is granted.

Misrepresentation

There is no tort for "misrepresentation." To the extent plaintiffs really intended to plead fraud, it fails. To state a cause of action for fraud, plaintiffs must show: (1) that

defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiffs' reliance; and (4) that the misrepresentation resulted in some injury to plaintiffs. Held v. Kaufman, 91 N.Y.2d 425 (2d Dept. 1998).

Here, plaintiffs allege that Harris and Wesley made false representations to the Council, and that the Council relied upon these false statements, resulting in the loss of plaintiffs' employment with the Church. Here, the fraud was directed at the Council, not at plaintiffs. There was no reliance by plaintiffs. Any misstatement made by the Council were to third-parties; therefore, plaintiffs' remedy lies in other torts, such as defamation. Accordingly, plaintiffs' fourth cause of action for misrepresentation is dismissed.

Intentional Interference with Employment Relationships

The Court of Appeals has refused to recognize a cause of action in tort for abusive or wrongful discharge of an employee. Horn v. New York Times, 100 N.Y.2d 85 (2003); Murphy v. American Home Products Corp., 58 N.Y.2d 293 (1983). An employer has the right to terminate an at will employee at any time for any reason or for no reason. Lobosco v. New York Telephone Company/NYNEX, 96 N.Y.2d 312 (2001).

Here, plaintiffs allege that defendants interfered with plaintiffs' employment relationships. However, plaintiffs have not alleged that they had an employment contract with the Church for any period of time. Since no employment contract existed, plaintiffs could have been terminated at any time. Plaintiffs, therefore, cannot maintain a cause of action for intentional interference with plaintiffs' employment relationships

against defendants. *See* Williams v. County of Genesee, 306 A.D.2d 865 (4th Dept. 2003). Accordingly, defendants' motion to dismiss the fifth cause of action is granted.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendants' motion to dismiss is granted only as to plaintiffs' 2nd, 4th, and 5th causes of action, which are hereby severed and dismissed; and it is further

ORDERED that defendants' motion to dismiss is denied as to plaintiffs' 1st and 3rd causes of action; and it is further

ORDERED that defendants have **30 days** from date of entry of this decision/order to interpose a verified answer; and it is further

ORDERED that this case is set for a **Preliminary Conference** on **April 7, 2011 at 9:30 a.m.**, at 60 Centre Street, Room 232, Part 10; and it is further

ORDERED that any requested relief not expressly addressed has nonetheless been considered; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
February 28, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.