Rivera v ABC Supply Co.
2013 NY Slip Op 33306(U)
March 18, 2013
Sup Ct, Queens County
Docket Number: 17534/12
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

RAFAEL RIVERA,

Plaintiff,

-against-

ABC SUPPLY CO. d/b/a BRADCO SUPPLY and STEVEN KUPFER, individually,

Defendants.

Index No. 17534/12

Motion Date January 8, 2013

Motion Cal. No. 116

Motion Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants ABC Supply Co. d/b/a Bradco Supply ("ABC") and Steven Kupfer ("Kupfer") for a judgment dismissing the Complaint of plaintiff Rafael Rivera in its entirety upon the grounds that the action may not be maintained because of failure to state a cause of action and that the Complaint must be dismissed or stayed because the exclusive remedy for any such claims is the arbitration process under the collective bargaining agreement between the parties and cross motion by plaintiff to amend the Complaint pursuant to CPLR 3025 in the event the court grants defendants' motion to dismiss the Complaint are hereby decided as follows:

Plaintiff, a former employee of defendant ABC commenced this action alleging three causes of action for slander per se against defendant ABC and against defendant Steven Kupfer, the branch manager of the ABC Store located in Jamaica, Queens. The first cause of action alleges *slander per se* in that it is alleged defendants intentionally made false statements by stating that plaintiff "was a dishonest employee". The second cause of action alleges slander per se in that it is alleged defendants intentionally made false statements by stating that plaintiff

"was a thief in the workplace who stole materials from the Company". The third cause of action alleges slander per se in that it is alleged defendants intentionally made false statements by stating that plaintiff "was arrested and jailed for theft of Company merchandise". Defendants now move to dismiss the Complaint.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendants for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; Leon v. Martinez , 84 NY2d 83) and a determination by the court as to whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc., 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept 1992]).

It is well settled that words constitute slander per se if they impute the commission of a serious crime, a loathsome disease, unchaste behavior in a woman, or affect one's trade or profession (Sterling Doubleday Enterprises, L.P. v. Marro, 238 AD2d 502 [2d Dept 1997]; Warlock Enterprises v. City Center Associates, 204 AD2d 438 [2d Dept 1994]).

The court finds that the first, second, and third causes of action adequately state a cause of action for slander per se.

The first cause of action sufficiently alleges slander per se in that it is asserted defendants intentionally made false statements by stating that plaintiff "was a dishonest employee", which statements were published to Company employees and store patrons, and which statements injured plaintiff's reputation with regard to his trade, business, profession and within the

professional community. Such a statement alleges injury affecting plaintiff's trade or profession (see, Gatz v. Otis Ford, Inc., 262 AD2d 280 [2d Dept 1991]).

The second cause of action alleges slander per se in that it is alleged defendants intentionally made false statements by stating that plaintiff "was a thief in the workplace who stole material from the Company", which statements were published to Company employees and store patrons, and which statements injured plaintiff's reputation with regard to his trade, business, profession and within the professional community. Such sustains a cause of action for slander per se because it charges plaintiff with a serious crime and injures him in his trade or profession. Defendants fail to make any arguments regarding a failure to state a cause of action for the second cause of action, and as such, the court finds the second cause of action is adequately stated.

The third cause of action alleges slander per se in that it is alleged defendants intentionally made false statements by stating that plaintiff "was arrested and jailed for theft of Company merchandise", which statements were published to Company employees and store patrons. Such a statement alleges injury affecting plaintiff's trade or profession (see, Gatz v. Otis Ford, Inc., supra) and imputes the commission of a serious crime.

Accordingly, the Complaint does adequately state three causes of action for slander per se.

That branch of defendants' motion arguing that the plaintiff's Complaint must be dismissed or stayed because the exclusive remedy for any such claims is the arbitration process under the collective bargaining agreement between the parties is hereby denied. At the outset, the court notes that the employment agreement is inapplicable to the individual defendant, Steven Kupfer. The court finds that plaintiff was employed as a warehouseman by ABC at Jamaica, New York from 1997 until he was discharged in November 2011. The record reflects that the plaintiff's employment was governed by a collective bargaining agreement, which agreement provides in relevant part: "Should any dispute arise between the Employer and the Union or any employee, the dispute shall be submitted to the New York State Employment Relations Board as impartial arbitrator and said arbitrator's decision shall be final and binding upon parties to the dispute". "Generally, it is for the courts to make the initial determination as to whether the dispute is arbitrable, that is 'whether the parties have agreed to arbitrate the particular dispute.'" (Nationwide General Insurance Co. v. Investors Ins. Co. of America, 37 NY2d 91 [NY 1975][internal citations

omitted]). It is well-established law that "[t]he agreement to arbitrate must be express, direct, and unequivocal as to the issues or disputes to be submitted to arbitration" (Gangel v. PVBA, 41 NY2d 840 [1977]). The court must make the initial determination as to whether there is a "reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract" (Id). In this action the subject matter the dispute is slander, i.e. imputing the commission of serious crime by theft of property. The general subject matter of the underlying collective bargaining agreement is to govern the employment relationship between employer and employee as it relates to work and employment. The court finds that there is no reasonable relationship between the common law right to sue for slander and the employment relationship. As such, the matter shall not be submitted to arbitration.

Accordingly, the motion is denied.

Plaintiff's cross motion to amend the Complaint pursuant to CPLR 3025 in the event the court grants defendants' motion to dismiss the Complaint is hereby rendered moot.

This constitutes the decision and order of the court.

Dated: March 18, 2013

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Howard G. Lane, J.S.C.