Jamal v Weil
2012 NY Slip Op 33580(U)
September 28, 2012
Supreme Court, Westchester County
Docket Number: 54967/2011
Judge: Sam D. Walker
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To commence the statutory
time for appeals as of right
(CPLR 5513[a]), you are
advised to serve a copy
of this order, with notice
of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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SAMMY EL JAMAL

Plaintiff,

-against-

JAMES A. WEIL

Defendant.

Index No.54967/2011
Decision & Order
Seq. 1

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The following papers were read on Defendant's motions to dismiss the amended complaint as against him:

PAPERS	NUMBERED
Defendant's Notice of Motion/Affirmation/Exhibits A-D	
Exhibits A-F; Exhibit F	1
Memorandum of Law in Support of Motion to Dismiss	2
Affirmation in Opposition to Motion (Joshua J. Grauer, Esq.)	3
Affidavit in Opposition to Motion (Sammy El Jamal)	4
Affidavit in Opposition (Musa El Jamal)	5
Affidavit in Opposition (Tulio Lopez)	6
Affidavit in Opposition (Bryan Orser)	7
Affidavit in Opposition (Miguel Santiago)	8
Affidavit in Opposition (Ayman Ibrahim)	9
Affidavit in Opposition (Wisam F. ElJamal)	10
Memorandum of Law in Opposition to Motion	11
Reply Affirmation (Marc S. Oxman, Esq.)/Exhibits A-D	12
Memorandum of Law in Reply	13

Defendant moves for a judgment dismissing the verified amended complaint in this action on the ground that each cause of action fails to set forth a cause of action against defendant, to strike Plaintiff's demand for punitive damages and for the issuance of a protective

order to quash the non party subpoenas served upon Paul Rich, Carol Thompson, Chris Singleton, Alan H. Rothschild, Angela Barbuto, and Hank (Chris) Simpson, Bonnie Silverman, and Barry Weisfeld, on the ground that the depositions sought have no purpose other than to harass Defendant.

MOTION TO DISMISS

The Verified Complaint follows a related and very contentious action in which Plaintiff sought to enjoin his removal by defendant and by others, as manager of two jointly operated Limited Liability Companies (NY Dealer Stations and NY Fuel Holdings)(referred to herein as "the Company") . That action involved several motions and was the subject of at least one appeal of a Supreme Court order requiring Plaintiff to post a security as a condition of securing an injunction. The instant complaint sets forth three causes of action sounding in defamation and seeks punitive damages.

In the first cause of action Plaintiff alleges that an email from Defendant dated July 21, 2011 constituted libel *per se*. Defendant's email stated "[W]e are dealing with ***someone who is a liar*** and not in touch with reality ...".

The second cause of action is predicated on an email sent on August 25, 2011 from Defendant which stated "Leon and I are in no way saying the money was not ***stolen we know it was*** ..." and the third cause of action is based on numerous occasions since December 2010 when Defendant is alleged to have made slanderous statements to third parties including Plaintiff's own father, in house counsel, driver and other employees, that by virtue of their association with Plaintiff they were "***Guilty by Association***," that Plaintiff is a "***liar***" and "***thief***," and that Plaintiff is "***going to jail***..." (emphasis added).

Defendant argues that the emails referred to in plaintiff's First and Second Causes of Action do not constitute libel *per se.* Stating that in the July 21, 2011 email the parties to that communication were discussing issues pertinent to plaintiff's related legal action that sought an injunction and were privileged as it was disseminated only to three high level employees of the Company and outside counsel. Arguing that the employees of the company are also considered parties for the purpose of determining that the communication was related to the pending litigation. Defendant also maintains that the August 25, 2011 email is similarly privileged as it concerned matters key to the pending litigation and were a reiteration of statements contained in Defendant's affidavits submitted in that action. As to the Third Cause of Action, defendant argues that plaintiff has failed to satisfy the requirements of CPLR 3016(a) which states that in an action for libel or slander, the particular words complained of must be set forth in the complaint. Furthermore, the complaint is alleged to lack specifics as to the time place and manner of the purported defamatory statement. (*see Grynberg v. Alexander's Inc,* 133 AD2d 667 (2nd Dept. 1987).

Plaintiff proposes that the First and Second Causes of Action should not be dismissed as the emails at issue constitute false factual assertions interposed in bad faith for a collateral objective and cannot be considered as material to the ongoing litigation. Citing *Moore v. Manuafacturers' Nat'l Bank of Troy,* 123 NY420,426 (1890) plaintiff argues that the privilege:

> "[I]s not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or at least it does not protect slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant"

When the statement is not pertinent to the subject matter of the lawsuit, or not made in good faith and without malice, any claim of privilege is abused and the protections is withdrawn. *Youmans v. Smith* 153 NY214, 220 (1897). In addition, plaintiff states that defendant had no realistic expectation of privacy with respect to the July 21, email when it was copied to two employees of the Company and to their work email addresses. Plaintiff's affidavit in opposition to the motion recounts that on June 30, 2011 by order of the Harrison Town Court, Hon Ronald B. Bianchi over the objection of defendants counsel herein, granted Plaintiff the express right to monitor the e-mail accounts of all employees of the New York Fuel Holdings and its related entities.

With respect to the Third Cause of Action plaintiff argues that the Amended Complaint and accompanying affidavits allege the particular words used, the time when, place where and manner in which the false statements was made and specifies to whom the statements were made. The complaint is corroborated by affidavits that adequately describe the circumstances of the publication at issue and the cause of action satisfies the CPLR 3016(a) as a matter of law. *Herlihy v Metropolitan Museum of Art,* 214 AD2d 250(1st Dept. 1995) .

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction" *(Matter of Casamassima v. Casamassima*, 30 A.D.3d 596(2nd Dept. 2006); see CPLR 3026). The reviewing court "accept[s] the facts as alleged in the complaint as true, accord[s][the] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" *Matter of Casamassima v. Casamassima* supra at 596.

Generally, the elements of a cause of action to recover damages for defamation are that

the defendant is responsible for 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'" . *Salvatore v. Kumar*, 45 A.D.3d 560, 563(2nd Dept. 2007), quoting , *Dillon v. City of New York,* 261 A.D.2d 34, 38, (1st Dept. 1999). The complaint must set forth the particular words allegedly constituting defamation (see CPLR 3016[a]), and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made (see *Dillon v. City of New York*, 261 A.D.2d at 38). When alleging slander the plaintiff must plead and prove that he or she has sustained special damages, i.e., 'the loss of something having economic or pecuniary value' " (*Rufeh v. Schwartz,* 50 A.D.3d 1002, 1003(2nd Dept. 2007), quoting *Liberman v. Gelstein*, 80 N.Y.2d 429, 434–435(1992). However, there is no need to prove special damages where the alleged defamatory statement constitutes slander *per se,* See *Rufeh v. Schwartz*, 50 A.D.3d at 1003. The four exceptions which constitute "slander per se" are statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman (see *Liberman v. Gelstein*, 80 N.Y.2d at 435). When statements fall within one of these excepted categories, the law presumes that damages will result.

Defendant argues that the causes of action relating to the July and August 2011 email messages are absolutely privileged communications. On the issue of privilege and the July 21, 2011 email message, this Court finds for the plaintiff. Based on the particular circumstances present in this case and when the email communication is viewed in the light most favorable to plaintiff, there is only a tangentially related nexus to the related litigation . Although

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defendant's attorneys are copied on the messages, it is also clear that the defendant could not reasonably consider the communications to be part of a confidential and privileged conversation with counsel. Plaintiff states that on June 30, 2011 a Harrison Town Justice gave him unlimited access to all the Company employees emails. While defendant proposes that plaintiff has failed to produce the actual judicial order when reviewing a motion to dismiss, this Court allows plaintiff every favorable inference on this point and concludes that the defendant could not reasonably have presumed any attorney client privilege or confidentiality with respect to the July 21, 2011 email.[1]

With respect to the August 25, 2011 email, the motion seeking dismissal of this cause of action must also be denied. The statement contained in the email are not material or pertinent to the litigation and furthermore, if there was some privilege attached to the communication that privilege is lost if abused and published with malice. *Youmans v. Smith,* 153 NY214 (1897). With the issue of privilege disposed in plaintiff's favor, plaintiff has clearly established sufficient basis to support the for a claim for libel *per se.* A statement that accuses one of stealing or swindling or being a thief in connection with one's business is defamatory *per se*. *Epifani v. Johnson* , 65 AD3d 224(2nd Dept. 2009). The language " we know " the money was stolen has a precise meaning and one which is readily understood in this context and in connection with the preceding email chain.

The Plaintiff's Cause of Action that allege slander sufficiently states a valid cause of action and satisfy the particularity requirements of CPLR 3016 (a). Agin the complaint is

[1]The emails was sent during the workday and employees of both parties were copied on the message at their work email addresses to which Plaintiff had been given unlimited access to.

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liberally construed and plaintiff given the benefit of every favorable inference. *Mitchell v. TAM Equities, Inc.*, 27 AD3d 703 (2nd Dept .2006); *Paterno v. CYC, LLC,* 8 A.D.2d 544 (2nd Dept. 2002). Also given a favorable inference are the factual submissions made in opposition to the motion. *Norman v. City of New York*, 9 NY3d 825 (2007). The complaint and accompanying affidavits alleges the particular words spoken or published and sets forth the time period in which the statements were made. *Herlihy v. Metropolitan Museum of Art* , 214 AD2d 250 (1st Dept. 1995).

Plaintiff's claim for punitive damages is adequately supported by the allegations of both intentional and malicious conduct. *K. Capolino Const. Corp. v. White Plains Housing Authority,* 275 A.D.2d 347(2nd Dept. 2000) and the defendant's application for a protective order against plaintiff deposing the eight non party witnesses is also denied. Full disclosure of all relevant material is proper (CPLR 3101(a)) and the depositions of individuals with whom defendant regularly communicates regarding his business interaction with plaintiff including plaintiff's own employees, are clearly relevant, advance the function of a trial in this case and cannot be obtained from other sources. *Kooper v. Kooper*, 74 AD3d 6(2nd Dept. 2010)and *Tenore v. Tenore*, 45 AD3d 571(2nd Dept. 2007).

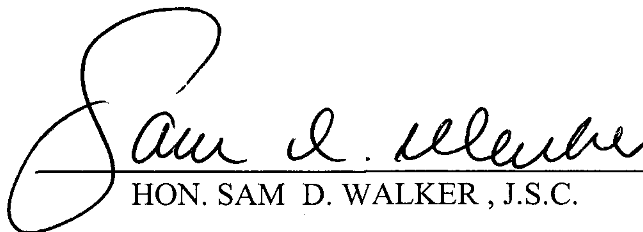
For the foregoing reasons, defendant's motions to dismiss the complaint, to dismiss the claim for punitive damages and for a protective order quashing the non party subpoenas are DENIED.

The parties are directed to appear at 9:30 AM on November 5, 2012 before Court

Attorney Mary Nicholas Brewster for the previously scheduled compliance conference.

The foregoing shall constitute the decision and order of this court.

Dated: White Plains, New York
September 28, 2012



HON. SAM D. WALKER , J.S.C.