| **L.Y.E. Diamonds Ltd. v Gemological Inst. of Am., Inc.** |
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| 2017 NY Slip Op 32576(U) |
| December 7, 2017 |
| Supreme Court, New York County |
| Docket Number: 151771/2016 |
| Judge: Barry Ostrager |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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L.Y.E. DIAMONDS LTD., E.G.S.D. DIAMONDS LTD., GREGORI ELIZAROW, YOSEF YLAZAROV, MIKHAEL YLAZAROV, NATANEL YLAZAROV,

Plaintiff,

- v -

GEMOLOGICAL INSTITUTE OF AMERICA, INC., RAPAPORT USA, INC., RAPAPORT DIAMOND CORPORATION, THOMAS MOSES, JOHN AND JANE DOES 1 THROUGH 10, JOHN DOE CORPORATIONS 1 THROUGH 10, OTHER JOHN DOE ENTITIES 1 THROUGH 10

Defendant.

**INDEX NO.** 151771/2016

**MOTION DATE** _____

**MOTION SEQ. NO.** 004

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 134, 135, 136, 137, 138, 139, 140, 170, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201

were read on this application to/for Dismissal

HON. BARRY R. OSTRAGER:

**Background:**

This action involves a dispute arising out of the allegedly defamatory statements made by defendants Gemological Institute of America, Inc. ("GIA"), Rapaport USA, Inc., Rapaport Diamond Corporation, and Mr. Thomas Moses. Plaintiffs L.Y.E. Diamonds Ltd. ("LYE") and E.G.S.D. Diamonds Ltd. ("EGSD") are Israeli companies in the business of purchasing raw diamonds and preparing them for sale to wholesalers and retailers. Plaintiffs Yosef Ylazarov, Gregori Elizarow, Mikhael Ylazarov, and Natanel Ylazarov are Israeli individuals and principals of family-operated LYE and EGSD. Defendant GIA is a corporation specializing in analyzing, grading, and identifying diamonds and other gemstones. Most pertinently, GIA issues reports,

also known as certificates, which set forth the attributes of a diamond based on grades associated with the color, cut, clarity, and carat (the "Four C's"). GIA's reports are relied upon by diamond merchants and end purchasers in the United States and around the world. Specifically, GIA enters into client agreements with diamond merchants, such as LYE, pursuant to which diamonds are submitted to GIA for grading. GIA grades submitted diamonds and issues a report for each unique diamond. GIA thus seeks to ensure a certain level of commercial integrity within the diamond trade by safeguarding against fraud and providing purportedly impartial grading to merchants and consumers.

Plaintiffs LYE and ESGD signed client agreements with GIA whereby they would submit diamonds to GIA's lab for grading, and GIA would issue grading reports for each unique diamond. Plaintiffs allege that on May 12, 2015, GIA published a statement (the "Alert"), alerting the diamond industry that GIA reasonably suspected that

> "approximately 500 colorless to near colorless diamonds submitted primarily to [GIA's] laboratory in Israel potentially were subjected to an undisclosed temporary treatment. GIA believes that the treatment is a process that temporarily masks the inherent color of the diamond and can lead to a higher grade.... At this time, the diamonds treated in this way have been submitted by just a few clients." (Amend. Compl. ¶ 61 [NYSCEF Doc. No. 126]).

GIA also included the report numbers of each of the unique diamonds in question, as well as the name of the corresponding diamond seller. The Alert was published on GIA's website and by mass email.

Plaintiffs have brought this suit to recover $180 million in compensatory and punitive damages stemming from lost profits resulting from the allegedly defamatory statements. Plaintiffs assert that their diamond business has suffered significantly because of the Alert, and have alleged thirteen causes of action against the various defendants in their Amended Complaint. The gravamen of the Amended Complaint sounds in defamation and trade libel.

Defendants GIA and Moses now move to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1) and (a)(7).

**Legal Analysis:**

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs 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 N.Y.2d 83, 87-88 (1994) (internal citations omitted). Further, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* at 88.

In a defamation action, such as this, "[a] qualified privilege [] negate[s] any presumption of implied malice flowing from a defamatory statement, and places the burden of proof on this issue upon the plaintiff." *Toker v. Pollak*, 44 N.Y.2d 211, 219 (1978). A qualified privilege may be found where a statement is "fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." *Id.* "One such conditional, or qualified, privilege extends to a communication made by one person to another upon a subject in which both have an interest." *Liberman v. Gelstein*, 80 N.Y.2d 429, 437 (1992). The privilege underscores a public policy in favor of "the flow of information between persons sharing a common interest...." *Id.* "Occasions conditionally privileged afford a protection based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public." *Trim-A-Way Figure Contouring v. National Better Bus. Bur.*, 37 A.D.2d 43, 45 (1st Dep't 1971) (internal

quotations omitted). In prior actions sounding in defamation, this common-interest privilege has been extended to members of a board of directors (*see Foster v. Churchill*, 87 N.Y.2d 744, 752 (1996)), constituent physicians of a health insurance plan (*see Shapiro v. Health Ins. Plan*, 7 N.Y.2d 56, 60-61 (1959)), and members of a faculty tenure committee (*see Stukuls v. State of New York*, 42 N.Y.2d 272, 279-80 (1977)).

Defendants GIA and Moses (the "GIA Defendants") assert that any liability stemming from the Alert is protected by a qualified common-interest privilege. In response, plaintiffs argue that even if the GIA defendants are protected by a qualified privilege, that such a privilege must be pleaded as an affirmative defense and cannot be asserted in a pre-answer motion to dismiss. The First Department has held, however, that such a privilege can be found at the pleading stage. *See, e.g., O'Neill v. New York University*, 97 A.D.3d 199 (1st Dep't 2012); *Green v. Combined Life Ins. Co. of N.Y.*, 69 A.D.3d 531 (1st Dep't 2010); *Ferguson v. Sherman Square Realty Corp.*, 30 A.D.3d 288 (1st Dep't 2006); *Lowinger v. Jacques*, 204 A.D.2d 175 (1st Dep't 1994).[1]

Here, the GIA Defendants have presented documentary evidence of their client agreements with plaintiffs which were in effect at the time of the Alert. (Yates Aff., Exs. 4-7 [NYSCEF Doc Nos. 197-200]). The client agreements[2] clearly state that GIA maintains the right to "make public via GIA's website or otherwise, the names of" clients it reasonably suspects of treating diamonds. *Id.* Indeed, as the Amended Complaint and motion papers make crystal clear, GIA undoubtedly protects the interests of third persons in the diamond industry. The Alert was

[1] Plaintiffs cite to a 1931 Court of Appeals decision for the proposition that "privilege is a defense to be pleaded and proved," *Ostrowe v. Lee*, 256 N.Y. 36, 41 (1931), as well as a 1991 First Department decision holding that it was "error to give conclusive effect to defendants' position of qualified privilege before any affirmative defense to that effect was raised in a responsive pleading." *Acosta v. Vataj*, 170 A.D.2d 348, 348-9 (1st Dep't 1991). Defendants have cited to more recent First Department law for the proposition that a qualified common-interest privilege can be successfully asserted in a pre-answer motion to dismiss. In the absence of further guidance, this Court finds the most recent First Department decisions persuasive.

[2] Notably, plaintiffs are not asserting that there was a breach of these contracts.

intended to serve that public function by warning interested parties of potentially treated diamonds, pursuant to GIA's client agreement with plaintiffs. A qualified privilege therefore shields the GIA Defendants from liability unless plaintiffs can allege malice in more than merely conclusory terms.

As discussed at length during oral argument, plaintiffs' Amended Complaint epitomizes the type of conclusory allegations of malice that "are insufficient to overcome the moving defendants' qualified common-interest privilege." *Ferguson*, 30 A.D.3d at 288. The Amended Complaint states that defendants "published defamatory statements with malice" without alleging any facts to support an inference that GIA "spoke out of spite or ill will, and that such malicious motivation was the one and only cause for the publication." *Hoesten*, 34 A.D.3d at 158 (internal quotations omitted). Thus, plaintiffs' conclusory allegations of malice are insufficient to overcome the privilege, and the causes of action sounding in defamation and trade libel are dismissed as to the GIA Defendants.

**Conclusion:**

Having already dismissed the fifth, seventh, ninth, tenth, eleventh, twelfth, and thirteenth causes of action for the reasons stated on the record during oral argument, the Amended Complaint is dismissed in its entirety as against the GIA Defendants.

Finally, the Court has ordered the plaintiffs to conduct discovery to determine the narrow issue of whether this Court can properly invoke personal jurisdiction over the Rapaport defendants. Jurisdictional discovery is to be completed by December 31, 2017. The Court requests that the remaining parties submit supplemental briefing on both the jurisdictional issue and the arguably similar motion to dismiss by January 4, 2018. Oral argument on the Rapaport defendants' motion to dismiss will be heard on January 9, 2018 at 2:15 p.m.

For all the foregoing reasons, it is hereby

ORDERED that the GIA Defendants' motion to dismiss is granted pursuant to CPLR 3211(a)(1). The Clerk is directed to sever defendants Gemological Institute of America, Inc. and Mr. Thomas Moses from the Amended Complaint and enter judgment accordingly.

ORDERED that the remaining parties complete jurisdictional discovery and submit supplemental briefing as outlined herein.

12/7/2017
DATE

BARRY R. OSTRAGER
JSC

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