

Bindela v Skye

2012 NY Slip Op 33346(U)

July 24, 2012

Supreme Court, New York County

Docket Number: 150035/12

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN
Justice

PART 63

Index Number : 150035/2012
BINDELA, IANCU
vs.
SKYE, LISA
SEQUENCE NUMBER : 001
DISMISS ACTION

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 THE ANNEXED DECISION
AND ORDER.**

*This constitutes the decision and order of
the Court.*

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

Dated: 7/24/12

Em, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

IANCU BINDELA a/k/a JOHN BINDELA, d/b/a
BINDELA CONSTRUCTION, INC.

Index Number: 150035/12
Subm. Date: July 11, 2012
Motion Seq.: 001 and 002

Plaintiff,

DECISION AND ORDER

-against-

LISA SKYE, JOSH DOYLE, and JASON
CAMPBELL,

Defendants.

-----X

For Plaintiff :
WS Krol PLLC
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347-204-4687

For Defendants Skye and Doyle:
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For Defendant Campbell:
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By Seth M. Weinberg, Esq.
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Melville, New York 11747
631-755-0117

Papers considered in review of these motions to dismiss:

	Papers	Numbered
Seq. 001	Notice of Motion and Affidavits Annexed.....	<u>1</u>
	Plaintiff's Memo. of Law in Opp.....	<u>2</u>
	Memo in Reply.....	<u>3</u>
Seq.002	Notice of Motion and Affidavits Annexed.....	<u>4</u>
	Plaintiff's Memo. of Law in Opp.....	<u>5</u>
	Memo. in Reply.....	<u>6</u>

ELLEN M. COIN, J.:

Plaintiff Iancu Bindela commenced this case, alleging eight causes of action.¹ Defendant Jason Campbell moves pursuant to CPLR §3211(a)(7) to dismiss the Third, Fourth, Fifth and Seventh Causes of Action in the complaint (Mot. Seq. 1). Defendants Lisa Skye and Josh Doyle move pursuant to the same section to dismiss the entire complaint (Mot. Seq. 2). The motions are consolidated herein for disposition.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (CPLR 3026). The court should accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

At argument plaintiff's counsel conceded that the Fourth Cause of Action, for Portrayal in False Light, is unknown in New York law. Accordingly, it is dismissed as against all of the defendants.

Defendants Skye and Doyle move to dismiss the first two causes of action, for slander and libel.² In the First Cause of Action for slander, plaintiff alleges that at a meeting of Business

¹He has sued herein in his own name "d/b/a Bindela Construction, Inc.", and alleges that he is "doing business as Bindela Construction, Inc., a corporation, duly registered with the Secretary of State of New York in Westchester County" (Compl., para. 10). While an individual can be engaged as a sole proprietor under an assumed name, he cannot also be a corporation, which is itself a person, separate from its shareholders. (Gen. Constr. Law §37; *American Union Line, Inc. v Oriental Nav. Corp.*, 239 NY 207 [1924]). For purposes of this analysis, and based upon the other allegations in this complaint, the Court will consider the plaintiff to be the individual Iancu Bindela only.

²Defendant Campbell did not move to dismiss these causes of action, but added his contention that the alleged defamatory statements are not actionable as a point in his Memorandum of Law in Reply. Given the absence of notice to plaintiff of his motion to dismiss these causes of action, the Court will not consider his contentions at this time.

Networking International (“BNI”)(a networking organization to which he and defendants all belonged), defendant Skye stated that plaintiff is not trustworthy and let clients down and violated Rule no. 3 of BNI, and that plaintiff is “not able to perform the way we would be expecting him to.” (Complaint, paras. 29, 30, 31). Plaintiff alleges that defendants Doyle and Campbell republished Skye’s statements at the same meeting (Compl., para. 33), and that they “repeatedly republished the defamatory statement to the other members of [BNI] and potential clients” (Compl., para. 34).

In his Second Cause of Action for libel, plaintiff alleges that the defendants “communicated between each other...publishing in writing the same statements...” (Compl., para. 39). He adds that defendants “on numerous occasions have committed libel, by sending messages to other member of [BNI] as well as clients and potential clients, with similar statements....” (Compl., para. 40).

Defendants Skye and Doyle contend that their alleged statements are protected by the common interest privilege, citing *Foster v Churchill* (87 NY2d 744, 751 [1996]). Even though a statement is defamatory, a qualified privilege exists where the communication is made to persons who have some common interest in the subject matter. *Id.* Thus, the qualified privilege has been asserted in communications between members of a board of governors of a tenants’ association (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]); between a college administrator and members of a faculty tenure committee (*Stukuls v State of N.Y.*, 42 NY2d 272 [1977]); and between constituent physicians of a health insurance plan (*Shapiro v Health Ins. Plan*, 7 NY2d 56, 60-61 [1959]).

To the extent that the complaint alleges statements directed by defendants, themselves members of BNI, to other BNI members, the qualified privilege applies. It is clear that the statements alleged to have been made among BNI members were in furtherance of the common interest shared by defendants and their fellow members with respect to what was a matter of legitimate concern: whether plaintiff could be recommended to work with their clients. Thus, the statements cannot become the basis for an action in slander or libel. (*Foster v Churchill*, 87 NY2d 585; *Roth v United Fedn. of Teachers*, 5 Misc3d 888, 900 [Sup Ct Kings County 2004]).

Once a qualified privilege is shown to exist, the burden of proof shifts to the plaintiff to offer evidentiary facts to establish that the communication was made in bad faith and was motivated solely by malice (*see Liberman v Gelstein*, 80 NY2d 429, 437-8; *Kamerman v Kolt*, 210 AD2d 454 [2d Dept 1994]; *Santavicca v City of Yonkers*, 132 AD2d 656 [2d Dept 1987]). In this context, actual malice is defined as spite or ill will or culpable recklessness, requiring a showing that such spite or ill will was the only cause for publication (*see Liberman v Gelstein*, 80 NY2d 429, 437-8; *Shapiro v Health Ins. Plan*, 7 NY2d 56, 60-61; *Stukuls v State of N.Y.*, 42 NY2d 272, 282).

In his First Cause of Action for slander, plaintiff alleges only in conclusory fashion that defendants' publication "was made with bad intent, knowledge of falsity and maliciously," an allegation he repeats in his Second Cause of Action for libel. In the absence of factual allegations that the defendants published their statements solely out of spite or ill will, it would appear that plaintiff has failed to overcome defendants' qualified privilege.

However, the Court's analysis cannot end here, as plaintiff makes allegations in his First and Second Causes of Action that defendants also made such statements to persons outside of the

BNI membership: to BNI guests, actual clients and potential clients of plaintiff (Compl., paras. 34, 36, 40). Defendants Skye and Doyle contend that as a general matter that their statements were constitutionally protected expressions of opinion. Thus, to the extent that their statements were made to non-BNI members, the Court must determine whether the statements are protected opinion.

An expression of pure opinion (i.e., that is accompanied by a recitation of the facts upon which it is based or that does not imply that it is based upon undisclosed facts) is not actionable. (*Steinhilber v Alphonse*, 68 NY2d 283,289 [1986]). When the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a “mixed opinion” and is actionable. (*Id.*).

The determination of whether a statement is pure opinion or mixed opinion is fact-based. In this case although the alleged comments that plaintiff is untrustworthy appear to fall into the former, protected category, the comments that he “violated Rule no.3 of BNI” and “is not able to perform the way we would be expecting him to” appear to be mixed opinions and potentially actionable. The statements imply that plaintiff engaged in inappropriate conduct and that they are based upon facts unknown to the listeners (*Glazier v Harris*, 95 AD3d 538 [1st Dept 2012]; *Guerrero v Carva*, 10 AD3d 105, 114 [1st Dept 2004]). Thus, the motion to dismiss the First and Second Causes of Action must be denied.

All defendants have moved to dismiss the Third Cause of Action for tortious interference. In that cause plaintiff alleges that he was doing construction work pursuant to a contract with an unnamed client (the “Client”). He further alleges that defendant Doyle telephoned him to demand that he lower his retainer fees with the Client, or cease work and leave the site. He

alleges that he declined to lower his retainer and finished the construction in accordance with the contract. He alleges that defendant Campbell did work that did not satisfy the Client. Finally, he alleges that defendants Doyle and Campbell interfered with his contract with the Client, and that their actions were “injurious” to him.

In order to state a claim for tortious interference with contractual relations, a plaintiff must allege “(1) the existence of a valid contract between plaintiff and a third party, (2) defendant’s knowledge of the contract, (3) defendant’s intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, [and] (5) resulting damages.” (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999]).

Plaintiff’s cause of action for tortious interference fails to allege that there was any breach of the contract. Indeed, plaintiff alleges that he completed the contract. It also fails to allege any facts to demonstrate that he suffered any damage. Accordingly, the Third Cause of Action must be dismissed.

Plaintiff’s Fifth Cause of Action for tortious interference with prospective economic advantage, while not well articulated, alleges that defendants expelled him from BNI, and brought in someone to replace him in the construction industry section of BNI. He alleges that defendants “had improper motive by virtue of taking this business away and passing onto others of their choosing [sic].” (Compl., para. 57).

In order to state a claim for tortious interference with prospective economic advantage, a plaintiff must allege: “(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted *solely* out of malice or used improper or illegal means that amounted to a crime or

independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009])(emphasis added).

Plaintiff fails to plead that in expelling him from BNI, defendants acted solely out of malice or used improper or illegal means that would amount to a crime or an independent tort. As defendants correctly note, wrongful means include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure...." (*Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc3d 776, 779 [Sup Ct New York County 2007][cit. omitted]). Simple economic "persuasion" fails to qualify as wrongful means; thus, for economic pressure to be wrongful, it must be "extreme and unfair." (*Id.*).

In this case plaintiff fails to allege any facts to show that defendants employed any wrongful, improper or illegal means in expelling him from their membership. In the absence of such allegations, this cause must be dismissed. (*Phillips v Carter*, 58 AD3d 528 [1st Dept 2009]).

Defendants Skye and Doyle move to dismiss the Sixth Cause of Action for injurious falsehood. The required elements for such a claim are "falsity, malice and special damages." (*Mink Hollow Dev. Corp. v State of N.Y.*, 87 Misc2d 61, 62 [Ct Cl 1976]). Plaintiff fails to allege facts sufficient to support the element of malice and does not allege any special damages. (*Emergency Enclosures, Inc. v Nat'l Fire Adj. Co.*, 68 AD3d 1658, 1659 [4th Dept 2009]). Thus, this claim must be dismissed as against defendants Skye and Doyle.

Plaintiff's Eighth Cause of Action is denoted as "Intentional or Malicious Harm to Another [sic] Relations." Significantly, in his opposition to this motion plaintiff fails to make

any argument or cite any case to support this cause. To the extent that plaintiff may be attempting to plead prima facie tort, he fails to plead the elements: intentional infliction of harm resulting in special damages, without excuse or justification, by an act or series of acts that would otherwise be lawful. (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 [1983]). While plaintiff alleges that he suffered “a specific, measurable loss” (Compl., para. 74), he fails to allege facts as to the nature or amount of the loss. Nor does he allege that defendants acted without excuse or justification. Accordingly, this cause must be dismissed.

In light of the foregoing, it is

ORDERED that the motion to dismiss the First and Second Causes of Action is denied, and it is further

ORDERED that the Third, Fourth, Fifth, and Seventh Causes of Action are dismissed as against all the defendants, and it is further

ORDERED that the Sixth and Eighth Causes of Action are dismissed against defendants Skye and Doyle, and it is further

ORDERED that the defendants serve and file their answers to the causes remaining in the complaint within thirty (30) days from the date of filing of this order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on September 12, 2012 at 2:00 PM.

This constitutes the decision and order of the Court.

Dated: July 24, 2012
New York, New York

ENTER:



Ellen M. Coin, A.J.S.C.