SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

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Joseph Naftali,

Plaintiff,

-against-

Nelson Lugo, Juliet Rose Levine a/k/a "Bunny Buxom" and Danielle Geist a/k/a "Anja Keister",

Defendants.

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Index Number: 159998/2017

Motion Seq. No.: 003

Doris Ling-Cohan, J.:

Defendant Juliet Rose Levine a/k/a "Bunny Buxom" (Levine) moves, pursuant to CPLR 3211 (a) (5) and (7), to dismiss plaintiff's complaint against her based upon the statute of limitations and for failure to state a claim.[1]

Underlying Allegations

Plaintiff is the operator of burlesque shows in New York (amended complaint, ¶¶ 14, 19) and Levine is a burlesque performer who worked on burlesque shows with plaintiff (*id.*, ¶¶ 15, 24-25). Plaintiff alleges that one evening in 2012, after a show, plaintiff and Levine went back to his apartment where they "began kissing and 'made out' a little [and that] everything was consensual" (*id.*, ¶¶ 26-27). Plaintiff states that Levine worked

[1] The court notes that it has been informed that this case settled as to defendant Danielle Geist a/k/a "Anja Keister".

with him afterwards and that they remained friendly (*id.*, ¶ 29, 31-33).

Plaintiff asserts that in December 2014, he learned that Levine was claiming that he was a harasser (*id.*, ¶ 37) and that in early 2015, he heard that she was accusing him "of having 'sexually assaulted' her" (*id.*, ¶ 40). He contends that in 2015, Levine started telling people that plaintiff "raped her" and that Levine told other people in 2015, 2016 and 2017 that plaintiff sexually assaulted or raped her (*id.*, ¶¶ 52-55). Plaintiff states that, on or about September 25, 2016, Levine wrote in a Facebook post to another burlesque producer that she was "sexually assaulted [by plaintiff]" (*id.*, ¶¶ 57-61).

Plaintiff also claims that Levine stated in a January 25, 2017 email to Matthew Kessler (Kessler), a burlesque producer and performer, that plaintiff had sexually assaulted her and that, by working with plaintiff, Kessler was "endors[ing] by association an active sexual predator" and defending "a rapist" (*id.*, ¶¶ 65-71, 149). Plaintiff has also raised defamation claims against Nelson Lugo (Lugo), a former employee, and Danielle Geist a/k/a Anja Keister (Geist), a burlesque producer for their allegedly defamatory statements. Notably, this case has settled with respect to defendant Geist. Plaintiff alleges that Levine's "statements were knowingly false when made [and [s]he deliberately falsified them" (*id.*, ¶ 160). Plaintiff's summons

and complaint were filed on November 9, 2017.

Levine alleges that, on June 19, 2012, she went to plaintiff's apartment after a show and that, having drunk too much, she fell asleep and awoke to plaintiff sexually assaulting her (Levine Affidavit, ¶ 7). Levine contends that plaintiff's actions were not consensual (*id.*, ¶ 8), that her email exchange with Kessler was private and that her statements were "true and were shared with the sole intention of protecting other performers" (*id.*, ¶¶ 18-19).

Levine asserts that the statements made prior to November 9, 2016 are barred by CPLR 215 (3)'s one-year statute of limitations. She also contends that plaintiff is a limited public figure in the burlesque community and that her statements to other members of that community are protected by a qualified privilege and that plaintiff's complaint lacks adequate allegations of actual malice and, accordingly, it should be dismissed against her.

Plaintiff asserts that his allegations must be presumed to be true on Levine's pre-answer motion to dismiss and that viewed from this perspective, he has set forth a viable claim of a knowingly false accusation of rape and sexual assault, that Levine has not shown a common interest privilege and, regardless, that plaintiff has adequately alleged actual malice and that, therefore, Levine's motion to dismiss his complaint against her

should be denied.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Defamation

"Defamation is the making of a false statement about a person that 'tends to expose a the plaintiff to public contempt, ridicule, aversion or disgrace, or to induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society'" (*Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014], *quoting Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *cert denied* 434 US 969 [1977]). "'The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a

negligence standard, and it must either cause special harm or constitute defamation per se'" (*Frechtman*, 115 AD3d at 104. *quoting Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]).

"[T]he public interest is served by shielding certain communications, though possibly defamatory, from litigation . . . [for] compelling public policy . . . the law affords an absolute privilege, while statements fostering a lesser public interest are only conditionally privileged" (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]; *see also Toker v Pollak*, 44 NY2d 211, 218-220 [1978]). "Statements among employees in furtherance of the common interest of the employer, made at a confidential meeting may well fall within the ambit of a qualified or conditional privilege. [However,] the privilege is conditioned upon its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity" (*Loughry v Lincoln First Bank*, 67 NY2d 369, 376 [1986] [citation omitted]; *see also Liberman*, 80 NY2d at 437).

Similarly, "[i]n defamation actions against a 'public official' or 'public figure,' a plaintiff must prove that the statement was made with 'actual malice,'i.e., with either knowledge that it was false or reckless disregard for the truth" (*Huggins v Moore*, 94 NY2d 296, 301 [1999]). "A person is

considered a limited public figure regarding a particular issue or subject when he or she voluntarily injects him or herself into a public controversy with a view toward influencing it" (*Krauss v Globe Intl.*, 251 AD2d 191, 192 [1st Dept 1998]). However, "illegal and unethical actions [and] [a]ccusations of criminal activity, even in the form of opinion, are not constitutionally protected" (*Rinaldi*, 42 NY2d at 382). Further, "a defamation complaint should not be dismissed on a pre-answer motion to dismiss based on a qualified privilege claim where . . . the content and context of the alleged defamatory statements in the complaint . . . are sufficient to potentially establish malice . . . and that an inference of malice flows from a defamatory statement" (*Weiss v Lowenberg*, 95 AD3d 405, 406 [1st Dept 2012] internal quotation marks and citations omitted; *see also Pezhman v City of New York*, 29 AD3d 164, 168 [1st Dept 2006]).

Also, CPLR 215 (3) provides that "[t]he statute of limitations for an action to recover damages for slander is one year . . . measured from the date of the publication or utterance of the allegedly slanderous statement" (*Cullin v Lynch*, 113 AD3d 586, 586 [2d Dept 2014]; *see also Frederick v Fried*, 10 AD3d 444, 445 [2d Dept 2004]).

Discussion

In plaintiff's complaint, he alleges that one evening after work, he had a physically intimate encounter with Levine, that it

was consensual and that several years afterward, Levine claimed that it was a sexual assault or rape. Levine asserts that plaintiff's conduct was non-consensual, that it was a sexual assault and that her statements to other people in the burlesque industry were for the purpose of informing them of plaintiff's conduct. Plaintiff has alleged that Levine's statements were knowingly false and that the false accusations constitute defamation.

Levine's motion is a motion directed at the face of the pleadings and, for the purpose of deciding a motion to dismiss based upon CPLR 3211, "the allegations of a complaint . . . are to be deemed true and the plaintiff is to be accorded the benefit of every reasonable inference" (*Weiss*, 95 AD3d at 406; see also *Leon*, 84 NY2d 87-88). Viewed from this perspective, plaintiff has asserted a claim that Levine deliberately lied about the nature of their encounter, that she falsely stated that it was non consensual and that her accusation of sexual assault or rape was malicious. A false accusation of sexual assault is defamatory, since it claims both "illegal and unethical" activity and potentially "criminal activity" (*Rinaldi*, 42 NY2d at 382; *see also Frechtman*, 115 AD3d at 104). Levine has contended that her statements were protected by a qualified privilege applicable to members of the burlesque community that she sought to warn about plaintiff's conduct. However, plaintiff's allegations that

Levine knew her statements were false and that she deliberately falsified her statements, if proven, are sufficient to establish malice (*see Weiss*, 95 AD3d at 406; *Schottenstein v Silverman*, 128 AD3d 591, 592 [1st Dept 2015]). "[However,] the privilege is conditioned upon its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity" (*Loughry*, 67 NY2d at 376; *see also Weiss*, 95 AD3d at 406; *Pezhman*, 29 AD3d at 168). Accordingly, the portion of Levine's motion that seeks dismissal of plaintiff's complaint against her for failure to state a claim and based upon a qualified privilege must be denied.

However, plaintiff has asserted claims based upon statements in 2015, 2016 and 2017, and the summons and complaint were filed on November 9, 2016. Since "[a]n action for slander must . . . be commenced within one year of the publication or utterance of the defamatory statement" (*Frederick*, 10 AD3d at 445), "statements uttered more than one year before the commencement of the action are time-barred" (*Gigante v Arbucci*, 34 AD3d 425, 426 [2d Dept 2006]). Consequently, the portion of Levine's motion that seeks to dismiss plaintiff's complaint against her is granted to the extent of dismissing plaintiff's claims against her based upon statements made before November 9, 2016, one year prior to the commencement of this action.

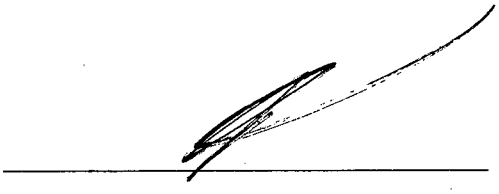
Order

It is, therefore,

ORDERED that the motion of Juliet Rose Levine a/k/a "Bunny Buxom" to dismiss plaintiff's complaint against her is granted to the extent of dismissing plaintiff's claims against her based upon statements made prior to November 9, 2016 and is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

Dated: June 28, 2019



Doris Ling-Cohan, J.S.C.

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