SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH *Justice* **PART 29**

JAMES DAWSON,

Plaintiff,

- v -

ADAM LEITMAN BAILEY P.C. et al.,

Defendants.

INDEX NO. 152112/2017

MOTION DATE 4/20/18

MOTION SEQ. NO. 003

NYSCEF Doc Nos. 82–95 were read on this motion to dismiss.

Motion by Defendants Adam Leitman Bailey P.C., Adam Leitman Bailey, Esq., John M. Desiderio, Esq., and Vladimir Mironenko, Esq. pursuant to CPLR 3211 (a) (7) to dismiss the second amended verified complaint in its entirety is granted and the action is dismissed.

BACKGROUND

In an order dated February 8, 2018, incorporated herein by reference, this Court previously granted Defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss Plaintiff's verified complaint. (Spiegel affirmation, exhibit B.) Specifically, the Court dismissed with prejudice the first, third, and fourth causes of action, alleging violations of Judiciary Law § 487, malpractice, and intentional infliction of emotional distress, respectively. The Court, in its discretion, dismissed the second cause of action, for defamation, "with leave to replead, . . . the second cause of action." (Spiegel affirmation, exhibit B, at 9.)

On March 9, 2018, Plaintiff e-filed a second amended verified complaint. (Spiegel affirmation, exhibit A [Complaint].) The Complaint alleges defamation as a first cause of action. The Complaint further alleges causes of action 2–5 sounding in negligence, negligent infliction of emotional distress, negligent misrepresentation, and prima facie tort doctrine.

On March 26, 2018, Defendants filed the instant motion pursuant to CPLR 3211 (a) (7) to dismiss the Complaint. Defendants argue, in sum and substance, that the Court should not consider causes of action 2–5 as there was no leave to replead as to them and they are no more than restyled versions of causes of action this Court previously dismissed with prejudice. Defendants further argue that only a certain cease-and-desist letter, dated September 27, 2016 (the "Letter"), is alleged to have been published to a third party by Defendants. The Letter and its contents are discussed more fully below. Defendants then argue that any other statements alleged by Plaintiff to have been defamatory do not satisfy the elements of defamation necessary to state a cause of action.

Defendants argue that the Letter was not published but, even if it was, it was sent in anticipation of good-faith litigation and is therefore subject to a qualified privilege. Defendants submit an affidavit by defendant Adam Leitman Bailey ("Bailey") which states, in sum and substance, that Defendants maintained a good-faith basis for sending the Letter. The affidavit and accompanying exhibit thereto are discussed more fully below. Defendants further argue that no statement contained in the Letter was made with malice.

Plaintiff argues in opposition, in sum and substance, that the Letter was defamatory. Plaintiff further argues that other communications by or with Defendants, such as phone calls and voicemails, are defamatory. Plaintiff further argues that he should be permitted to plead causes of action 2–5.

Defendants, in their reply papers, reiterate the arguments in their moving papers.

Submissions by Plaintiff that were e-filed after the April 20, 2018 return date of this motion are not properly before the Court and will not be considered. (*See* NYSCEF Doc Nos. 96–101.)

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201–02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703–704 [2d Dept 2008].) "It is axiomatic that, on a motion brought pursuant to CPLR 3211, our analysis of a plaintiff's claims is limited to the four corners of the pleading." (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 133 Ad3d 96, 105 [1st Dept 2015], *aff'd* 30 NY3d 572 [2017].) "'The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" (*Sigmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994].) "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." (*Kamen v Berkeley Co-op. Towers Section II Corp.*, 98 AD3d 1086, 1086 [2d Dept 2012], citing *Hartman v Morganstern*, 28 AD3d 423, 424 [2d Dept 2006].)

To the extent this Court granted leave to replead as to defamation, the Court will examine the question of whether Plaintiff's first cause of action in the Complaint states a cause of action for the purposes of the instant motion. As to causes of action 2–5, the Court either did not grant Plaintiff leave to replead as to them, or they are duplicative of causes of action previously dismissed by this Court in its February 8, 2018 decision and order. As such, causes of action 2–5 of the Complaint shall be dismissed.

As the Appellate Division, First Department, has stated,

> "[d]efamation is the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society. To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."

(*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 91 [1st Dept 2015] [internal citations omitted].)

More recently, Judge Kapnick of the Appellate Division, First Department, stated in a dissent that

> "[t]he elements of defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judge by, at a minimum, a negligence standard, . . . causing special harm or constituting defamation per se. When a qualified privilege applies, the statements are protected unless made with malice, meaning either spite or ill will or reckless disregard of whether they were false []."

(*Stega v New York Downtown Hosp.*, 148 AD3d 21, 36 [1st Dept 2017, Kapnick, J., dissenting].)

A writing that is read by one person other than the defamed, when not authorized by the defamed, satisfies the publication element. (*See Torati v Hodak*, 147 AD3d 502, 504 [1st Dept 2017]; *Barber v Daly*, 185 AD2d 567, 568 [3d Dept 1992]; *Ostrowe v Lee*, 256 NY 36 [1931].) As this Court stated in its February 8, 2018 decision and order, "[i]n Dawson's Complaint, only the September 27, 2016 letter is alleged to have been sent to a third party by Defendants." (Spiegel affirmation, exhibit B, at 7.) In the instant motion, the Letter remains the only specific item in the Complaint which was allegedly published to a third party by Defendants.

Defamation must be pled with sufficient particularity to withstand a motion to dismiss. Pursuant to CPLR 3016 (a), "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Further, "the particular words complained of must be pleaded specifically." (*Three Amigos SJL Rest., Inc. v CBS News Inc.*, 132 AD3d 82, 92 n 1 [1st Dept 2015].) "To satisfy the falsity element of a defamation claim, plaintiff must allege that the complained of statement is substantially false." (*Franklin*, 135 AD3d at 94.)

In *BCRE 230 Riverside LLC v Fuchs*, the Appellate Division, First Department held that a defamation counterclaim by the defendants "fail[ed] to specify with particularity the alleged falsehood uttered by plaintiff." (59 AD3d 282, 283 [1st Dept 2009].) The court held further that where "plaintiff's representatives had good reason to believe" the truth of the statements made,

such belief served to "flatly contradict defendants' contention that any such statements were made with intentional malice or with reckless disregard for the consequences flowing therefrom." (*Id.*)

In the instant motion, the section of the Complaint that alleges defamation does not set forth any particular words that constitute a false statement. (Complaint ¶¶ 141–154.) Moreover, Plaintiff's specific references to the Letter in his Complaint do not specify a false statement. (Complaint ¶¶ 58–82.) On this basis alone, the claim that the Letter is defamatory must be dismissed for Plaintiff's failure to state a cause of action relating thereto.

The Court has examined the Letter closely. The Letter was addressed by email to "abuse@internet.bs" and by electronic abuse form to both "wordpress.com/abuse" and "whoisprivacycorp.com/report." The subject of the Letter is stated as "Re: lalezarianfraud.com." The Letter was sent by defendant Bailey on letterhead indicating the Letter is from Adam Leitman Bailey, P.C. The Letter begins by stating that "[w]e represent Lalezarian Properties LLC ("Lalezarian"), the owner of several rental buildings located in New York City." The Letter then states that "[i]t has come to Lalezarian's attention that a website calling itself 'lalezarianfraud.com' contains the following false, abusive and defamatory statements about Lalezarian, about the various rental properties it owns and/or about the respective officers and employees of Lalezarian." The Letter next lists six numbered paragraphs of such statements. The fourth paragraph states that "[o]dds are if you have are renting [sic] or have rented from any of the following properties, you've been overcharged and subject to reimbursement [sic] from Lalezarian: -100 Maiden Lane, 100 Maiden Lane, New York, NY . . .".

The Letter continues, "Lalezarian has reason to believe James Dawson, the person who occupied apartment 1005, at 100 Maiden Lane, until August 28, 2016, is the creator and owner of the domain name 'lalezarianfraud.com' and that he is using said domain name and website to disseminate the false and defamatory statements quoted above." The Letter then, among other things, demands the name and contact information of the website owner and creator and that the letter's recipients take down the website. The letter then states that, "[s]hould you fail to do as demanded above, we have been directed by our client to commence legal action against you and anyone aiding and abetting this defamatory campaign against Lalezarian." The letter indicates that it was also sent ("cc'ed") to Marissa Goba (at mgoba22@gmail.com) and James Dawson.

Based upon its review of the Letter, the Court finds that the only statement in the letter relating directly to Plaintiff is Bailey relating that Lalezarian had reason to believe that Plaintiff created and owned the website. "Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue." (*Thomas H. v Paul B.*, 18 NY 3d 580, 584 [2012].) As the Court of Appeals stated,

> "distinguish[ing] an actionable statement of fact from a protected statement of opinion . . . is a task that courts must perform by examining three factors: (1) whether the allegedly defamatory words have a precise meaning that is readily understood; (2) whether the statement can be proven as true or false; and (3) whether either the full context of the communication in which the statement

> appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact."

(*Id.*) Here, the context of the communication is that Defendants' client, not Plaintiff, was allegedly being defamed, and a cease-and-desist letter was sent to have an allegedly defamatory website taken down. Further, the hosts of the website were in the best position to identify whether Plaintiff was its creator or owner. Moreover, the Letter was conveying an opinion about Plaintiff based upon whatever the reason was which Defendants' client had to believe it. As such, as relates to Plaintiff, the Letter contained, at best, nonactionable opinion.

Assuming for the sake of argument that the Court found the Complaint alleges that certain words or phrases from the Letter constitute not opinion, but a false defamatory statement, such "a statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his or her own affairs, in a matter where his or her interest is concerned." (*Front, Inc. v Khalil*, 24 NY3d 713, 719 [2015].) As the Court of Appeals stated:

> "The rationale supporting the application of privileged status to communication made by attorneys during the course of litigation is also relevant to pre-litigation communication. When litigation is anticipated, attorneys and parties should be free to communicate in order to reduce or avoid the need to actually commence litigation. Attorneys often send cease and desist letters to avoid litigation. Applying privilege to such preliminary communication encourages potential defendants to negotiate with potential plaintiffs in order to prevent costly and time-consuming judicial intervention. Communication during this pre-litigation phase should be encouraged and not chilled by the possibility of being the basis for a defamation suit."

(*Id.*) The Court of Appeals held that "the privilege should only be applied to statements pertinent to a good faith anticipated litigation" and is "lost where a [party] proves that the statements were not pertinent to a good faith anticipated litigation." (*Id.* at 720.)

In the instant motion, the Court finds that the affidavit of Bailey shows prima facie that Defendants had a good-faith basis for sending the Letter and making the statements therein. Defendant Bailey's affidavit submitted in the instant motion indicates that Defendants were contacted by Lalezarian on August 27, 2016, a month before the Letter was sent, regarding a landlord-tenant dispute. (Aff of Bailey ¶ 2.) Bailey states that he "was informed by [Lalezarian] that Plaintiff was an occupant in apartment 1005 located at 100 Maiden Lane [], for the period of August 29, 2015[,] to August 28, 2016[,] pursuant to a lease agreement []. Plaintiff was not a party to the Lease, but stayed with the sole leaseholder, Marissa Goba, during the lease's duration." (*Id.* ¶ 3.) Bailey then states that he "was further informed that as the lease duration was ending, Ms. Goba had vacated the apartment but Plaintiff remained and refused to allow potential tenants to view the apartment." (*Id.* ¶ 4.)

Bailey next states that Plaintiff sent an email to Lalezarian on August 27, 2017, stating, among other things, that Lalezarian was "forbidden from showing Apartment 1005 at 100 Maiden Lane until August 29, 2016" and that "[i]n the mean time, please feel free to check out a website I just found: http://lalezarianfraud.com. Rumor has it it'll be added to accordingly." (*Id.* ¶ 5; Bailey aff, exhibit A [Aug. 27, 2016 email from Plaintiff to Lalezarian re APARTMENT SHOWING].) The email was cc'ed to "Marissa Goba <mgoba22@gmail.com>."

Bailey then states that, after reviewing the website, he contacted the leaseholder, Ms. Goba, and "[s]he informed me that she was aware that the Website existed and told me that Plaintiff created it." (*Id.* ¶ 7.) Bailey then states that the foregoing "formed the good faith basis for my belief that Plaintiff either had direct involvement with creating the Website or editing its defamatory content" and for sending the Letter. (*Id.* ¶¶ 8–11.) Bailey further states that "[n]o subsequent litigation was necessary after the cease and desist letters were sent because the Website was removed." (*Id.* ¶ 12.)

The Court finds that the Letter was subject to the qualified privilege contemplated in *Front, Inc. v Khalil*. The Court finds further that no actual malice can be found on the part of Defendants in sending the Letter or in the contents of the letter based upon, among other things, Plaintiff's email to Lalezarian, which told Lalezarian about the website, and the website itself, which listed Plaintiff's 100 Maiden Lane address with leaseholder Ms. Goba at the top of a list of addresses where Lalezarian was allegedly overcharging tenants.

The Court finds further that any publication of the Letter to Ms. Goba did not break the privilege. First, Plaintiff cc'ed Ms. Goba on the August 27, 2016 email. Second, Ms. Goba was the leaseholder at the premises identified on the website and where Plaintiff was allegedly residing. Third, Bailey indicated in his affidavit that it was Ms. Goba who who told Bailey that Plaintiff created the website. As such, assuming for the sake of argument that Plaintiff had identified a false, allegedly defamatory statement in the Letter that was an alleged defamatory fact, not an opinion, the statement was protected by a qualified privilege and was not actionable.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendants Adam Leitman Bailey P.C., Adam Leitman Bailey, Esq., John M. Desiderio, Esq., and Vladimir Mironenko, Esq. pursuant to CPLR 3211 (a) (7) to dismiss the second amended verified complaint in its entirety is granted and the action is dismissed with prejudice; and it is further

ORDERED that Defendants shall, within 20 days of entry, serve a copy of this order with notice of entry upon Plaintiff and upon the Clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: June 29, 2018
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

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☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE