[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 112674/2007
KAISER, KEVIN
VS.
RAOUL'S RESTAURANT CORP.
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

FOR THE FOLLOWING REASON(S): _____

Dated: 5/21/12

LOUIS B. YORK J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------x

KEVIN KAISER,

Plaintiff,

Index No 112674-2007

-against-

RAOUL'S RESTAURANT CORPORATION, CINDY SMITH, GUY RAOUL and SERGE RAOUL

Defendants

----------x

YORK, J.:

Motion Sequence Numbers Six and Seven are consolidated for disposition and resolved as follows:

BACKGROUND

Kevin Kaiser ("Kaiser") was employed by Raoul's Restaurant Corporation ("Raoul's"), which owns and manages a restaurant "Raoul's," from July 2011 until his termination on September 29, 2006. He was 49 years old at that time. Guy and Serge Raoul are the restaurant's owners, and Cindy Smith ("Smith") its general manager. Kevin Kaiser's duties as an accountant and part of the restaurant's management included calculating daily receipts, preparing weekly cash distributions to employees and owners, and occasional booking of events held in the restaurant.

On September 29, 2006 Cindy Smith accused Kevin Kaiser, in the presence of Eddie Hudson, a senior employee and maitre'd of the restaurant, of stealing cash from the safe. She had audited the cash payrolls for the previous two weeks and found out that $3,800 reported as paid to Guy, Reine (Guy's wife), Serge Raoul and herself were not distributed to them. Kaiser could not explain the discrepancies, and Smith was authorized by the owners to fire him. Guy Raoul and Cindy Smith decided not to pursue the investigation and did not contact the police.

Plaintiff applied to the State Department of Labor for unemployment benefits, but was denied them on the ground that he had been terminated for embezzling funds. Though the State Unemployment Insurance Appeal Board initially affirmed the determination, it later rescinded its decision and remanded the matter for a further hearing. On March 27, 2009 the benefits were granted. According to the Administrative Law Judge, there existed credible evidence that the employers sincerely believed plaintiff had stolen money from the restaurant, but there was insufficient evidence to establish that plaintiff had in fact stolen it.

Plaintiff Kevin Kaiser commenced this action on September 19, 2007. In the first cause of action, Kaiser argues that Smith falsely accused him of stealing as a pretext to force him out because of his age, in violation of New York State Executive Law §290 *et seq.* and New York City Administrative Code §8-101 *et seq.* The claim under New York State Law was subsequently withdrawn. Plaintiff points to several conversations he allegedly had with Smith related to age and concerning the restaurant's intent to replace older workers and to restaurant's alleged steps to implement this new policy.

The second cause of action, for hostile work environment, was dismissed by the Order of this court dated May 23, 2008. Kaiser v Raoul's Rest. Corp., 2008 WL 2328937 (N.Y.Sup.), aff'd Kaiser v Raoul's Rest. Corp., 72 AD3d 539; 899 N.Y.S.2d 210 [1st Dept 2010].

The third cause of action, for defamation of character, against all defendants, was limited by the same Order to a claim against Cindy Smith based on her alleged statement to a third party that Kevin Kaiser was fired for stealing money.

Currently, defendants move for summary judgment, pursuant to CPLR 3212, to dismiss the age discrimination claim and defendant Smith moves for summary judgment to dismiss the claim of defamation as against her.

DISCUSSION

Age Discrimination

Standard for Summary Judgment in Age Discrimination Cases under New York City Human Rights Law

In Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 936 N.Y.S.2d 112 [1st Dept 2011] the First Department set out a comprehensive framework for deciding motions for summary judgment in cases of discrimination in violation of New York City Human Rights Law. This decision extended the city law's "uniquely broad and remedial purposes," which go beyond those of counterpart State or federal civil rights laws (Williams v. New York City Hous. Auth., 61 A.D.3d 62, 66, 872 N.Y.S.2d 27 [1st Dept 2009]) to the evaluation of plaintiffs' evidentiary burden.

The Appellate Division elaborated on the three-step burden-shifting framework proposed by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 [1973]. Under McDonnel Douglass, an element of plaintiff's *prima facie* case for discrimination is a showing that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. The Appellate Division suggested that on a motion for summary judgment the court does not need to start its analysis from plaintiff's *prima facie* case. If defendant has proffered evidence of a legitimate and non-discriminatory reason for an adverse action against plaintiff, it is no more relevant whether plaintiff sufficiently alleged circumstances giving rise to inference of discrimination. Bennett, at 39-40. The burden shifts to plaintiff to raise a material fact showing that the defendant's explanation for terminating employment was a pretext. At this stage the evidentiary standards under city law become more favorable to plaintiff than under state or federal law. If plaintiff adduces enough evidence to demonstrate that

defendant's reasons for an adverse employment action are false, incomplete or misleading, this alone is sufficient to defeat the motion for summary judgment. Proffering false reasons raises a strong presumption that defendant seeks to disguise a discriminatory intent. Bennett, at 43-44. Failure to adduce such evidence, though, is not fatal for plaintiff's opposition to summary judgment. Under federal law, "plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." Gross v. FBL Financial Services, Inc., 557 U.S., 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009). The city human rights law preserves mixed-motive standards in discrimination cases: discriminatory reasons cannot be a contributing factor for an otherwise legitimate action. Bennett, at 40. It is sufficient for plaintiff to raise a triable material fact about alleged discrimination to send the case to the jury.

The Pretext Argument

In their motion for summary judgment to dismiss Kevin Kaiser's complaint of age discrimination, defendants Raoul's restaurant, Guy Raoul and Cindy Smith provide reasons why Kaiser was terminated. According to defendants Cindy Smith and Guy Raoul, they sincerely believed and continue to believe that plaintiff was embezzling money from the restaurant and altering business records to conceal it.

Kaiser has to prove that the accusations mounted at him by Smith were false, and she knew or should have known at the time she made them that they had no ground in reality. He does not need to prove that he did not steal the money. Defendants' memorandum of law correctly states that plaintiff "must raise an issue that Defendants could not believe that Plaintiff embezzled cash funds from the safe. If Defendants believed that he embezzled, then the firing

was not pretextual regardless of whether Plaintiff actually did embezzle." (Raoul's Brief at p.8). However, it further asserts that "the Plaintiff admitted that he cannot prove that cash money was not removed from the safe." This statement obscures the real issues. The present action is based on a claim of age discrimination, and this court has to determine whether age discrimination occurred, not whether Kevin Kaiser is guilty of embezzling funds from his employer, or whether his name should be cleared. As the court in Stephenson v. Hotel Employees stated, the issue in that case was not whether plaintiffs were actually corrupt. Rather, the issue was whether plaintiffs had been accused of corruption (whether or not the accusations were true) and, if so, whether those accusations actually were the reason they were dismissed. "Even if it could be said that the Trustee unfairly credited the information implicating plaintiffs in the corruption (a point as to which we express no opinion), that would not render the dismissals actionable under the Human Rights Law." Stephenson v Hotel Employees and Rest. Employees Union Local 100 of the AFL-CIO, 14 AD3d 325, 329, 787 N.Y.S.2d 289 [1st Dept 2005]. "In a discrimination case, however, we are decidedly not interested in the truth of the allegations against plaintiff. We are interested in what "motivated the employer," the factual validity of the underlying imputation against the employee is not at issue." McPherson v New York City Dept. of Educ., 457 F3d 211, 215-16 [2d Cir 2006] (internal quotations omitted).

Cindy Smith described in detail the circumstances which led her to lose trust in Kevin Kaiser as a bookkeeper and office manager. Plaintiff was responsible for accounting of cash sales to patrons and placing daily cash deposits in a safe. Each Thursday, Kaiser prepared envelopes with cash to be paid to employees and owners for the preceding week. These envelopes were usually placed in the safe, and the corresponding amount was recorded as "paid" on the cash payroll record. Sometime in September 2006 Smith learned that Guy and Serge

Raoul did not receive the usual distributions, and decided to investigate. Cash payroll records prepared by Kaiser on Thursday, September 21, in the form of a Post-it note, included payments to the owners and herself, but this money was neither received nor placed, in envelopes, in the safe. Other employees were paid as reflected in the record. The same situation occurred a week later.

When asked to produce the payroll records on the morning of September 29, Kaiser submitted documents in which payments to Guy, Reine and Serge Raoul were crossed out and replaced with "0." This alteration was made after Smith had seen the records the previous evening. Both Cindy Smith and Eddie Hudson in their affidavits and depositions testified that plaintiff behaved as if caught red-handed, and did not defend himself. He did not ask to count the money in the safe or explain where the missing money could be found. Neither did he try to exonerate himself in the coming days and weeks, and never contacted Guy or Serge Raoul with both of whom he was on good terms. All these circumstances led defendants to believe that he was responsible for embezzling the funds.

It was not until the unemployment hearing and the present suit that Kevin Kaiser offered his account of the incident. In these proceedings he claims that Raoul's and Smith's proffered reasons to fire him are but a pretext to make room for a younger employee.

Plaintiff points to the following issues that should be resolved by the jury.

First, he contests that the notation "paid" on the cash payroll records means that money was in fact distributed on Thursdays. On his version, it was made in advance and referred to the date of the expected distribution (Kaiser Affidavit ¶23). Thus, such notations on September 21 and 28 records do not mean that money had left the safe.

He further alleges that in June 2006 Cindy Smith suggested that the weekly distributions to the owners and herself should be suspended until specifically requested. As a result, Kaiser created an Excel spreadsheet in which he recorded sums due to the owners and Smith but not paid to them. Such a spreadsheet indeed exists, having been retrieved from Kaiser's computer after his termination, an e-mail with an earlier version was sent to Smith on August 9, 2006, and preserved in Kaiser's e-mail folder. The Excel table, in his view, explains any discrepancies in financial records.

Next, Kaiser denies that he ever "altered" business records. He concedes that he drew a line through sums "paid" to Guy, Reine and Serge Raoul and wrote "0" instead, but explains that the Post-it note was only a working document, and the change was a way to remind himself that this money was still owed.

Finally, plaintiff claims that defendant's failure to conduct a serious internal investigation or seek an investigation by police circumstantially supports his claim that their allegation of embezzlement was a pretext justifying his dismissal on grounds of age.

As is common on motions for summary judgment, facts are to be seen in a light favorable to the non-moving party. In the course of these proceedings, parties had an opportunity to depose each other on many occasions, and the record contains an almost nine-hundred-page long deposition of plaintiff Kaiser. Assuming, for the sake of argument, that he indeed was so intimidated by the general manager Smith on the termination day, as he claims, that he was not able to deny the accusations of embezzlement, and that all the evidence he presented since was readily available to her on September 29, 2006, could she have reasonably suspected him of misconduct?

Smith had in her possession Post-it notes that indicated, in Kaiser's handwriting, that cash was "paid" to her and the owners of the restaurant. Plaintiff did not deny that he made this record but from the beginning of this lawsuit has maintained that the term "paid" meant "to be paid" (Kaiser Affidavit, ¶19) and referred to the day of the expected distribution (*id.*,¶23). In his Complaint he explained that he accounted for the cash distributions by indicating on yellow Post-it notes the amounts owed to the owners using an "*accrual method*" (italics in the original) (Complaint, ¶37). A footnote to this paragraph explains that "As used herein, the term "accrual method" means recording, by a handwritten notation, cash distributions owed to the owners for each week, even when no actual cash distribution was made for that given week." In his deposition, however, plaintiff agreed that the term "paid" has its ordinary meaning in plain language. (Kaiser Deposition 720:10- 721: 6).

Kaiser implies that he prepared the Post-It notes in advance of the distribution date, while in his deposition he acknowledges that the form for the period ending September 16, Sunday, was prepared, together with the envelopes to be distributed on Thursday, either on Wednesday or Thursday (Kaiser Deposition 132: 4 -22). On the Post-It notes the second date, preceded by the word "paid", is underlined by two, sometimes three lines. (DeLince Affirmation, Ex. F).

Cindy Smith was dealing with a situation in which money was accounted for as "paid" but never reached its destination, requiring an explanation. When she asked Kaiser to produce the payroll records, several lines were crossed out, while the total remained unchanged. This in itself aroused additional suspicions. In his brief Kaiser plainly denied that business records were altered (Opposition Brief, pp. 14-15). In his deposition, though, he admitted that he changed the documents only when he was called upon to produce them (Kaiser Deposition 522: 7 – 523:11). This effort to modify business records was a sufficient ground to lose trust in him as an

accountant on the day of the termination, and could lead a reasonable person to doubt his veracity and professionalism.

Parties dispute the circumstances in which the Excel table was produced and distributed. This table is central to the plaintiff's evidence adduced to prove that Smith was aware of how money was accounted for. Smith denies ever seeing the table before the unemployment insurance hearing. Both she and Eddie Hudson testified that Kevin Kaiser did not mention the table on the day he was fired (Smith Supplemental Affidavit, ¶22; Hudson Affidavit ¶9) while he claims that he did (Kaiser Affidavit, ¶51). Even taking Kaiser's statements as true, his *ex post facto* explanations cannot resolve the following contradictions in his position.

In his complaint, Kevin Kaiser asserts that the Excel spreadsheet was based on a cash method of accounting, as distinct from an "accrual" method on the Post-it notes. He maintained it "to be able to keep an accurate accounting of all instances when cash distributions were actually made" (Complaint, ¶38 and 39). Assuming that cash distributions to the owners and Smith were withheld during the summer and into September, and actual distributions were accurately reflected in the spreadsheet, the spreadsheet does not account for inconsistencies in the payroll records. If the table was the only document that dealt with real payments to the owners, as Kaiser claims, then the distributions that were made in lump sums would not be reflected on the Post-it notes. The record for the week ending on August 26 ("paid" on August 31) nevertheless lists payment to Cindy of $10,500, to Serge of $2500+150, and to Guy of $7,000. The record for the week ending on September 16 ("paid" September 21) contains two sums -- $5000 to Guy and $2000 to Serge. On both dates, August 31 and September 21, the Excel duplicates these amounts. It follows that the cash payroll records refer both to sums actually paid and to what Kaiser called "accrued" sums. At the very least, anyone seeing these

records could not distinguish between what was and what was not paid, under either "cash" or "accrual" methods. Plaintiff admitted as much at his depositions. The second set of books, the Excel table, even if it were produced by Kaiser on the termination date, does not explain why sums recorded as "paid" on September 21 and 28 were neither distributed nor placed in envelopes in the safe.

No reasonable jury could find that Smith's suspicions were groundless and that she could not sincerely believe that there was professional misconduct on the part of plaintiff Kaiser. A book-keeper's position requires trust and Smith had reasons to lose it. Plaintiff was given an opportunity to explain himself before his dismissal, but neither at the time, nor in the course of these proceedings could he dispel warranted doubts about his misconduct. He failed to raise a material issue of fact that employer's reason to fire him was a pretext disguising discrimination against him on grounds of age.

Inferences of Age Discrimination.

Even if employer's proffered reason to terminate Kaiser is legitimate and not itself discriminatory, age discrimination might still play a role in the employer's decision. (Bennett, at 40). This court will use all the evidence in the record, as the court in Bennett has done, to determine whether plaintiff has raised a material issue of fact that could lead a jury to find in his favor in his claim of discrimination on account of age.

Kevin Kaiser refers to several incidents that allegedly occurred in the last year of his employment with Raoul's. Sometime in August 2005 Smith told him that the owners of the restaurant wanted to change "the face" of the restaurant to appeal to a younger crowd, and intended to replace three persons -- a Sunday night bartender, and two maitre d's, all in their 50s.

He felt that this endangered his own position at the restaurant. Kaiser further alleged that the owners and Smith started implementing this strategy in early 2006, when they had a younger person "trail" the experienced bartender so that he could take over some shifts from older persons (this person was not hired). In addition, a waitress in her 20s was hired, though she left employment in the spring of that year. On Kaiser's account, the strategy was abandoned only when two maitre d's threatened the restaurant with an age-discrimination suit.

There is ample evidence in the record to show that the restaurant explored the possibility of adding a late-night bartender's shift to the existing ones, not to replace current employees. Even assuming that the restaurant wanted to attract a younger clientele, the relation of this legitimate business goal to plaintiff's job security is at best remote. Plaintiff worked in the back office, was not required to follow a dress code, usually finished his working day before the restaurant opened for dinner service and did not interact with patrons. On his own evidence, he met at most ten clients out of 35,000 a year when on rare occasions he booked parties in person rather than over the phone. Evidence should have a causal link to an alleged ground of discrimination. Campbell v Cellco Partnership, 2012 WL 400959 [SD NY Feb. 7, 2012].

Much of plaintiff's case consists of the discussion of the position of other employees, older than him, and who indeed represented the "face" of the restaurant by working in the "front room." He acknowledged that many of these people have held their positions at the restaurant for 25-30 years, some from the day the restaurant was opened in 1976, and that no one was fired to make room for younger persons while he was employed. To reconcile this plain fact with his allegation of a policy to replace existing employees with younger ones, plaintiff tells a story of a threatened lawsuit. The story has evolved. At first it was alleged that Cindy Smith told him about the threat coming from two members of the senior staff (Kaiser Deposition 250: 12-18; 253: 19-

254:1), then he added that he heard it himself from Philip Sanders (*id.* 312: 7-11). In a more detailed account, Eddie Hudson bragged that he would take away all his clients with him if he had to leave the restaurant and waived a notebook with clients' names in the presence of Kaiser, while Cindy Smith and Philip Sanders witnessed the scene (*id.* 327: 4- 330:9). These contradictory accounts are not corroborated and denied by all alleged participants. In addition, Kaiser refers to the departure of a 63 year-old Sunday night bartender in 2009, two years after he was fired from the restaurant, as further evidence of age discrimination.

Apart from comments about the age of third persons Smith also allegedly stated that she did not know how long she would be able to continue in the business, because the occupation was demanding, more suitable for the young. Since both Smith and Kaiser are approximately the same age, he took this remark to refer to him as well (Complaint, ¶48).

Remarks about the age of people other than plaintiff, even if actually made, are insufficient to infer that plaintiff's age was a motivating factor in deciding to dismiss him. DiGirolamo v MetLife Group, Inc., 2011 U.S. Dist. LEXIS 62104, 2011 WL 2421292 [SD NY 2011] (comments referring to others as old and tired insufficient to show age discrimination); Renz v. Grey Adver., Inc., 135 F.3d 217, 224 (2d Cir. 1997) (remarks allegedly made by [supervisor] commenting critically on the ages of several female employees . . . none of [which] w[ere] directed at [plaintiff] insufficient to raise inference). The case of DiGirolamo is very similar to the present one: the three persons who were older than plaintiff and about whose age the supervisor made disparaging comments, remained employed or retired to explore other opportunities. The court concluded that the "evidence here . . . refutes rather than supports [Plaintiff's] claim of age animus." DiGirolamo, at 34, n.12.

Plaintiff points to only few conversations about himself. Cindy Smith inquired about what he would like to do if he left the job at the restaurant. He shared with her his dream to establish himself in the flower business. Smith introduced Kaiser to Rob Houtenbos, a friend of hers, the owner of Dutch Flowerline, a floral products business in New York. As a result of this meeting, Houtenbos hired Kaiser as a part-time bookkeeper. This is held by plaintiff against Smith as part of a long-term strategy to get rid of him. In plaintiff's brief in opposition to summary judgment, his introduction to Houtenbos by Smith is listed under "ageist discussions" (Opposition Brief, p. 6). On a few occasions, Smith allegedly mentioned that plaintiff seemed concerned that he was going to be fired. Even if such words were said, which is denied, they did not in any way refer to age. In a stronger case for plaintiff, the court found that defendant supervisor's statement that plaintiff was "not a good fit," to be too isolated and ambiguous to raise an issue of fact as to defendants' age-based animus. Green v Citibank, N.A., 299 AD2d 182, 182; 749 N.Y.S.2d 30 [1st Dept 2002].

The fact that a decision-maker belongs to the same protected class as plaintiff also weakens any inference of discrimination that could be drawn in the case. Boston v MacFadden Publishing, 2010 U.S. Dist. LEXIS 103294, 2010 WL 3785541, at 11; DiGirolamo, at 34.

In his deposition testimony plaintiff contradicted his claim that Smith's discussion of age issues with him made him feel "uncomfortable and uncertain about the status of his future" at Raoul's (Complaint, at ¶48). Until September of 2006 he did not think that he was going to lose his job (Kaiser Deposition 427: 21- 428:17).

Considering evidence in light most favorable to plaintiff, and according him all the benefit of a doubt, as has been the case during these lengthy proceedings, plaintiff failed to raise inferences that age was a contributing factor to his dismissal. All the alleged episodes concern

either other people, or are not related to plaintiff's age, even if one accepts his account. Plaintiff's claims may be rejected outright in the context of a summary judgment motion when some of the factual assertions are negated by plaintiff's own admissions and concessions, or evidence conclusively establishing the nature of the events. Forrest v Jewish Guild for the Blind, 309 AD2d 546, 553-54, 765 N.Y.S.2d 326 [1st Dept 2003]. Evidence shows that there was no pattern of age discrimination at Raoul's. On the contrary, the restaurant retained its employees for decades, well into their 50s and 60s. Plaintiff's assertions of discomfort due to his age are undermined by his own admissions.

Defamation

Plaintiff's claim of defamation is based on a communication from Cindy Smith to Robert Houtenbos, the owner of Dutch Flowerline, several days after plaintiff's termination at Raoul's. Houtenbos employed Kevin Kaiser part-time as a book-keeper on Smith's recommendation. On plaintiff's version of events, Cindy Smith told Houtenbos that Kevin Kaiser was dismissed for "stealing" from the restaurant. The two participants to the conversation deny that she made such statement. In their account, Cindy Smith called Houtenbos and informed him that plaintiff was terminated for misconduct, that she believed someone was stealing money from Raoul's and it could be the plaintiff. At no time did she suggest that Houtenbos fire Kevin Kaiser.

The elements of a defamation claim are 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. Dillon v City of New York, 261 AD2d 34, 38; 704 N.Y.S.2d 1 [1st Dept 1999]. Defendant Smith moves for

summary judgment to dismiss the claim for defamation on various grounds: that the alleged statement was not published, that the statement actually made was true or, alternatively, expressed an opinion rather than stated a fact, that plaintiff did not allege special damages or defamation per se, and that even if the court finds that the statement was slanderous, it was nevertheless protected by a qualified privilege.

It is undisputed that a phone conversation between Cindy Smith and Robert Houtenbos did occur, that Smith initiated it, and that she explained the reasons why Kaiser was fired from the restaurant. Generally, if everyone present when an alleged statement is made denies making or receiving it, and plaintiff fails to come forth with admissible evidence to substantiate his claim, the claim is dismissed for lack of publication. Snyder v Sony Music Entertainment, Inc., 252 AD2d 294, 298; 684 N.Y.S.2d 235 [1st Dept 1999] (by submission of affidavits from the only three persons present during the conversation, in which each unequivocally denies that the slanderous statement was made, defendants made a prima facie showing of no publication, no showing has been made that discovery will yield any evidence demonstrating publication).

In this case, the participants to the conversation admit that, at the least, they discussed suspicions of theft by plaintiff. If Smith accused Kaiser of stealing money, this would satisfy the requirement of defamation per se: it would be an allegation of serious crime and bear directly on plaintiff's business reputation. ("Slander per se" consist of 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. Liberman v Gelstein, 80 NY2d 429, 435; 590 N.Y.S.2d 857, 860 [1992]).

Since Smith's precise words are not known, the court cannot engage in a highly contextualized analysis of whether they referred to fact or opinion, were true or false.

No matter how damaging Smith's message was to plaintiff, it benefits from a qualified privilege. "A qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty". Silverman v Clark, 35 AD3d 1, 10; 822 N.Y.S.2d 9 [1st Dept 2006] (internal quotations omitted). First, Smith and Houtenbos shared an interest as Kaiser's employers. Kaiser worked as an accountant for their two businesses, and information concerning his professional misconduct at the restaurant would be important for the other employer to know. Second, Smith had a moral obligation to speak. From the earliest cases on qualified privilege, the New York courts have emphasized that an obligation to impart information need not be of a legal nature. Byam v. Collins, 111 N.Y. 143, 150, 19 N.E. 75, 2 L.R.A. 129 [1888] ("this though the duty be not a legal one, but only a moral or social duty of imperfect obligation"). Smith has been friends with Houtenbos for more than twenty years, and she introduced Kaiser to Houtenbos. Since she initially provided a positive reference to Kaiser, her silence in changed circumstances would amount to misrepresentation.

The qualified privilege could be defeated only by evidence of malice. For purposes of determining whether allegedly slanderous statements made by defendant are protected by qualified privilege, either constitutional malice standard, that defendant made statement with knowledge that it was false or with reckless disregard of whether it was false or not, or common-law malice standard of spite or ill will is sufficient to defeat conditional privilege. Liberman v Gelstein, 80 NY2d 429; 590 N.Y.S.2d 857 [1992]. Kaiser did not provide any evidence that there was ill will or spite in his relations with Smith up to the date of his dismissal. On the contrary, he testified that they remained friends (Kaiser Deposition 427: 3-6), an opinion that Smith shares

(Smith Deposition 523:3-4). In the absence of evidence of malice, the defamation claim must be dismissed on the grounds of a qualified privilege.

CONCLUSION

For all the foregoing reasons, it is

ORDERED that summary judgment dismissing the complaint is granted with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

FILED

MAY 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/21/12

ENTER: Lowy

J.S.C.

LOUIS B. YORK
J.S.C.