

Khaski v Brooklyn Lollipops Import Corp.
2018 NY Slip Op 32797(U)
November 1, 2018
Supreme Court, New York County
Docket Number: 153286/2018
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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INDEX NO. 153286/2018

MARSIL KHASKI,

MOTION DATE 06/12/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

BROOKLYN LOLLIPOPS IMPORT CORP., 345 MANAGEMENT
CORP., ALBERT SROUR, ERNEST MASLATON, JOSE KISHIK

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18

were read on this motion to/for DISMISSAL

Upon the foregoing documents, the motion to dismiss is granted.

Plaintiff commenced this action alleging that the defendants defamed him and intentionally inflicted emotional distress upon him. Plaintiff, a former employer of defendants, claims that defendants defamed him by publicly accusing him of providing copies of a houseware product imported by defendants to plaintiff's son, who was employed by a competitor of defendants and that plaintiff's son copied defendants' product.

Defendants move to dismiss the complaint arguing that plaintiff's allegations lack any factual support of a defamation or intentional infliction of emotional distress cause of action. Defendants also claim that plaintiff fails to allege any particular defamation and that plaintiff has not sufficiently pled damages per se or special damages resulting from the alleged defamation. Finally, defendants allege that plaintiff fails to allege sufficiently the requisite "outrageous" conduct necessary for a cause of action sounding in intentional infliction of emotional distress.

Plaintiff opposes the motion by filing an amended complaint. Plaintiff asserts that the amended complaint meets the heightened pleading standard for defamation claims because it states the time, place and manner of the alleged defamatory remarks, identifies the speaker of the remarks, alleges special damages, and adds a cause of action for defamation per se.

The court's role in determining a motion to dismiss pursuant to CPLR § 3211(a)(7), is usually limited to determining whether the complaint states a cause of action (*Frank v. Daimler Chrysler Corporation*, 292 AD2d 118). The standard on a motion to dismiss a pleading for failure to state a cause of action is whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained. (*Leviton Manufacturing Co. Inc. v Blumberg*, 242 AD2d 205). The Court must accept the facts as alleged in the complaint as true, and accord the plaintiff the benefit of every possible inference, the court is not required to accept as true "legal conclusions that are unsupported based upon the undisputed facts" or "factual claims either inherently incredible or flatly contradicted by documentary evidence (see *Cozzani. County of Suffolk* 84 AD3d 1147).

A claim for defamation or libel must allege (1) a false statement about the complainant; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on the part of the publisher; (4) that either constitutes defamation per se or caused special damages (*Grynberg v. Alexander's Inc.*, 133 AD2d 667). In an action for libel or slander, the particular words complained of shall be set forth in the complaint, in addition to "the time, place and manner of the purported defamatory statement" (*Lesesne v. Lesesne*, 133 AD2d 667). Paraphrasing and other descriptions or summaries of the alleged defamatory words, without stating the words themselves is insufficient to satisfy the particularity requirement of (CPLR § 3016(a); *Romanello v. Intesa Sanpaolo S.p.A.*; 97 AD3d 449).

The amended complaint does not allege that any defamatory statements were made by the defendants, Brooklyn Lollipops, 345 Management, Albert Srour or Ernest Maslaton. The amended complaint's allegations against defendant Kishik do not rise to the level of defamation. Thus, the claims of defamation against the defendants are dismissed, as plaintiff has not sufficiently pled defamation against them (*Sirianni v. Rafaloff*, 284 AD 2d 447).

Plaintiff's amended complaint does not sufficiently plead a cause of action for special damages. Plaintiff alleges that he has sustained special damages by reasons of false and defamatory remarks which constitute defendants' failure to pay him the severance to which he was entitled. However, he fails to allege a loss of something having an economic or pecuniary value flowing directly from the injury to reputation caused by the defamation, or such loss resulting from the injury to his reputation. Defendants' failure to pay plaintiff's severance does not arise from any of the alleged defamatory remarks. As such, this cause of action is dismissed.

Plaintiff does not meet the standard for pleading Defamation Per Se. A party alleging defamation need not prove special damages, if that party is able to establish that the allegedly defamatory statement constituted defamation per se (*Epifani v. Johnson*, 65 AD3d 224). A defamatory statement can constitute defamation per se where, the statement charges the plaintiff with a serious crime. *Id.* In the amended complaint, plaintiff alleges that defendants have charged him with theft, a serious crime. Plaintiff does not allege that defendant Kishik falsely accused him of theft. Plaintiff claims that Kishik, falsely accused him of misappropriating confidential, which may be, as defendants' claim, a breach of plaintiff's fiduciary duties, but does not constitute theft. As Plaintiff has not properly alleged that defendants falsely accused him of a crime, the cause of action for defamation is dismissed.

Finally, plaintiff's cause of action for intentional infliction of emotional distress is dismissed.

Plaintiff states that "the utterances of the defamatory remarks at plaintiff's place of worship falls within the parameter of extreme and outrageous conduct." This conclusory allegation fails to rise to level of intentional infliction of emotional distress (see, *Chanko v. American Broadcasting Cos. Inc.*, 27 NY3d 46).

As plaintiff has failed to sufficiently plead the elements of the allegations contained in the complaint, the motion to dismiss is granted.

11/1/2018

DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE