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| <b>Frechtman v Gutterman</b>   |
| 2013 NY Slip Op 33558(U)   |
| May 30, 2013   |
| Supreme Court, New York County   |
| Docket Number: 157028/12   |
| Judge: Saliann Scarpulla   |
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Saliann Scarpulla

PART 19

Index Number : 157028/2012  
FRECHTMAN, ESQ., A. BERNARD  
vs  
GUTTERMAN, ALLEN  
Sequence Number : 002  
DISMISS

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 determined in  
accordance with the accompanying  
decision/order.

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

Dated: 6/30/13

(Signature), J.S.C.  
**SALIANN SCARPULLA**

- 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: CIVIL TERM: PART 19

-----X  
A. BERNARD FRECHTMAN, ESQ.,

Plaintiff,

Index No.: 157028/12  
Submission Date: 3/6/13

- against-

ALLEN GUTTERMAN, 23 EAST 39<sup>TH</sup> STREET  
MANAGEMENT CORP., AND RPI SERVICES, INC.,  
RPI PROFESSIONAL ALTERNATIVES, INC.,  
RESPONSE MEDICAL STAFFING OF  
CONNECTICUT, INC., RESPONSE MEDICAL  
STAFFING OF NEW JERSEY, INC., D/B/A  
THE RESPONSE COMPANIES,

**DECISION AND ORDER**

Defendants.

-----X

For Plaintiff:  
Anne Peyton Bryant, Esq.  
305 Broadway, 14<sup>th</sup> Floor  
New York, NY 10007

For Defendants:  
Granovsky & Sundaresh PLLC  
48 Wall Street, 11<sup>th</sup> Floor  
New York, NY 10005

Papers considered in review of this motion to dismiss:

|                            |   |
|----------------------------|---|
| Notice of Motion . . . . . | 1 |
| Aff in Opp . . . . .       | 2 |
| Reply . . . . .            | 3 |

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for defamation, defendants Allen Gutterman, 23 East 39<sup>th</sup> Street Management Corp., and RPI Services, Inc., RPI Professional Alternatives, Inc., Response Medical Staffing of Connecticut, Inc., Response Medical Staffing of New Jersey, Inc., d/b/a The Response Companies (“Gutterman defendants”) move to dismiss the complaint pursuant to CPLR §3211(a)(7).

Plaintiff A. Bernard Frechtman, Esq. ("Frechtman"), a practicing attorney for over 60 years, represented the Gutterman defendants in various legal matters for approximately seven years prior to August 15, 2012.

In October 2012, Frechtman commenced this action against the Gutterman defendants. He alleged that on August 15, 2012, an employee of the Gutterman defendants typed three letters, which were then delivered to Frechtman. In each letter, Allen Gutterman terminated Frechtman's employment as attorney for the Gutterman defendants. The letters provided "we do not believe that you adequately represented our interest;" "we believe that your failure to act in our best interest in reference to certain matters upon first engaging in the matter may equate to misconduct, malpractice and negligence;" "we believe that your future representation on this matter only became necessary, as a result of mistakes and oversights made by you acting as counsel;" and "further, we believe we should not pay for the value of services for which any misconduct or counsel oversight relates to the representation for which fees are sought."

According to the allegations of the complaint, after serving Frechtman with these letters, the Gutterman defendants withheld payment of outstanding legal fees owed to Frechtman in the amount of \$57,64.07. Frechtman further alleges that the above quoted statements in the letters were libelous and thus, he is entitled to punitive damages in the amount of \$250,000, plus attorneys fees.

The Gutterman defendants now move to dismiss the complaint pursuant to CPLR §3211(a)(7), arguing that the statements in the letters were part of attorney/client communications, are non-actionable opinion statements, were not published to a third party, were not made with malice, and were merely made to inform Frechtman of the reasons for the Gutterman defendants' decision to terminate Frechtman's employment.

In opposition, Frechtman argues that the statements in the letters do not constitute "pure opinion," the fact that the letters were typed at the direction of Allen Gutterman by an employee of the Gutterman defendants satisfies the publication requirement, and there is no evidence that the statements made in the letters were true.

### **Discussion**

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), "if, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action." *O'Loughlin v. Patrolmen's Benevolent Ass'n*, 178 A.D.2d 117, \*2 (1<sup>st</sup> Dept. 1991).

To recover on a cause of action for libel, plaintiff must establish that defendants made (1) an unprivileged statement of fact, (2) concerning plaintiff, (3) with the requisite degree of fault, (4) that is false and defamatory, and (5) that damaged plaintiff. *Cassini v. Advance Publ., Inc.*, 2013 N.Y. Slip Op 30796(U) (Sup. Ct. N.Y. Co., Mar. 14, 2013). A statement is defamatory only if it (a) is false and (b) exposes plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him and deprive him

of friendly intercourse in society. *Dillon v. City of New York*, 261 A.D.2d 34 (1<sup>st</sup> Dept. 1999).

An allegedly defamatory statement is not actionable if it is an expression of pure opinion. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986). The distinction between fact and opinion is made on the basis of what the average person hearing or reading the communication would take it to mean, and certain factors are considered in making this assessment: (1) whether the specific language employed is precise or vague and ambiguous, (2) whether the statement may be objectively characterized as either true or false, (3) the context in which the statement appears and (4) the broader social setting surrounding the communication, including a custom or convention which might serve to indicate that it is an expression of opinion and not fact. *Sandals Resorts Intl. Ltd. v. Google, Inc.*, 86 A.D.3d 32 (1<sup>st</sup> Dept. 2011); *Parks v. Steinbrenner*, 131 A.D.2d 60 (1<sup>st</sup> Dept. 1987).

Here, the Court finds that even though, as Frechtman alleges, the publication requirement could be satisfied because the letter was allegedly typed and read by someone other than the Gutterman defendants (*see Hirschfeld v. Institutional Investor*, 208 A.D.2d 380 [1<sup>st</sup> Dept. 1994]; *Public Relations Soc'y of Am., Inc. v. Road Runner High Speed Online*, 8 Misc. 3d 820 [Sup. Ct. N.Y. Co., May 27, 2005]), the statements made to Frechtman in the subject letters were clearly expressions of opinion of a dissatisfied

client. Therefore, Frechtman's complaint fails to state a cause of action for libel and must be dismissed.

In accordance with the foregoing, it is hereby

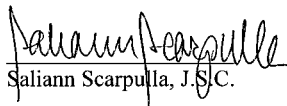
ORDERED that defendants Allen Gutterman, 23 East 39<sup>th</sup> Street Management Corp., and RPI Services, Inc., RPI Professional Alternatives, Inc., Response Medical Staffing of Connecticut, Inc., Response Medical Staffing of New Jersey, Inc., d/b/a The Response Companies's motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York  
May 30 2013

ENTER:

  
Saliann Scarpulla, J.S.C.